

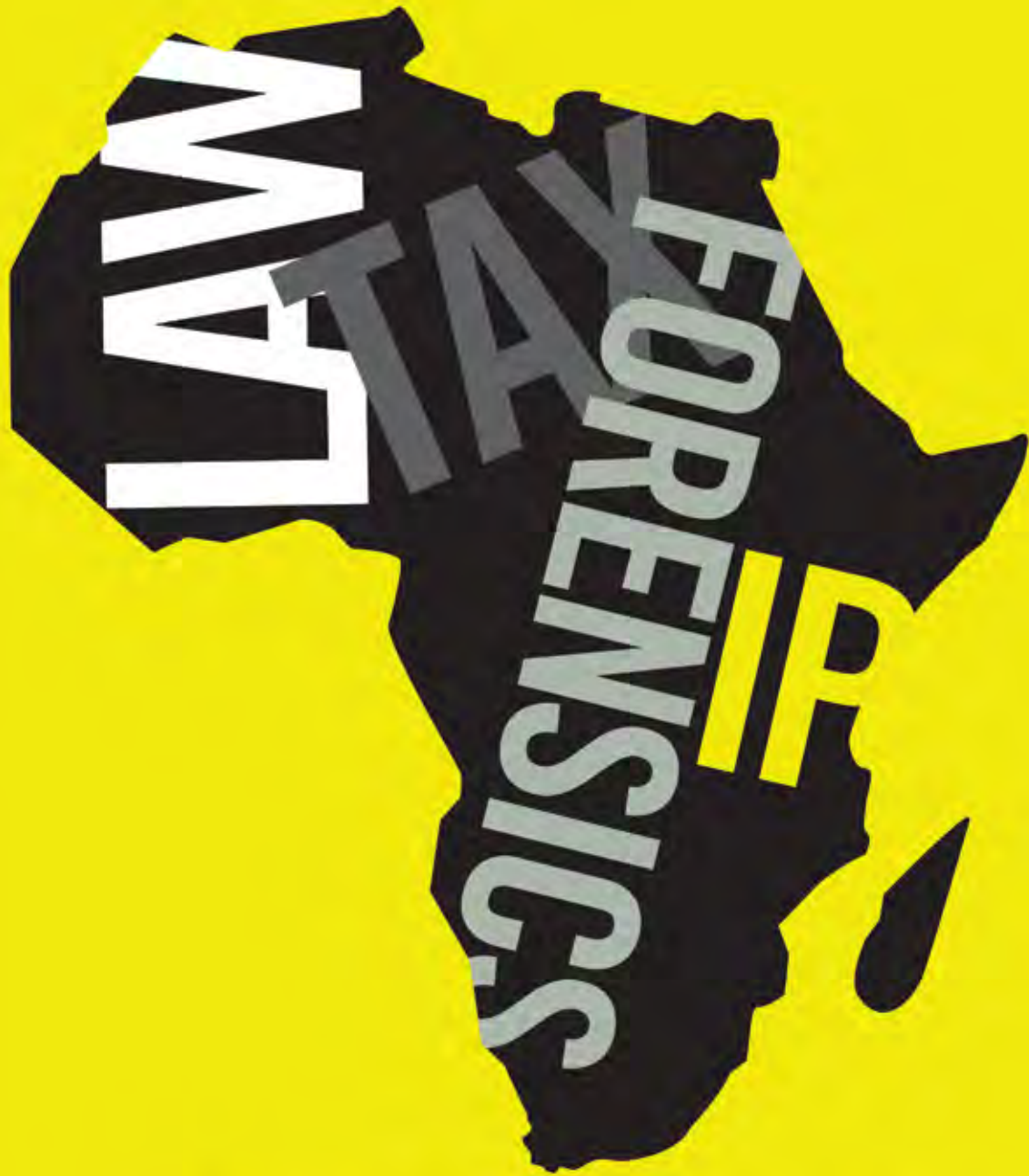
OCTOBER 2014

COURTROOM OF THE FUTURE – VIRTUAL COURTS, E-COURTROOMS, VIDEOCONFERENCING AND ONLINE DISPUTE RESOLUTION



Calculating legal costs:
Changing the way we charge

The link between the Legal Practice Bill and access to justice



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Since the advent of our democracy the executive, the legislature and the judiciary have combined their efforts by putting measures in place with the objective of broadening access to justice. The Legal Practice Bill is a product of the continued collaboration between the three branches of State and ultimately a progressive measure taken to amplify access to justice by the ordinary citizen. **Jacques Halbert** discusses some of the aspects of the Bill aimed at promoting access to justice.

40 Calculating legal costs: Changing the way we charge

Clause 35 of the Legal Practice Bill will lead to the close scrutiny of the charging of legal fees by attorneys and advocates, as well as the criteria used for calculating them. **Gerhard Buchner** discusses alternate fee arrangements and value billing as an alternative method to hourly rates.

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Where on the profession's agenda – if at all – are the strategies to deal with challenges faced by female lawyers?

Society in general and the legal profession in particular, are not lacking in strong female role models.

Recently, however, serious concern has been raised by the Law Society of South Africa (LSSA) and other organisations at the unwarranted and scurrilous attacks that have been levelled against Public Protector, advocate Thuli Madonsela, particularly after the release of her report 'Secure in Comfort', and Pretoria High Court Judge Thokozile Masipa following her judgment in the *Oscar Pistorius* matter (see 22 of this issue). One wonders whether the same level of criticism and insensitive personal comment would have been generated had the incumbents been male?

In various news items in this issue, the challenges faced by female lawyers are raised repeatedly at a number of different forums. Granted, there are those that are of the view that female attorneys and candidate attorneys do not require 'special' treatment. But there is no evidence that special treatment is what female practitioners expect. However, in the past few months the same concerns have been echoed across various platforms – at a session on the challenges faced by female lawyers at the SADC Lawyers Association conference (see 18 of this issue), at the South African chapter of the International Association of Women Judges' (IAWJ) conference (see 6 of this issue), in a survey conducted by the LSSA Gender Committee, as well as in a report published in September by the Foundation for Human Rights and the Centre for Applied Legal Studies at the University of the Witwatersrand.

The challenges faced by female lawyers are startlingly the same throughout the region and in small and large firms: The patriarchal nature of the profession, sexual harassment; the pressures created by the multifaceted care roles that women are obliged to take – caring for children, parents and extended families – which need to be recognised and properly acknowledged by their firms and workplaces; gender stereotyping in practice areas, as well as the challenges in reaching leadership and decision-making roles within law firms and in the structures of the organised legal profession.

Gauteng High Court Judge President

Dunstan Mlambo noted this at the IAWJ conference when he said: 'Very competent and able women practitioners are forced to take up legal positions away from practice and in government due to the dictates of their personal environments.'

The Commission on Gender Equality (CGE) is conducting research on the lack of gender transformation in the judiciary, taking into account systemic issues in the profession, as the pool from which judges are drawn. The CGE indicates that the lack of transformation is not only applicable to permanent judicial posts only, but it is also reflected in the appointment of acting judges which, on the face of it, also seem to favour men more than women. It has noted that that gender transformation in the profession is not receiving priority and reflects the slow pace of women representation and participation.

With the Judicial Service Commission interviews of candidates for the Bench this month, the dearth of suitable female candidates will again be a talking point in the media. In the past four years, the JSC has appointed 155 candidates as judges; 40 have been women (see 10 of this issue).

Of course, suitably qualified and experienced female candidates must be available and willing to be interviewed by the JSC. But even before that stage, women must be available for acting appointments, and here the role of Judges President – with the assistance of practitioners – is crucial in identifying and nurturing appropriate candidates.

But what is the profession itself doing? Is there a lack of vision or a lack of will to tackle the challenges head on?

The challenges faced by female lawyers appear stuck in a catch 22 situation – every August, around Womens' Day, the issues are canvassed and ventilated at various forums and then everything abates again until the conferences the following August. In addition, when they are discussed, it is at 'women lawyers' conferences' and separate, smaller, dedicated sessions attended by female delegates. It is seldom in the plenary sessions at general meetings where all practitioners – male and female alike – participate in charting the way forward.

We know what the problems are; what are the solutions?

October and November traditionally sees the attorneys' profession taking stock of developments that have impacted on it throughout the year. Five of the six LSSA constituent members – the four statutory provincial law societies and the Black Lawyers Association – will be holding annual general meetings during these two months, while the sixth, the National Association of Democratic Lawyers will hold its AGM early next year.

Attorneys and candidate attorneys are urged to attend these meetings as not only is it an opportunity to touch base with colleagues, it is also your platform to raise concerns and ask your Council members for information and feedback. The profession is in the process of systemic change with the Legal Practice Bill looming, and ancillary matters that will arise from it, such as the change in the way attorneys charge fees (see also 40 of this issue), community service (see 37) and the uniform rules, that will require serious attention.

These are also ideal forums to brainstorm implementable strategies that will level the playing fields for women to participate fully in the profession that they have chosen, but that sadly, many are forced to abandon.

AGM venues and dates

- 17 October 2014
KwaZulu-Natal Law Society
Coastlands Hotel, Durban
- 17 – 18 October 2014
Black Lawyers Association
Lagoon Beach Hotel, Cape Town
- 30 – 31 October 2014
Law Society of the Free State
Lapenetta, Welkom
- 31 October – 1 November 2014
Cape Law Society
Boardwalk Convention Centre,
Port Elizabeth
- 8 November 2014
Law Society of the Northern
Provinces
Sun City

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.

The Legal Practice Bill: No consultation on clause 35

Your editor's note in the July 2014 issue of *De Rebus* (2014 (July) DR 3) has reference.

I have interacted with Portfolio Committees (primarily that of Safety and Security and subsequently the Police) on an ongoing basis since 1997.

It appears to be a typical tactic of government to introduce amendments to proposed legislation at short notice and without consultation, particularly where such amendments are going to be contentious and strongly opposed.

Coupled with this, is a tendency of government, to publish draft legislation of a contentious nature over the December holiday period when less attention is given to legislation, until the period for consultation and discussion has passed.

The manner in which clause 35 of the Legal Practice Bill was introduced appears to be typical of this approach by government.

Our current government appears to see the Constitution as an impediment and not as a vehicle for creating and enhancing democracy.

I am reminded of the content of a radio show I shared with an extremely senior police official debating the then Firearms Control Bill. That policeman

said that it was not for the government to act in accordance with the Constitution, but rather to test the parameters of the Constitution.

I trust that the organised legal profession will challenge clause 35 of the Legal Practise Bill on the basis of a lack of consultation and that it may contravene s 22 of the Constitution.

Martin J Hood, attorney,
Woodmead

Ethical position when client terminates mandate

I act for a client who was seriously injured in a motor vehicle accident, in respect of his claim against the Road Accident Fund (RAF). The trial has been set down for hearing in the High Court, Gauteng Division, Pretoria on 12 October 2014. I am fully prepared for this trial and have briefed counsel and experts. Notices and reports have been timeously filed and as matters presently stand, at the time of writing, counsel and I are actively involved in trial preparation.

Most unexpectedly and without prior warning, I have just received a letter from another firm of attorneys intimating that my client has terminated my mandate to act and has instructed that firm to continue the matter. My file of papers has been requested. I would only

be prepared to release my file and permit the attorney to continue the matter on payment of my taxed attorney-and-client bill of costs.

I undoubtedly recognise that the client has the inalienable right to be represented by an attorney of his own choice and in whom he has confidence. However, by the time my bill – which has to be prepared – is taxed and I am paid, there will be precious little time for the new attorney to acquaint himself with the matter, brief counsel and handle the matter appropriately. It occurs to me that clearly it is not in the client's best interests at this late stage for a new attorney to enter the litigation. It seems to me that there would be an ethical duty on both myself and the new attorney to apprise the client of the pitfalls he faces should he change attorneys at this advanced stage and that it is not in his best interests to do so. If, on being apprised of these consequences, the client is insistent on changing attorneys then he must suffer the consequences of his choice.

I would be most interested to hear the viewpoint of colleagues on this issue.

Leslie Kobrin, attorney,
Johannesburg

• Readers wishing to respond to Leslie Kobrin can e-mail their responses to derebus@derebus.org.za



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SADC stakeholders form coalition to lobby for restoration of a SADC Tribunal

Stakeholders have urged heads of state and government of Southern African Development Community (SADC) member states to reconsider their decision to suspend the SADC Tribunal. They have also urged them to reconsider their decision to adopt a new protocol.

This came during a roundtable discussion of stakeholders at the Centre for Human Rights at the University of Pretoria. The discussion took place on 28 and 29 August 2014 where stakeholders called for the restoration of the SADC Tribunal. The objective of the round table was to discuss the implications of the adoption of a new protocol by the SADC Summit.

The discussion was attended by different stakeholders including former judges and officials of the SADC Tribunal; the East African Court of Justice, the Economic Community of Western African States (ECOWAS) Court of Justice; lawyers from private and academic practice and officials from the Department of Justice; the SADC Lawyers Association; the Law Society of South Africa; researchers; and members of civil society.

Background

According to a statement by the roundtable participants SADC was established in 1992 with economic growth and development at the top of its agenda. Under articles 4 and 6 of the SADC Treaty, the SADC objectives are to be achieved by adhering to equality, democracy, good governance, rule of law and – notably – human rights. In pursuit of these objectives, SADC member states adopted a protocol that established the SADC Tribunal which was inaugurated in November 2005.

The Tribunal had jurisdiction over disputes between states as well as between natural or legal persons and states, subject to the requirement of the exhaustion of local remedies and with the decisions of the Tribunal being binding on member states.

Cases by the Tribunal

The statement notes that between 2007 and 2010 the Tribunal ruled on 19 cases that included disputes between citizens and their governments, as well as cases between companies and governments.



Justices Makhambra Mkandawire, SADC Tribunal Registrar; Ariranga Pillay, former President of the SADC Tribunal; and Isaac Mtambo, judge at the SADC Tribunal, at a SADC stakeholders roundtable discussion on the implications of the adoption of a new protocol on the SADC Tribunal.

Of the 19 cases, 11 were against Zimbabwe. Eight of these cases were concerning the expropriation of agricultural land in Zimbabwe.

'The most prominent case was *Mike Campbell (Pvt) LTD and Others v Republic of Zimbabwe SADC (T)* (unreported case no 2/2007, 28-11-2008) in which Mr Campbell and others successfully challenged Zimbabwe's land policy and laws before the SADC Tribunal after meeting the exceptions to the exhaustion of local remedies rule. A majority of the Zimbabwe's white farmers were deprived of their right to compensation and access to justice after the expropriation of their agricultural land. The SADC Tribunal found such acts by the Zimbabwean government to be discriminatory and contrary to the SADC Treaty,' the statement said.

According to the statement, the judgments against Zimbabwe resulted in efforts to cast suspicion over and do away with the Tribunal. These efforts culminated in a decision by the SADC Summit to remove the right of individual access to the Tribunal and in August 2010, the SADC Summit adopted a resolution to suspend the Tribunal pending a review of its role, functions and terms of reference by an independent consultant.

The independent consultant reviewed the Tribunal and concluded it had been properly constituted and its decisions

were binding on member states. In May 2011 the SADC Heads of State and Government unanimously agreed to extend the suspension of the Tribunal for one more year, pending yet another report of the Attorneys General of the SADC member states.

'Further, the SADC Summit determined that the Tribunal will not hear any more cases, whether new or existing and judges whose terms were due to expire were not reappointed. On 18 August 2012 the Summit of Heads of State and Government, the SADC's supreme policy-making organ, suspended the work of the Tribunal indefinitely and resolved that a new protocol on the Tribunal should be negotiated and that its mandate should be confined to inter-state disputes,' the stakeholders stated.

According to the statement, the SADC Summit adopted the new protocol on 18 August 2014. However, the protocol was not yet in force as only eight of the 15 member states had signed it. The new protocol will only enter into force after two-thirds of member states (ten states) have ratified it. The SADC Summit also mandated the SADC Ministries of Justice to propose a mechanism for the resolution of pending cases and to report on this issue to the SADC Summit by August 2015.

The stakeholders concluded that the suspension of the Tribunal lacks legality,

inter alia, because the SADC Treaty does not allow for suspension. 'Moreover, the SADC Summit did not act in accordance with the Treaty's own amendment procedures. Therefore, the legality of the purported suspension of the Tribunal can be challenged,' they said.

Resolutions

The round-table stakeholders -

- urged SADC citizens to reject and protest against the decisions of the Summit adopted from August 2010 to August 2014 regarding the Tribunal;
- called on the SADC Heads of State and Government and all institutions of SADC immediately to embark on the revision of the SADC Treaty to strengthen and

democratise SADC institutions, including the SADC Secretariat; establish a regional parliament with law-making powers; and create a sub-regional court with adequate jurisdiction accessible to individuals;

- called on the relevant SADC organs and institutions to ensure that the process of establishing a mechanism for cases that had been pending before the Tribunal is transparent and participatory; and
- called for the restoration of individual access so that an authentic sub-regional court - the SADC Tribunal - would be able to dispense justice to the people of the region.

The stakeholders resolved to collaborate and support the establishment of a

coalition for the restoration of the Tribunal, comprising stakeholders in all SADC countries, to campaign against the ratification of the new protocol and to explore and coordinate alternative strategies to restore individual access to the Tribunal and to strengthen democracy and improve the rule of law within SADC.

- See also page 14.

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Women and the judiciary

The South African chapter of the International Association of Women Judges (SAC-IAWJ) held its national conference from 8 to 10 August 2014 at the University of Pretoria. The SAC-IAWJ was also celebrating its ten-year anniversary. The theme of the conference was 'reshaping women's participation for gender equality in the South African judiciary.'

The people present at the event included recently appointed Minister of Justice and Correctional Services, Michael Masutha; Minister in the Presidency responsible for Women, Susan Shabangu; Judge President of the Gauteng Division of the

High Court, Dunstan Mlambo; former Constitutional Court Justice, Yvonne Mokgoro; and former Justice Minister, Bridgette Mabandla.

Mlambo: Some practitioners regard acting appointments as 'an act of insolvency'

Delivering the welcome address Judge Mlambo spoke on behalf of the Gauteng Division of the High Court. He said that he was going to be 'brutally frank' in the hope of enriching the gender transformation debate. Judge Mlambo reminded

everyone that the key values of the Constitution are 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.

Judge Mlambo said that what is topical today is the slow pace of gender transformation in the judiciary. He said: 'I surmise that the basis advanced for the call to fast track gender transformation in the judiciary is that, 20 years into our democracy, we have only one woman head of court and generally the appointment of women judges has lagged markedly behind. This is so despite the fact that women in general, and those who enter legal practice, are more in number than their male counterparts. This is according to the latest statistics from the Law Society of South Africa (LSSA) in particular.' Judge Mlambo asked why gender transformation has lagged so far behind in the judiciary especially because the overarching injunction in the Constitution is broad representativeness reflecting South Africa's demographics.

Judge Mlambo said that there were more than enough women legal professionals practising at various levels either in private or public practice in the country. Despite this depth of available capacity, he added, the judiciary remained behind. Judge Mlambo noted: 'Having been a head of court for close on four years this year, I am not persuaded that there is a "sinister reason" for this slow pace of gender transformation in the judiciary. I consciously use the word sinister to illustrate the fact that I have not come across any scenario where it can be stated that that there was a conscious stratagem to keep women out of the ju-



The former and recently appointed presidents of the South African chapter of the International Association of Women Judges, Judge of the Free State High Court, Connie Mocomie and Judge Mmaleshane Kgoele from the North West High Court respectively.

diciary. I hasten to concede that there may be isolated incidents pointed out to me, but those who are eloquent say one swallow does not make a summer.'

Judge Mlambo said that it is a fact that not all suitable women candidates are available to take up either acting or permanent positions due to commissions of inquiry such as the Marikana and Arms Deal Commissions which 'swallow up' a sizeable number of women practitioners who are suitable to take up acting appointments. He added that he finds it frustrating when women candidates do not put their names on his list to take up acting appointments. 'It becomes a lot more stressful when I have to chase and cajole them to avail themselves. If I were to go only on the persons who avail themselves, then I will be left with an all-white lineup which is male dominated,' he said.

Judge Mlambo said that another reason why there is a shortage of women judges on the Bench is because certain practitioners regard accepting acting appointments as 'an act of insolvency' because there are practitioners who make a lot of money in their practices and do not readily agree to give that up. The consequence is that they are available for very short periods of rarely more than two weeks per year in certain instances. Judge Mlambo added that this period is too short to prepare anyone

for permanent appointment especially in the Gauteng Division due to the sheer volumes of work the court deals with.

Judge Mlambo went on to say that he is aware that there are women who have never acted as judges whom others feel are ready and are prepared to take up acting appointments. However, he added: 'Litigants want judges who will deal with their matters expeditiously and without delay. For this reason it would be counterproductive to appoint women based on that criterion only especially persons who have never engaged with High Court litigation whether in argument or as instructing attorneys. That engagement with High Court work is crucial as it prepares one for the task of sitting as a judge and deciding these matters.'

Judge Mlambo pointed out that he had encouraged judges in his division to take practitioners for mentoring stints in order for them to get exposed to a judge's environment firsthand. He added that this exposure would alleviate the lack of engagement with High Court work. Also, the exposure had proven pivotal in a number of instances in enabling those who had gone through the process to deal with the responsibility once appointed permanently.

Judge Mlambo also spoke on what he regards as anti-transformation trends. He said that white male domination of

legal practice continues unabated. 'It is a sore point to me to field these reports from judges in my division and the resistance to adapting, I am told, is always fierce.' He added: 'The strange phenomenon in these trends is that invariably the state is one of the parties. In one instance one of the white male silks leading one team lodged a complaint to my office when one of my judges questioned the all-white male lineup of both legal teams appearing before him. I mention this because this has a direct influence on the women practitioners who are left out of such litigation.'

According to Judge Mlambo, there needs to be sensitivity to circumstances confronting women practitioners in private practice. He said that in most instances very competent and able women practitioners are forced to take up legal positions away from practice and in government due to the dictates of their personal environments. 'I am aware of a number of very competent women practitioners who deal on a daily basis with high level High Court litigation in their positions in government departments in particular. However due to some peculiar view that working in government renders these practitioners executive minded and therefore disqualified to be appointed as judges, we are unable to appoint them. I disagree,' he said.

Judge Mlambo went on to say that the



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sooner this issue is addressed, the better it will be for the country's jurisprudence as he knows of a number of practitioners who have engaged with serious High Court litigation locally and abroad, but whom the Judicial Services Commission is not at liberty to appoint due to the existing constraint. 'It is our loss as we are unable to appoint practitioners especially women, who have a rounded world view and who can enrich our jurisprudence immensely', he said.

Judge Mlambo noted that although the judiciary had been transformed compared to the apartheid era, the gender front needed work. He added that heads of court are always on the lookout for ways to promote transformation.

He concluded by reminding the judges that society's expectations are that those who head the judiciary should provide effective leadership to ensure transformation of the judiciary in all respects.

Minister: Gender transformation in the judicial system

Minister Masutha said that judicial officers needed the courage and resilience of the women of the calibre of Lillian Ngoyi, Helen Joseph, Rahima Moosa and Sophie Williams, among others, in order to fight a different struggle, that of reversing the legacy of inequality and deprivation, overcoming poverty and landlessness, and uprooting crime and corruption.

According to Minister Masutha, the judiciary's gender transformation championed by the Constitution is amplified by international and regional instruments and conventions that have been ratified by South Africa. He was of the view that he believes that the Convention on the Elimination of all Forms of Discrimination against Women is the most significant.

Minister Masutha stated that the transformation of the judicial system entails a broader concept of reform, which includes the -

- reorganisation and rationalisation of the courts to align them with the Constitution;
- transformation of the legal profession; and
- reform of the state legal services and initiatives to improve the criminal and the civil areas of the justice system.

He added that the judicial system will be impoverished if judges, practitioners and women in general do not make their voices heard in the transformation discourse.

The Minister said that following the recent elections, parliament boasts a 45% representation of women, which is an increase from 42% in 2009. 'This ranks South Africa third in the world in terms of representation of women in



Justice Minister, Michael Masutha gave the keynote address at the South African chapter of the International Association of Women Judges conference in August.

parliament. With regard to the judiciary, our statistics currently show that in our 20 years of democracy 311 new judges were appointed. Of these, only 76 are women. The situation is more acute at the Supreme Court of Appeal where out of 25 judges only seven are women while the Constitutional Court has two women judges in its 11-member panel,' he said.

'The limited number of women who advance to the Bench is attributed to the low number of female legal practitioners in comparison to their male counterparts. As at the end of 2013, women made 1 841 of the total number of 5 708 practising advocates on the roll of advocates. During the same time there were less than 6 000 practising female attorneys out of a total of 22 500,' he noted.

Minister Masutha noted that special attention was required to create opportunities for aspirant judges and lawyers to pursue a career in the legal sector. He added that the Legal Practice Bill as well as the State Attorney Amendment Bill 52 of 2013, which are currently being considered by the President, are intended to level the playing field. 'The Legal Practice Bill in particular, aims to remove barriers to the practice of law for previously disadvantaged individuals and thus widen the pool of lawyers both in the Bar and side bar. On the other hand the State Attorneys Amendment Bill will institutionalise the preferential allocation of state legal work to female and other previously disadvantaged practitioners. We are optimistic that the 75% target we have set for ourselves for the briefing of previously disadvantaged practitioners will widen the pool from which judges may be appointed,' he explained.

Minister Masutha said that it was encouraging that judges were increasingly being appointed from the ranks of magistrates. He said that this affirmed gov-

ernment's commitment to a unified judiciary that subscribes to uniform norms and standards that are aimed at guaranteeing judicial independence and the rule of law. He added that this calls for the Magistrates Commission to be more vigilant in its recruitment process as it lays a foundation for future judicial officers.

Minister Masutha concluded by acknowledging 'the indelible contribution' that the judiciary continues to make in dispensing justice to citizens 'under very trying circumstances'.

He said: 'Today there are no laws that exclude women from any career pursuit or life opportunities in the legal profession or elsewhere. My appeal to all women in the legal sorority is that, do not drop the ball when appointed to the bench but strive to excel so as to quell the perception that at times, as a country, we promote mediocrity thus compromising quality of service to our people. This criticism must not find a place in our noble profession.'

A reflection of the past 20 years

In her speech, Minister Susan Shabangu reflected on 20 years of democracy and the social context of South Africa's justice system. She said that one way to sum up the achievements of the last 20 years is to say that, with democracy, South African society has become 'safe' for the rule of law since neither apartheid nor colonial South Africa was ever a safe place for the rule of law to be properly understood.

According to Minister Shabangu, in the absence of a just society and legitimate laws, judges become part of the problem.

She said that South Africa was also celebrating 60 years of the Women's Charter of 1954. The charter called for -

- the empowerment of men and women of all races, the right to vote and be elected to all state bodies;
- the right to full opportunities for employment with equal pay and possibilities of promotion in all spheres of work;
- equal pay for equal work;
- equal rights in relation to property, land rights, marriage and children; and
- the removal of all laws and customs that denied women such equality, among others.

'It further demanded paid maternity leave for women, childcare for working mothers and free and compulsory education for all South African children. The demands in the Women's Charter were ultimately incorporated into the "Freedom Charter" and used by the Women's Coalition to lobby for their inclusion in the Interim Constitution of 1993,' she said.

The Minister added: 'Accordingly, for

the law and its institutions to play a meaningful role in the fulfilment of the constitutional vision, there needs to be certain fundamental shifts. In my view, the key fundamental changes that need to happen within law relate to systematising equality in all aspects of the law and closing the gap between law and justice.' She added that a closer look at the two reveals their interconnectedness and symbiotic relationship. 'If we accept equality as real as opposed to theoretical enjoyment of all rights and freedoms, then justice is an element of equality. Furthermore, true or substantive justice is unimaginable without according equal consideration to all. The prerequisite for true or substantive justice is substantive equality,' she said.

Minister Shabangu said the legislative review process undertaken over the past 20 years to address discrimination against women has resulted in an unprecedented body of laws on aspects including employment, property rights, family law and the eradication of violence against women. However, she said, the achievements are not without challenges.

She said that although there are laws aimed at curbing domestic violence, women continue to be subjected to violence. 'For example, many of the problems that the Domestic Violence Act 116 of 1998 sought to address persist. This includes recidivism. In many instances victims continue to endure abuse despite having secured protection orders. In some of these cases the abuse progresses to murder or "intimate femicide".'

In an attempt to address the incidence and prevalence of rape and sexual offences, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 was passed to improve prosecution and conviction. 'However, the time it takes for rape and sexual offences cases to go to trial defeats the purpose.'

Minister Shabangu also noted that the Maintenance Act 99 of 1998 provides for garnishee orders, attachment of emoluments and orders by default but that these provisions are, however, underutilised.

She pointed out that the Recognition of Customary Marriages Act 120 of 1998 (RCMA) had been promulgated to recognise and regulate customary marriages, but that the implementation of this Act had a number of hurdles arising from interpretation difficulties and a lack of knowledge of the RCMA by public officials and the general public.

'Despite the absence of explicit sanctions for non-registration in the RCMA, there are many indirect sanctions for those who have not registered their customary marriages, especially women



Deputy Chief Justice Dikgang Moseneke at the gala dinner of the South African chapter of the International Association of Women Judges which preceded its conference.

who have to prove the existence of the marriage for many reasons, including getting their inheritance or share of the estate'.

Minister Shabangu also highlighted unequal access to land as one of the main key forms of economic inequality, which has dire consequences for women.

To conclude, Minister Shabangu said that, although unjust legislation against women generally had virtually disappeared, 'the whole world remains patriarchal, with men dominating all aspects of life – from the family to politics, business and the workplace, including the judiciary and the legal profession – that is why always before the Judicial Service Commission interviews, you will hear debates about women's lack of experience to be appointed as judges,' she said.

Continuing judicial education

Supreme Court of Appeal Judge Ronnie Bosielo spoke on continuing judicial education and mentorship. He said that continuing education was imperative because, according to him, it had become impossible to keep pace with critical legal developments. The only sure way for judges to keep pace with the development of the law domestically and internationally was through continuing legal education.

Judge Bosielo said: 'In its bold and laudable efforts to translate the pious words in our Constitution into reality for our people, our courts, in particular, the Constitutional Court has developed a veritable body of case law suffused with constitutional values, adding to our new constitutional jurisprudence. Our courts have created a new and impressive jurisprudence on *inter alios*, fair trial rights, the death penalty, the rights of children; the right to dignity, equality, education, environment, housing, health etcetera.

In addition, there are tomes and tomes of new legislation which have come from Parliament ...'. He added that it is because of these factors that continuing education is needed.

Judge Bosielo noted that providing judicial training for lawyers would ensure that all judges receive the same training and are exposed to the same curricula. 'Hopefully, this will result in our judges sharing the same constitutional values and legal philosophy which will help us to avoid producing conflicting judgments. The result will be judgments which are clear and consistent with our constitutional values. To my mind, this will help to engender and maintain the confidence of the public in the judicial system – something without which the justice system will not be able to function efficiently and effectively. Needless to state that the loss of confidence and trust by the public in the judicial system is a serious threat to the rule of law and a recipe for lawlessness and anarchy – the nemesis of a constitutional democracy,' he said.

According to Judge Bosielo, the delivery of effective and efficient justice in a country relies primarily on the abilities, competence and knowledge of its judges, and for judges to be efficient, they have to know the law. 'However the reality is that the law, like human beings, is never static. It is dynamic. It grows, changes and adapts to new circumstances as the people change their lifestyles. It is only through a process of continuing judicial education that we can keep pace and remain abreast of all developments in the law and in society,' he said.

Judge Bosielo said that judges owe it to the people to keep themselves informed and knowledgeable. He added that this will enable judges to deal effectively with the new challenges brought about by rapid cultural, sociological and technological changes in people's lives. 'This will enable us as judges to appreciate the society in which we operate; a judiciary which will appreciate the impact which its judgments have on the people; a judiciary which is not perceived to be living in ivory towers, far removed from the daily realities of the people it is supposed to serve; and a judiciary which sees and uses the law as a potent tool for social transformation,' he said.

Judge Bosielo said that to be good judges, judges have to remain students of the law throughout their judicial careers. 'After all, this is one of the essential attributes of a good judge,' he added.

Equal representation of women

Tabeth Masengu, a researcher at the Democratic Governance and Rights Unit at the University of Cape Town, spoke on

equal representation of women at all levels in the judiciary.

Ms Masengu looked at the potential avenues for women after law school. She listed these as –

- prosecution;
- articles of clerkship;
- pupillage;
- academia;
- legal advisers/researchers; or
- magistracy.

Ms Masengu also looked at the potential pools for judges. She said that these are –

- advocates, from which the most successful candidates have emerged;
- the attorneys' profession, from which there has been a fair amount of appointments;
- the magistracy, from which there has also been a fair number of appointments; and
- academia, which has not been tapped into for the last ten years.

Ms Masengu went on to give a few statistics. Speaking on the attorneys' profession, Ms Masengu said that this was a popular route for graduates as clerkship is paid. She said that nationally, there



Former Justice Minister, Bridgette Mabandla (right) and retired Constitutional Court Justice, Yvonne Mokgoro, were guests at the South African chapter of the International Association of Women Judges conference held in Pretoria in August.

are 22 473 attorneys and that 8 301 or 36% of them are women. Ms Masengu said that what is interesting about this fact is that 56% of candidate attorneys

are women. She asked what happens to women attorney graduates (see 2014 (Sept) DR 20).

Speaking on advocates, Ms Masengu said that pupillage was expensive and generally for the privileged few. She noted that of the 2 571 advocates registered with the General Council of the Bar, 645 or 25% are women of which 35% are black. Ms Masengu said that as of April 2014, there were 451 senior counsel of which 27 are women and nine are black.

According to Ms Masengu, there are 1 711 magistrates in the country, 673 of them are women of which 64% are black.

Ms Masengu said that in the last four years, 262 candidates were interviewed by the JSC for 134 positions. Of these, 82 candidates or 31% were women. Ms Masengu pointed out that 155 candidates were successful; 40 of these were women.

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ICT and the profession

The Law Society of South Africa (LSSA) held an information communication technology (ICT) session on 15 August. The aim of the strategic session was to develop a holistic approach to ICT in the legal profession by looking at the interests of the profession.

The conference focused on the impact of ICT on the attorneys' profession going into the future, as well as the actions needed to be taken by the profession in the next five years.

Discussion topics included information security, privacy and confidentiality; social media and the profession; legislation, rules and codes affecting the use of ICT within the attorney's practice; as well as paperless practice and e-signatures.

Speakers included co-chairperson of the LSSA, Max Boqwana; attorney and member of the LSSA's e-law committee, Brendan Hughes; attorney and chairperson of the LSSA's e-law committee, Gavin McLachlan; attorney and information security consultant, Mark Heyink, and attorney and media law consultant, Emma Sadleir.

Mr Boqwana gave the welcome address. He said that the legal profession was changing rapidly and that it was influenced by advances in technology. He added that the use of social media must not compromise security.

Mr Boqwana said that South Africa must start thinking about e-filing and serving documents electronically, as this is where the country should be going. He suggested that maybe the South African justice system should start with a pilot project at the labour courts.

Information security

Speaking on information security Mr Heyink said that attorneys are custodians of constitutional rights. He said that the internet has changed everything, including what we do on a daily basis; it changes how we communicate, how businesses' target markets, as well as the law due to new legislation being developed, such as laws dealing with cybercrime.

Mr Heyink added that the market was changing and questioned whether South Africa's legal profession was ready to change with the times. 'Do we understand our market and are we ready to

give them what they need?' he asked.

Mr Heyink stressed that information security was imperative as confidentiality is a professional responsibility. He said that electronic signatures are critical to attorneys as they are a 'stamp' that states that the documents are what they are. Mr Heyink explained that advanced electronic signatures lock the documents. He concluded by saying that privacy was impossible without security.

Overview of legislation

Mr Hughes gave an overview of legislation, rules and codes affecting the use of ICT in legal services. He said that the pervasive reach of technology has an impact on legal practice and institutional functioning.

He noted that judicial recognition of the impact of technology on law and society had already been given by South African courts. For example, he said, in *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens 2012 (5) SA 604 (KZD)* KwaZulu-Natal High Court Judge Esther Steyn made history when she approved service of court documents via Facebook. In her judgment, Steyn J

stated that 'Changes in the technology of communication have increased exponentially and it is therefore not unreasonable to expect the law to recognise such changes'. (See also 2012 (Nov) DR 30 and 2012 (Oct) DR 47).

Mr Hughes said that lawyers needed to adapt to technology because once customers have experienced a new and better way of doing things, they no longer tolerate any other way.

He quoted the example of the South African Post Office being forced to adapt to its own customers and introduce secure electronic communications services (including the provision of registered e-mail in the near future as provided for in s 19(4) of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act)).

He said that public bodies had institutional power to introduce change as stated in ss 27 and 28 of the ECT Act which provides as follows -

27. Acceptance of electronic filing and issuing of documents - Any public body that, pursuant to any law

(a) accepts the filing of documents, or requires that documents be created or retained;

(b) issues any permit, licence or approval; or

(c) provides for a manner of payment, may, notwithstanding anything to the contrary in such law -

(i) accept the filing of such documents, or the creation or retention of such documents in the form of data messages;

(ii) issue such permit, licence or approval in the form of a data message; or

(iii) make or receive payment in electronic form or by electronic means.

28. Requirements may be specified - (1) In any case where a public body performs any of the functions referred to in section 27, such body may specify by notice in the *Gazette* -

(a) the manner and format in which the data messages must be filed, created, retained or issued;

(b) in cases where the data message

has to be signed, the type of electronic signature required;

(c) the manner and format in which such electronic signature must be attached to, incorporated in or otherwise associated with the data message;

(d) the identity of or criteria that must be met by any authentication service provider used by the person filing the data message or that such authentication service provider must be a preferred authentication service provider;

(e) the appropriate control processes and procedures to ensure adequate integrity, security and confidentiality of data messages or payments; and

(f) any other requirements for data messages or payments.'

Mr Hughes gave an overview of the court's responses to technological changes. He said that following amendments to the rules promulgated in 2012, r 19(3)(c) now provides that the defendant may request the consent of the plaintiff to consent to the exchange or service of documents and notices by e-mail. 'Rule 19(3)(d) now also provides that if the plaintiff fails to provide its consent, the court may, on written application by the defendant, grant such consent and on such terms as to costs as may be just and appropriate in the circumstances. Rule 4A(3) of the High Court Rules expressly provides that Chapter 3 Part 2 of the ECT Act is applicable to service by e-mail. However r 4A(5) also says that the filing of originals with the registrar may not be done by e-mail,' he said.

Mr Hughes said that the Magistrate's Court Rules essentially mirror the provisions of the High Court Rules. He added that the only court rules that expressly permit the filing of documents electronically are the rules of the Supreme Court of Appeal, where r 4(1)(b) provides that documents may be submitted to the registrar electronically provided the 'original' document is filed within ten days. This means that even in this case, e-filing simply interrupts running of time periods and does not constitute formal de-



*Law Society of South Africa
Co-chairperson, Max Boqwana,
giving a welcome address at the
LSSA information communication
technology strategic session at OR
Tambo Airport on 15 August.*

livery of a document, he said.

According to Mr Hughes, there is a need for the legal profession to adapt to technology. He said that the value of litigation compared to the net possible result against the time, risks and monetary costs involved were not on par.

Mr Hughes looked at the risks of not adapting. He said: 'Currently under South African law, the admissibility and/or evidential weight of any document that was generated, sent, received or stored by electronic means that is produced at court in paper format may be challenged on the basis that -

- the "original" was not produced in terms of s 14 of the ECT Act;
- the "best evidence" was not produced in terms of s 15(1)(b) of the ECT Act; and
- the "integrity" of the information was not capable of passing assessment in terms of s 15(3) of the ECT Act.'

He added that this significant risk arises for virtually every party to litigation because -

- s 15(2) of the ECT Act provides that the

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rules of evidence must not be applied so as to deny the admissibility of a data message 'if it is the best evidence that the person producing it could reasonably be expected to obtain';

- s 15(3) of the ECT Act expressly provides that the evidential weight of a data message must be assessed by having regard to, *inter alia*, the reliability of the manner in which the document was generated, stored or communicated and the reliability of the manner in which the integrity of the document was maintained; and

- s 14(2) of the ECT Act provides further that the integrity of a data message must be assessed by considering, *inter alia*, whether the information presented has remained complete and unaltered since it was created.

'Quite simply, neither of these assessments can be conducted against paper print outs of electronic documents such as e-mails,' he said.

Mr Hughes indicated that the admissibility and evidential weight of data messages (including ordinary e-mails, attached electronic files and electronically stored records) depends on an integrity assessment, which can be properly assessed only from an electronic copy of the document containing file metadata, such as, information contained in the electronic copy that typically evidences when, and by whom, an electronic document was originally created, whether it was revised or edited, to whom it may have been sent and when it was received.

'Internationally, discovery rules have been amended to address these issues by catering for the proper discovery and production of electronic documents before trial,' he said.

Mr Hughes recommended that r 35(1)(a)(b) of the the uniform rules of court dealing with the discovery, inspection and production of documents, should read:

'(a) such documents and tape recordings in his possession or that of his agent other than the documents and tape recordings mentioned in paragraph (b) and the electronic format, if any, in which any such documents and tape recordings exist.'

And 35(6) should read:

'(6) Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3) and the electronic format, if any, in which such documents or tape recordings are to be made available. Such notice shall...'

Cloud computing

According to Mr Hughes cloud computing offers flexible, affordable technology that directly addresses a business's ob-



Cape Town attorney and member of the Law Society of South Africa's e-law committee, Brendan Hughes speaking on legislation, rules and codes affecting the use of ICT in legal services at the LSSA information communication technology strategic session held recently.

jectives and goals by providing required functionality, reduced expenditure and increased mobility and convenience.

He added that the general consensus internationally was that the use of cloud computing architectures in legal practice do not violate any ethical duty (and in many instances may go some way towards upholding them) provided that reasonable care is taken effectively to minimise any risks to the confidentiality and security of client information and client files. In other words, he said, lawyers must take reasonable steps or reasonable protective measures to minimise any risks to the confidentiality and security of client information. He added that lawyers should exercise due diligence before utilising a third-party service provider for purposes of storing or processing confidential information offsite.

Duties of attorneys

According to Mr Hughes, the general ethical duties of an attorney relating to the use of ICT and cloud computing include to -

- understand and guard against the risks inherent in the cloud by remaining aware of how and where data is stored and what the service agreement says, namely, the duty of competence;
- keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology;
- have a reasonable understanding of technology and using it, or seek assistance from others who have the necessary proficiency;
- keep abreast of, and understand, any

advances in technology that genuinely relate to competent performance of the lawyer's duties to a client;

- ensure that service providers and the technology they use support the lawyer's professional obligations;
- conclude an agreement with the provider/operator of the services, where the information to be processed is personal information, to ensure that appropriate security for the protection of personal information is established and maintained; and
- implement and provide appropriate information security for the information and communications processed by the attorney.

E-signatures

Speaking on a paperless practice and e-signatures, Mr McLachlan said that paper-based signatures or traditional signatures are readily understood in commerce and law. He added that paper is an effective means of transmitting information and that this methodology will remain in use for the foreseeable future.

'That being said, in today's tightly regulated legal and financial services market, paper-based document retrieval, management and storage is time consuming and costly. Another obvious negative is the ease with which a paper signature can be forged and it can, at times, be difficult to conclusively prove a signature in a legal process,' he said.

Mr McLachlan said that there are two types of electronic signatures in South African law - the electronic signature and the advanced electronic signature.

- *Electronic signature*: This is electronic data that the sender intends to serve as a signature. As with the traditional method of signature, this can be done in any number of ways - typing your name at the end of an e-mail, for example, will serve as an electronic signature.

- *Advanced electronic signature*: This is an electronic signature, the provider of which has been accredited by the accreditation authority in terms of the provisions of the ECT Act. In its accreditation the provider must meet globally accepted security in security encryption and authentication standards and is subject to an annual audit to ensure that these standards are maintained.

Mr McLachlan said that there were only two accredited providers of advanced electronic signatures at the time of the strategic session - the South African Post Office and Lawtrust (Pty) Limited.

Social media

Ms Sadleir spoke on social media and risks for the profession. She highlighted recent case law involving employees being fired or getting into trouble with



Emma Sadleir speaking on social media and its risks for the legal profession at the LSSA information communication technology session on 15 August.

their employers for their posts on social media platforms such as Facebook.

Ms Sadleir urged judges to sign up on social media websites. 'How can judges decide on matters dealing with Facebook, for example, if they are not aware of what goes on on Facebook or how to use it?' she asked.

Ms Sadleir noted that there are no guidelines on tweeting in court, except in *S v Kotze and Others* (GNP) (unreported case (C119/12, 15-7-2013) (Bam AJ) - the *Modimolle* case - where tweeting was banned. She noted that these days all you need to know is which journalists are in court covering a certain case, and the hashtag they are using, to be able to follow court proceedings as if you were in court yourself.

Ms Sadleir warned delegates to avoid tweeting when angry, drunk or emotional. 'Once you tweet, that is it; it is out there. Even if you delete it, people usually retweet so quickly, someone is bound to read your tweet,' she said, adding that the disclaimer which reads 'I tweet in my personal capacity' is not a magic wand that gets one out of trouble for 'wrong' tweets.

Ms Sadleir highlighted the fact that as long as your profile indicates where you work, you cannot distance yourself from your employer in your tweets.

She concluded by making a few recommendations for the legal profession:

- Guidelines on social media for legal practitioners.*
- A social media policy.*
- A policy or rules on social media as evidence.
- Guidelines on tweeting from court.
- Social media training for judges.

*The LSSA's guideline and draft social media policy for law firms can be accessed on the LSSA website at www.LSSA.org.za under 'Resources for attorneys'.

- See also 2013 (April) *DR* 7; 2013 (Jan/Feb) *DR* 17 and see page 28 of this issue.

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Shaun Barns wins SALRC 10th anniversary essay competition

Shaun Barns has come up tops in the 2013 Ismail Mahomed Law Reform Essay Competition. This was announced at the awards ceremony held by the South African Law Reform Commission (SALRC) in Centurion on 5 September 2014. The ceremony also commemorated the ten-year existence of the competition.

Speakers at the ceremony included Justice Minister Michael Masutha; Judge of the Supreme Court of Appeal and SALRC chairperson, Mandisa Maya; and South Gauteng High Court Judge and vice chairperson of the SALRC, Jodi Kolapen.

Shaun Barns (24) who studied law at the University of Cape Town told *De Rebus* that he entered the competition because it is a prestigious one. He said he felt humbled by winning. He noted: 'I think that it is amazing that something that I wrote was given recognition and that it matched the spirit of the late Chief Justice Mahomed.'

His essay titled 'Constitutional damages: a call for the development of a framework in South Africa' explored whether the doctrine of vicarious liability adequately fulfills the positive duties placed on the state by the Constitution. More specifically, whether vicarious liability in delict sufficiently protects the rights of citizens where institutional failures in the South African Police Service have resulted in physical injury to private persons. 'My intention when writing the paper was to identify some challenges legal reform faces in this complex space where the public and private spheres overlap, and further to provide a viable alternative to vicarious liability centred squarely within constitutional law, namely constitutional damages. Lastly, I used Canadian jurisprudence as a comparator to demonstrate how a framework for constitutional damages has been developed in foreign jurisdictions,' he said.

After completing his studies, Mr Barns did his articles at a law firm in Cape Town for five months but resigned for personal family reason. 'To keep myself busy I started two companies. The one helps vendors make furniture out of recycled goods, and the other one is closely related, it formalises informal traders in the city of Cape Town,' he said.

When asked whether he would consider going into practice, Mr Barns said that he would like to but he is not sure



The winner and runners up of the Ismail Mahomed Law Reform Essay Competition Steven Stuart-Steer, Shaun Barns (winner), Colette Ashton and David Houze. Nathan Sarkas was absent.

when. He added that he would also like to study further and would like to work on the paper that he submitted for the competition. 'A lot of my essay was on Canadian jurisprudence. I would like to go to the US as they have a unique take on damages as compared to the rest of the world,' he said.

Mr Barns would like to do a masters in law focusing on constitutional law and jurisprudence.

The runners up in the 2013 competition were Colette Ashton from the University of Pretoria; David Houze from the University of Witwatersrand; as well as Nathan Sarkas and Steven Stuart-Steer from the University of Cape Town.

According to the SALRC, the competition is named in honour of the late Chief Justice Mahomed and it aims to encourage and incentivise critical legal writing by students, while generating new and innovative ideas for law reform.

The initiative also seeks to encourage legal scholarship and dialogue on the link between law reform, human rights and the rule of law. Essays could be on any topic relating to the modernisation, improvement, development or reform of any aspect, area or branch of South African law.

The winner won a R20 000 voucher. The four runners up each won R10 000 vouchers and their supervising lecturers won R2 500.

A book - published by sponsors, Juta Law - containing all winning essays since inception of the competition in 1999 until 2013 was launched at the awards ceremony and presented to all the competition alumni.

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SADC lawyers urged to monitor **accountability, transparency and implementation**

Chissano: Africa not short of ideas; but a serious problem with implementation

Opening the 15th conference of the SADC Lawyers Association (SADC LA) at Victoria Falls, Zimbabwe in August, the outgoing President of the SADC LA, Zambian lawyer Kondwa Sakala-Chibiya said the conference theme of 'Strengthening the Rule of Law and Good Governance in the SADC Region: A Call for Transparent and Accountable Leadership' was relevant at a time when many Southern African Development Community (SADC) countries were making efforts to create laws and institutions that promote transparency and accountability, while at the same time, making efforts to connect citizens with their governments. 'There can be no transparent and accountable leadership without the people of our respective countries holding our leaders to account. It is incumbent on all of us to participate in the governance of our countries to ensure that we get the leaders we deserve,' she said.

Ms Sakala-Chibiya stressed that although positive strides were being made at national level, lawyers in the region remained concerned about the lack of transparency and accountability and the failure by SADC governments, the SADC Summit, the SADC Council of Ministers and other SADC organs to engage and involve the citizens of the region in key decision-making processes. 'The suspension of the SADC Tribunal and subsequent decision-making processes on the issue are a case in point. As we have said at every SADCLA conference since the suspension of the Tribunal in 2010, as the legal profession in the region we remain concerned that the Tribunal was suspended in the manner that it was, despite the clear negative implications of that decision on issues of access to justice, independence of the judiciary and respect for the rule of law.' She added: 'The SADC LA has, with great sadness and disappointment, learnt of the signing of a new protocol to the Tribunal which limits the jurisdiction of the Tribunal to settling disputes between state parties under the SADC Treaty. It is regrettable that this Protocol was signed without the involvement of the people of the region.' (See page 5 of this issue.)



Former Mozambican President Joaquim Chissano delivered the opening address at the SADC LA conference and annual general meeting at Victoria Falls in August. He said: 'I challenge the SADC Lawyers Association to make its contribution in the campaign to ensure the drafting of model laws and normative aspects for transparent and accountable leadership. Constructive criticisms work better with constructive dialogue and guidelines.' To the right is session chairperson Max Boqwana, who is a member of the Executive of the SADC LA and Co-chairperson of the Law Society of South Africa.

Ms Sakala-Chibiya added that the SADC LA lawyers were saddened by developments in Swaziland, where their colleague and human rights defender, Thulani Maseko and journalist Bheki Makhubu had been sentenced to two years' imprisonment for alleged contempt of court in July, after spending four months in pre-trial detention (see 2014 (Sept) DR 15; 2014 (Aug) DR 16 and (May) DR 15). 'There can be no transparent and accountable leadership where impunity reigns,' she noted.

Calls for abolition of death penalty in Zimbabwe

Law Society of Zimbabwe (LSZ) President Lloyd Mhishi welcomed delegates to Zimbabwe and then went on to address his opening remarks to Zimbabwean Minister of Justice, Legal and Parliamentary Affairs, Emmerson Mnangagwa. He said:

'I want to say to you Minister, the issue of protection of the rule of law and upholding of human rights, is a matter dear and close to the hearts of lawyers. ... The absence of the rule of law makes lawyers and the courts useless. Our intentions have in the past been misconstrued because of this. The LSZ has in the past been labelled a political party because of this. Some of my predecessors had to sacrifice body and limb to preserve the LSZ's integrity and independence. Allow me to dispel the misconception.'

Listing the names of 'lawyers of our liberation', Mr Mhishi noted: 'Those lawyers fought tenaciously against injustice and the trampling of human rights. Just as those lawyers sought to remind the regime then to restore our people's rights, we expect you not to frown when we, who came after you, remind you to stick to the good ideals that you brought through the barrel of the gun. After all

'Even before the ink gets dry. I can see that you [lawyers] are on the confrontational path. Good leaders take the nation where the nation wants to go, but great leaders take the nation where it ought to go. In SADC we have great leaders.'

what is wrong with what we say? We are indeed on the same side because we say, dear leaders, create laws for the country, but then go on to respect them!

He stressed that the LSZ urged the Minister to ensure that the death penalty is struck from the statute books of Zimbabwe.

He went on to call for the Minister's assistance for the following:

- Lawyers must not be arrested merely for doing their work. A recent judgment of the Zimbabwean Supreme Court explained why lawyers must fight tenaciously for the rights of their clients. They must not be arrested for doing so.
- Everyone must be equal before the law.
- Court orders must be obeyed.
- Judicial independence must be respected. This includes attending to the welfare and remuneration of judges so that this does not interfere with this independence.
- Zimbabwe has a new Constitution that has an expanded Bill of Rights. There must be adherence to the Constitution and a speedy alignment of the laws to the new supreme law. 'I need to confirm that you have opened your door wide for cooperation by Zimbabwean lawyers in this regard. We will, in the next few days, be seeking your audience to present to you the first model bill that our members have come up with in an effort to assist with the process,' he noted.

Deviating from his written opening address, Mr Mnangagwa referred briefly to the SADC Tribunal and to the issue of the death penalty.

On the SADC Tribunal Protocol which had been signed days before, the Minister noted: 'Even before the ink gets dry. I can see that you [lawyers] are on the confrontational path. Good leaders take the nation where the nation wants to go, but great leaders take the nation where it ought to go. In SADC we have great leaders.'

As regards the death penalty, he pointed out that at independence Zimbabwe had nine offences that attracted the death penalty. Now, under the new Constitution, there was only one. 'I will

continue to campaign for the abolition of the death penalty because I do not believe in it,' he stated. Referring to the current inmates who had been sentenced to death, the Minister said he would not be signing the warrants for their execution.

In referring to the conference theme in his prepared address, the Minister noted that the SADC region had made commendable progress in prioritising good governance. Under this priority area, the region hoped to achieve -

- improved justice delivery and the rule of law;
- enhanced accountability in the management of public resources and service delivery;
- enhanced participation in democratic governance; and
- strengthened mechanisms for peace building and for the prevention, management and resolution of conflict.

The Minister said crucial strides towards this goal had been made recently in Zimbabwe with the adoption of a new Constitution which had ushered in a number of progressive provisions. The Constitution now goes beyond civil and political rights and provides for an expanded Bill of Rights incorporating socio-economic, cultural and environmental rights as well as the protection of vulnerable groups of society. 'As lawyers, we have a sacred duty to participate actively towards the actualisation of the pledges of democracy that are enshrined in our Constitutions, but let me also hasten to add that in this endeavour, we are required to conduct our work with the dignity, discipline and decorum that is befitting of our profession.'

He added that the SADC LA could be instrumental in facilitating the participation of citizens in democratic processes and in the way public and local authorities are run to ensure accountability and more effective and efficient service delivery. He noted: 'Some of our public institutions in the sub-region are performing poorly and the scourge of corruption is rife. This can be partly attributed to weak monitoring and evaluation systems, and points to the need for results-based management and accountable service delivery in the public sector management systems.'

The Minister highlighted the issue of the representation of women in key decision-making positions. 'Women are still greatly under-represented as elected officials and in the vast majority of political institutions. Even though there has been some progress in the participation of women in national governance in the sub-region, it remains below that required by SADC. Women still suffer from legally or culturally embedded discrimination at the social, political and economic levels. Women's involvement in

politics is essential because the institutions that govern our lives should be representative of the population as a whole. Adequate representation of women is necessary to legitimise our political system and make it more likely that issues of particular importance to women will be addressed.'

Chissano: Constructive criticisms work better with constructive dialogue and guidelines

Former President of Mozambique and recipient of the 2007 Ibrahim Prize for Achievement in African Leadership, Joaquim Chissano, prefaced his keynote address to the 15th conference of the SADC LA by emphasising the point that Africa's political landscape was changing for the better. 'We as Africans should claim the credit and be proud of these momentous achievements. We have moved from one-party democracy to multi-party democracy; from life presidency to tenure presidency; from unconstitutional changes of government to democratic changes of government; and from mediocrity to meritocracy.'

He added that the economic landscape had also changed drastically. 'Africa is considered to have some of the fastest growing economies in the world. With changing political and economic landscapes new legal requirements to promote democracy and good governance are being re-enforced and sustained.'

In his keynote address, President Chissano pointed out that Africa had been through a period of protracted intra-state conflicts during which it was recognised that the rule of law was an important tool for promoting peace, security and stability and for building a democratic society. The struggle against colonialism and white minority regimes was a struggle against the violation of human and peoples' rights.

He noted: 'One could, therefore, argue that the wars of liberation were just wars against colonialism and the denial of basic human rights including the right to freedom of association as well as freedom of speech. There is no doubt that under colonialism there was no recognition of the fact that human beings are inviolable. Equally, there was no recognition of the fact that every human being is entitled to respect for his or her life and integrity of his or her person. As lawyers you all know that no one may be arbitrarily deprived of this right. But, colonialism deprived most of the African people of most of their basic human rights.' He added that the leadership in African countries after independence recognised the centrality of promoting human and peoples' rights and respect for the rule of law.

President Chissano noted that the African continent had come a long way in embracing democracy and democratic values as a way of building good governance and ensuring respect for the rule of law. He said: 'Multiparty democracy provided the opportunity for rotation and change in leadership. Through democratic values and principles it was possible to promote the notion that there was life after presidency and that life-presidency violated the basic rights of a people to choose their own leaders through elections. Since then elections have become common as Africa goes through a series of elections on the continent every year. We can say that democracy has taken root on the continent and good governance is evolving within the context of democratic values and principles.'

Having provided the background to Africa's efforts in promoting the rule of law, democracy and good governance, and outlining a number of declarations adopted by African leaders to promote these, the former President went on to share his views on how best to strengthen the rule of law and good governance in the SADC region on the basis of transparent and accountable leadership. 'Africa is not short of ideas, but there is a serious problem in implementing some of the decisions either because of a lack of funding or simply political will.'

At continental level, President Chissano said he was encouraged by the fact that the African Union Summit in Malabo, Equatorial Guinea in June this year, had adopted amendments to the protocol establishing the Pan African Parliament (PAP), gradually moving the PAP from advisory to legislative functions. 'This strategic shift may allow for the drafting of model laws and the strengthening capacity of the PAP to address normative issues effectively. I am convinced that the PAP will require the support of the SADC LA to support the development of model laws and the harmonisation of laws within the SADC and in Africa,' he said.

'The only alternative to transparent and accountable leadership is transparent and accountable leadership. There is no other option,' he stressed.

He noted that the objective of the African Charter on Democracy, Elections and Governance was clearly to provide latitude for the strengthening of the rule of law and good governance, and if these are well implemented, they would no doubt bring about the required transparent and accountable leadership. However, President Chissano stressed, institutions such as the SADC LA were needed to support the efforts aimed at enhancing transparency and accountability. 'If there are no checks and balances, we are likely to divert from established norms provided in all the declarations we have

'Through democratic values and principles it was possible to promote the notion that there was life after presidency and that life-presidency violated the basic rights of a people to choose their own leaders through elections.'

so far adopted on governance and leadership and make the current leadership a mockery of the future. We have made some significant progress in promoting good governance and accountable as well as transparent leadership, but we need to do more. There is no doubt that some countries have moved faster than others essentially because they had in place the enabling political environment and well-articulated legal frameworks and established norms.'

President Chissano noted some aspects essential for the enhancement of transparent and accountable leadership:

- There was a necessity to uphold the commitments that are made. 'It does not make sense to adopt declarations that we do not have the necessary will to implement. This is why I would propose the establishment of a follow-up, monitoring and implementation mechanism to ensure the enhancement of transparent and accountable leadership. It is not enough to adopt the declaration without such an enforcement mechanism in place to ensure its implementation. I challenge the SADC LA to establish the necessary measures to raise awareness about the need for greater transparency and accountability in leadership.'
- The first responsibility of a transparent and accountable leadership is to protect its citizens' rights and to avoid a relapse into authoritarian rule. 'We need, therefore, to redefine citizenship informed by commitment to a theory of citizenship that guarantees individual rights, and to restructure and accommodate fractured citizenship rights asserted by exclusion and marginalisation of minority groups and communities. We also need to inculcate a culture of tolerance and respect for divergent views.'
- The Constitution must be respected as a legal framework that serves as a guide to undertake a number of actions to ensure the rights of individuals as citizens. 'The people are the barometer for measuring good governance and for awarding transparent and accountable leadership. Leadership is about being able to address the concerns of the people and to anticipate corrective measures in the event things go wrong. This is why transparent and accountable leaders must

demonstrate visionary capacity to anticipate problems and solve them with the least impact on the people.'

- Peace and stability are the building blocks of sustainable development. 'There cannot be peace without economic development and, in turn, peace without economic development is unsustainable. We need stable governments led by a transparent and accountable leadership, based on democratic political succession with fixed presidential term limits, within the framework of competitive party and electoral politics and the periodic holding of free fair and credible elections, managed by independent electoral bodies recognized under the Constitution.'

He challenged the SADC LA to contribute to the campaign to ensure the drafting of model laws and normative aspects for transparent and accountable leadership. 'Constructive criticisms works better with constructive dialogue and guidelines,' he concluded.

From human rights to law firm management

The official communiqué issued by the SADC LA after the conference outlined discussions and resolutions taken during the two-day conference:

- Generally, conference delegates -
- acknowledged the progress made in the region in promoting accountable and transparent leadership, but highlighted gaps that still exist in electoral systems and processes, as well as in combating corruption and corrupt practices;
 - recognised that constructive dialogue and engagements between lawyers, the judiciary, the legislature and governments at national and regional level is critical in creating good relations for the benefit of the citizens of the SADC region;
 - recognised the role of the legal profession in promoting regional integration through citizen engagement and ensuring that the citizens of SADC - and indeed the rest of the African continent - know each other in order to promote inter-regional and inter-African trade, cooperation and relationships;
 - emphasised the need by SADC governments to move away from authoritarian rule and to tolerate divergent views while consulting citizens on key regional integration issues;
 - noted that the centering of regional conversations on cooperation and development as opposed to analysis of conflicts was an indication of a region that is more at peace with itself and a political landscape that is changing for the better; and
 - noted further that Africa is not short of ideas but lacks the effective implementation of ideas; hence the need for the

creation of regional strategies for implementation of laws and policies as well as the monitoring and evaluation of such implementation.

Following the three plenary and five parallel sessions that were held, the SADC LA summarised the outcomes of each session as follows:

The promotion of human rights - engage on the SADC Tribunal

On the promotion of human rights, and taking into account that the conference took place in Zimbabwe, delegates noted that the legal profession in Zimbabwe - and the SADC region - must work with the Minister of Justice of Zimbabwe and the Government of Zimbabwe in ensuring that the death penalty is totally removed from the statute books following progress that has been made in the country in limiting the application of the death penalty.

It was also noted that the 2013 Constitution of Zimbabwe should be used to better the rights of Zimbabwean citizens.

Generally in the region, the SADC LA and its constituent members must facilitate public participation in democratic processes and in local governance with a focus on effective service delivery at the local and municipal level. The inclusion of women in decision-making processes and key leadership positions is critical for the advancement and development of the SADC region.

The legal profession in the SADC region must continue to engage on the SADC Tribunal issue to ensure the creation of an institution that meets the expectations of SADC citizens.

Transparent and accountable leadership: Create a model law for monitoring

It was agreed that citizen engagement was necessary in order to hold leaders accountable and promote transparency in governance. Lawyers must participate in knowledge-sharing programmes with the rest of the citizenry on the laws that citizens can utilise for their protection and institutions that citizens can use to increase public participation in decision making.

Lawyers must -

- work with Pan-African institutions such as the PAP to create a model law on transparency and accountability for the African continent; and
- help in putting in place monitoring and evaluation mechanisms to ensure the implementation of transparency and accountability laws, programmes and commitments.

Media: A need to balance state regulation and self-regulation

In the session focusing on the role of the media in strengthening rule of law, good governance and accountability, lawyers highlighted the need for mechanisms to increase public access to information held by the state and state-owned enterprises.

It was noted that -

- lawyers must work closely with media practitioners to ensure that citizens enjoy the rights enshrined in national constitutions; and
- there is need to balance the issue of state regulation of and self-regulation by the media, at the same time ensuring that media practitioners carry out their work professionally and ethically.

As regards the new Constitution of Zimbabwe, it was commended for protecting journalists and media practitioners in the country, but Zimbabwean lawyers stressed the need for media laws to be aligned with the new Constitution, noting that the right to freedom of expression is not primarily for the benefit of the journalist but for the benefit of members of the public.

Fighting corruption and promoting accountability

It was noted that if all the money that is lost through corruption and illicit financial flows were channelled towards development, Africa would not need any foreign aid. As such it is necessary to -

- fully implement the SADC anti-corruption protocol and other international anti-corruption instruments, including the establishment of institutions to fight corruption; and
- establish fully functional, fully funded, independent and effective anti-corruption commissions at national level.

These must be complemented by strong and independent judiciaries, legal frameworks and other institutions, all of which must be coordinated to ensure effective implementation.

It was noted that research has shown that lawyers are involved in corruption, with 95 jurisdictions in the world citing corruption within the legal profession as an issue of concern. Lawyers are exposed to corruption when they act as intermediaries in international commercial and investment transactions. In that regard law societies must provide training, strategies and standards in anti-corruption, and law firms must have anti-corruption strategies and policies as well as focusing on due diligence when dealing with international clients.

Delegates also noted that, where corruption is prevalent within the judiciary, strategies are required to address this corruption.

As regards the independence of the judiciary in the SADC region, delegates noted that weak or corrupt judiciaries are a hindrance to social and economic development. Strengthening the judiciary is a pre-requisite to upholding the rule of law and maintaining the balance while promoting the separation of powers as enshrined in national constitutions.

Besides the importance of an independent judiciary, it was emphasised that the independence of the Judicial Service Commission is critical in maintaining that independence - and political will is important in maintaining the independence of both. In addition, the remuneration and conditions of service of judges must be such that they are not subject to manipulation or used to undermine the independence of the judiciary.

Law firm management: African law firms must prepare to be self-sufficient in the future

The session on law firm management covered presentations on the African legal market, the need to upskill African firms so as to create a critical mass of substantial African business law firms; the need to meet client demands as African economies grow and diversify; as well building deeper knowledge and alliances.

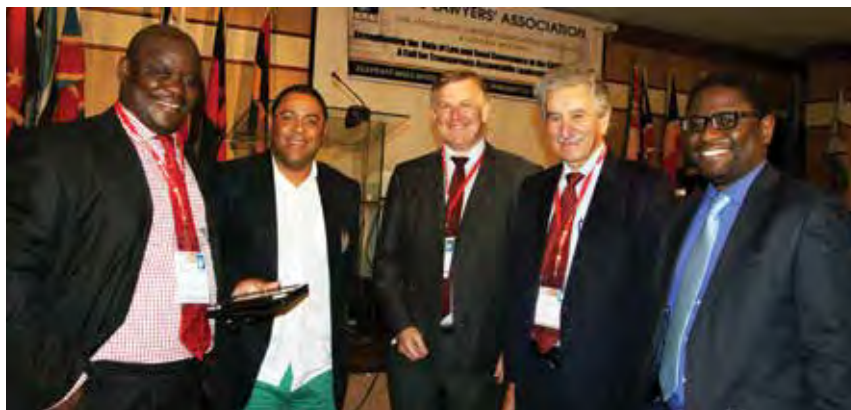
Delegates concluded that there was a need to leverage the relationships between African law firms and the big international law firms in order to grow the work of African lawyers and law firms.

'... to develop a substantial mass of African business law firms ... for this to happen, African law firms must evolve so that they can compete on the global platform. This evolution must be undertaken with the realisation that change is uncomfortable and they must, therefore, be prepared for such change.'

The law firm panel:

A plenary session at the SADC LA conference looked at how law firms and lawyers in the SADC region can adequately meet the increasingly demanding needs of clients, both local and international, as African economies grow and diversify.

The session was sponsored by the International Bar Association (IBA) Law Firm Management Committee. Speakers included, IBA Human Rights Institute chairperson, Zimbabwean lawyer Sternford Moyo, who chaired the session; Webber Wentzel partner Owen Tobias; London-based law firm consultant Rob Millard; Pretoria chartered accountant and trainer Vincent Faris; and Zambian lawyer Charles Mkokweza looked at meeting client demands as African economies grow and diversify. Also on the panel, but



From left, IBA Human Rights Institute chairperson, Zimbabwean lawyer Sternford Moyo; Webber Wentzel partner Owen Tobias; London-based law firm consultant Rob Millard; Pretoria chartered accountant and trainer Vincent Faris; and Zambian lawyer Charles Mkokweza.

not pictured, were Tito Byenkya, CEO of the East African Law Society, who also looked at meeting increasing client needs amidst growth and diversification from an East African perspective, and German lawyer, Herman Knott - Co-chairperson of the IBA Law Firm Management Committee - focused on building deeper knowledge and alliances with specialised attorneys.

Mr Millard noted: 'In order for Africa to progress from its political freedom to its economic freedom, a critical mass of substantial African business law firms is required, that can deliver teams of African lawyers who can competently advise large national and international clients on solving their most important, difficult legal challenges in Africa.'

Also, there was a need:

- to develop African capital markets and to develop a substantial mass of African business law firms. In order for this to happen, African law firms must evolve so that they can compete on the global platform. This evolution must be undertaken with the realisation that change is uncomfortable and they must, therefore, be prepared for such change.
- to put in place measures to ensure that regional trade in professional services is taken seriously and that lawyers play their role in promoting trade in the SADC region. Lawyers have a role, as part of professional services, in facilitating trade and investment, a role that lawyers in the East African Community have taken seriously. There must be partnerships between lawyers and governments, as opposed to them being adversaries, as this leads to governments not relying on local legal expertise but rather consulting foreign lawyers due to lack of trust;
- to address the weak skills base among local lawyers in relation to the changes that are taking place, for example in the areas of oil and gas. In this regard, law societies must address these skills gaps through continuing legal education for practitioners;
- for senior lawyers to manage the expectations of young lawyers; Bar associations and law societies should ensure

that young lawyers stay in the profession and contribute effectively towards its development;

- to revise legal and policy regulating frameworks for the legal profession to allow for innovation and competition by balancing the regulatory frameworks with the realities of the modern world, where information has become readily available. Liberalisation of trade and professional services must be balanced with the growth of skills for African lawyers to allow for effective competition, while allowing lawyers to specialise in specific areas;

- to support and strengthen Bar associations and law societies at national and regional level, while at the same time increasing lawyers' participation in *pro bono* work so as to fight the perception that lawyers are merely profit-oriented;
- to grow capacity in the area of law firm management as law firms need governance structures and strategies to invest in talent management, adopt value-based approaches to business and acknowledge the importance of business development; and
- for collaborative alliances by law firms as they provide both independence and presence in various jurisdictions.

Generally there was an acknowledgment that African lawyers must realise that there is no need to defer constantly

to international law firms, as African law firms have and can have the required expertise. There was a need to develop the expertise in order to be self-sufficient in the future.

Women in the legal profession: *A luta continua*

It was noted that women found it increasingly difficult to reach the upper



Lomcebo Dlamini, coordinator of the Swaziland Coalition of Concerned Civic Organisations, was a speaker in the session on women in the legal profession.

echelons of the profession due to the patriarchal nature of the profession on the one hand and their care roles on the other, which inhibit their professional development. There is, therefore, a need for such gender and care roles to be recognised and properly acknowledged by the organisations that female lawyers work in.

It has become increasingly difficult for young lawyers to get their first jobs after law schools, leading to the sexual harassment of young female lawyers. There was a need for senior female lawyers to protect young female lawyers and stand up against such abuse. Mentorship by senior lawyers was one way of protecting younger lawyers.

Female lawyers lacked networks to grow their businesses, as compared to their male colleagues. There was, therefore, a need for women to establish their own networks such as women lawyers'



Pietermaritzburg High Court Judge Thoba Poyo-Dlwati was the keynote speaker at the session which looked at challenges faced by female lawyers. She looked at the pressures faced by women as professionals meeting fee targets and as care-givers looking after different generations of dependants by asking whether law firms are generally keen to 'keep the keepers'. She noted that women should not measure their success by comparing themselves to their male counterparts, but rather urged the profession to change to embrace the multifaceted role which women must play. She summed up that multifaceted role as follows: 'I am Thoba. I am mother to Elihle and Lwandle. I am wife to Hlubi. And I am a judge.' Judge Poyo-Dlwati is a former President of the SADC Lawyers Association, Co-chairperson of the Law Society of South Africa and President of the KwaZulu-Natal Law Society.



Women lawyers panel: The panel that discussed the challenges faced by women lawyers in the legal profession and in advancing human rights protection included, from left, Connie Nawaigo-Zhuwarara from Zimbabwe Lawyers for Human Rights, Malawian lawyer Maureen Kondowe and Irene Petras from Zimbabwe Lawyers for Human Rights.

associations at national and regional levels. Delegates acknowledged that the majority of male lawyer were concerned that female lawyers should succeed and as such, female lawyers must work with their male colleagues to grow both professionally and socially.

Female lawyers must participate in law society governance structures at both national and regional levels in order to develop the requisite skills and also so that their skills and expertise are recognised. However, leadership in the legal profession for women can be an isolating and lonely experience. It was, therefore necessary for female lawyers in leadership positions to foster the necessary support structures.

Human-rights lawyering must be taken seriously by female lawyers - and all lawyers generally - to dispel the notion that human rights work is not rewarding.

The judiciary must appreciate the international human rights frameworks and instruments for the promotion and protection of women's rights and make a difference by giving progressive decisions on issue of women's rights at various levels.

Law societies and Bar associations must find ways of rewarding law firms that develop and effectively implement gender policies.

Mining agreements: Tools for building trust between stakeholders

Owing to new natural resource discoveries on the continent (and in the region), lawyers in developing countries need to become better versed in complex contract negotiations and drafting skills to realise the full financial and social benefits to local contracting partners and communities.

Model mining agreements are important in the promotion of the economic

development of any country and the success of projects.

Whereas there have been recent criticisms of model mining agreements due to the inequality of bargaining power and experience; corruption, lack of transparency as well as inequality of economic benefits, it would still be important for lawyers to familiarise themselves with them in line with regional and international best practices in the sector and as a means of articulating a role for regional economic communities such as SADC.

Lawyers needed to familiarise themselves with the stabilisation clauses regime to advise adequately on how to overcome risks to the projects as well as the potential imbalance of beneficitation between the state and the investor.

Lawyers must play a role in ensuring that communities affected by mining provide prior informed consent to mining activities and appreciate the nature of mining developments before the mining development commences, while at the same time ensuring that communities benefit from business relationships with the mining companies.

In negotiating contracts, lawyers must ensure that trust is developed between and among the various interested parties by clearly articulating the key roles and responsibilities of all the major actors, including the state, the private sector and communities.

Barbara Whittle
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SADC LA AGM

At its annual general meeting following the conference in Zimbabwe, the SADC Lawyers Association (SADC LA) adopted draft SADC Minimum Standard Guidelines for the Treatment and Management of Detainees. These have been made available to member law societies and Bar associations.

The guidelines aim to apply to the management of detainees in pre-trial detention, awaiting sentence and to those serving sentences following a legally recognised trial through a national court system of a SADC country. Places of detention where such detainees are held include police cells and correctional facilities housing either remand detainees or those serving prison terms. The guidelines do not apply to the management of detainees held in terms of military disciplinary or court martial proceedings or any proceedings outside of the nationally recognised criminal justice delivery system.

The SADC LA Executive elected at the conference in August is as follows:

- Gilberto Caldeira Correia, President (Mozambique);
 - James Banda, Vice-President (Zambia);
 - Max Boqwana, Treasurer (South Africa);
 - Binta Hazel Tobedza, Committee Member (Botswana); and
 - Nkoya Thabane, Committee Member (Lesotho).
- Copies of documents and presentations made at the SADC LA conference and AGM - where these have been made available by the presenters - can be accessed on the SADC LA website at www.sadcla.org or requested from Chantelle de Sousa at chantelle@sadcla.org



The LSSA's representatives on the SADC Lawyers Association council are Max Boqwana (left) and Noxolo Maduba (right). With them are outgoing SADC LA President Kondwa Sakala-Chibiya from Zambia and the newly elected SADC LA President Gilberto Correia from Mozambique.

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Errata

- In 2014 (Sept) DR 34, the author of 'Business Rescue: The position of secured creditors', Dominique Wesso, was said to be a candidate attorney at Cliffe Dekker Hofmeyr in Johannesburg.

Ms Wesso is, in fact, a candidate at-

torney at the Cape Town office of Cliffe Dekker Hofmeyr.

The confusion that this may have caused is regretted.

- In the article 'Rise of the machines - understanding electronic evidence' in 2014 (Aug) DR 34 the definition of data should

have read: 'Data *comprises* of the output of analogue devices or data in digital format. It is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system.'



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Compiled by Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.org.za

LSSA raises grave concern about scurrilous attacks on Public Protector and Judge Masipa

In September, the Law Society of South Africa (LSSA) raised its serious concern about the unwarranted, scurrilous and personal attacks on the Public Protector, advocate Thuli Madonsela, particularly as regards her Nkandla report 'Secure in Comfort', and against Pretoria High Court Judge Thokozile Masipa following the latter's judgment in the *Oscar Pistorius* matter.

As regards the Public Protector, LSSA Co-chairpersons Max Boqwana and Etienne Barnard noted in a press release: 'It is unacceptable that the Public Protector, advocate Thuli Madonsela, should be the target of undeserved attacks – even of a personal nature – and that her integrity and that of her Office and staff is questioned at every turn. The Office of the Public Protector is carrying out its mandate in terms of the Constitution. Her Office is a Chapter Nine institution which is independent and subject only to the Constitution and the law.'

They added that the Constitution enjoins all organs of state – including the

executive, the legislature and the judiciary – to assist and protect the Public Protector.

'Persons or organisations that have problems or disagree with her reports should follow the proper legal route to challenge the reports and call for them to be reviewed. Only a court of law can review her reports. However, such organisations and persons must guard against involving the Office of the Public Protector in unnecessary litigation as this will add to the financial and human resource burdens of her Office, which is already inundated with investigations on behalf of the public,' they said.

Aligning itself with the serious concern raised by a number of legal organisations including the Legal Resources Centre, Section 27, the Centre for Child Law and the Black Lawyers Association regarding the threats and personal attacks made against Judge Masipa, particularly comments made regarding the judge's race and gender, the Co-chairpersons said: 'The *Pistorius* matter was a high-profile case that played itself out

in the glare of the local and international media, and people are free to disagree with the judgment. Judgments by our courts are not above scrutiny; but judgments of the court must be respected and scrutiny must be informed, constructive and based on sound legal principles. For that reason we have an appeal procedure in our courts which allows parties – who are of the view that a different judge or court may come to a different conclusion – to apply for leave to appeal. However, personal attacks on the judicial officer and the legal practitioners are not acceptable or appropriate in a country where the rule of law and the independence of the judiciary and of the legal profession are paramount.'

They added that 'judicial officers – judges and magistrates – and legal practitioners must be allowed to perform their duties without fear of attacks on their persons, safety or work environment.'

LSSA calls for representation for attorneys and advocates on new Legal Aid South Africa Board

Earlier this year, the Law Society of South Africa (LSSA) made comments on the Legal Aid Bill and the Attorneys Amendment Bill. Both Bills were debated by the Portfolio Committee for Justice in Parliament late in August and in September.

As regards the Legal Aid Bill, the LSSA pointed out that clause 4(1) allowed the Board to do all that was necessary to achieve the objects of Legal Aid South Africa, including among other actions, employing paralegals. The LSSA noted that, although it had no objection to paralegals being used as researchers, interviewers and the like (provided that they are under proper supervision and oversight by a legal practitioner), they should not be allowed to sign pleadings and appear in court.

The LSSA added that currently paralegals did not fall under the disciplinary jurisdiction of any regulatory statutory

bodies and no provision had been made in the Legal Practice Bill (LPB) for the regulation of paralegals. Therefore, the LSSA suggested the clause be amended as follows: 'Legal Aid South Africa may employ paralegals to provide legal services and advice, provided that the paralegal is subject to the supervision of a legal practitioner.'

As regards the composition of the Board, the LSSA noted its concern that no provision had been made for the representation of the legal profession on the Board. The LSSA stated: 'The core function of Legal Aid South Africa is to deliver legal services. The statutory law societies and General Council of the Bar are the main regulators of practising attorneys and advocates and as such should be represented on the Board.'

In addition, the LSSA stressed that since Legal Aid South Africa employs in excess of 2 000 legal practitioners and as such is the largest employer of can-

didate attorneys, the law societies had a vested right in the functioning of the Board.

In terms of the LPB, the Legal Practice Council (LPC) would in future regulate attorneys, candidate attorneys, advocates and pupils. The LPB provides for separate representation by Legal Aid South Africa on the LPC, due to the nature of the legal services rendered and due to the contribution by Legal Aid South Africa to access to justice. The LSSA pointed out that it is an objective of the LPC to ensure access to justice and as such, the Legal Aid Bill should provide for reciprocity for attorneys and advocates as far as representation on the Board of Legal Aid SA is concerned.

As regards clause 22(3) of the Legal Aid Bill, the LSSA stated that it appears that a court may not *mero motu* refer a person to Legal Aid South Africa for legal representation at state expense, but can only do so after the person has already

applied to Legal Aid South Africa, which request has been refused and he or she has exhausted all internal remedies. The LSSA noted: 'This section might have unintended consequences, such as depriving people of their rights in terms of s 35 of the Constitution and lead to unnecessary delays in the conduct of trials.'

Attorneys Amendment Bill urgent

The Law Society of South Africa (LSSA)

made only very brief submissions of a technical nature on the Attorneys Amendment Bill, stressing that the Bill was urgent and that the amendments should in no way delay its passage, which was in the interest of the profession and of the public. The Bill is aimed, among other aspects, at addressing disparities in relation to attorneys and candidate attorneys in the territories comprising the former Republics of Transkei, Bophuthatswana, Venda and Ciskei. It re-

peals the laws of the former territories in so far as they are still applicable to attorneys and candidate attorneys in these territories.

- The full comments by the LSSA can be accessed on the LSSA website at www.LSSA.org.za under 'Legal practitioners – LSSA comments'.

Tshepo Shabangu to represent LSSA at IBA

Pretoria attorney Tshepo Shabangu will represent the Law Society of South Africa (LSSA) on the council of the International Bar Association (IBA).

Ms Shabangu is a partner at Spoor & Fisher in Centurion. She has the BProc, LLB and LLM degrees and has practised in the intellectual property (IP) field for more than 18 years. She specialises in local and foreign prosecution of trade marks, general advice on copyright matters, conducting due diligence investigations of (IP), trade mark audits, management of IP portfolios and has experience in drafting of IP-related agreements. Ms Shabangu is a past President of the South African Institute of Intellectual Property Law (SAIPL).

The IBA will be holding its annual conference in Tokyo from 19 to 24 October 2014.



Tshepo Shabangu is the Law Society of South Africa's new representative on the council of the International Bar Association.

LEAD launches course for women lawyers in leadership

'The Law Society of South Africa (LSSA) strongly supports the view that more women should take up leadership positions in the legal profession,' says LSSA Chief Executive Officer, Nic Swart.

The LSSA's Legal Education and Development division (LEAD), in association with the Nelson Mandela Metropolitan University, has launched a pilot project aimed at empowering women attorneys by focussing on key concepts relating to leadership.

These include –

- 'branding' and how to develop a personal brand;
- leadership styles and how to apply your own style;
- the requirements of *powerful thinking*;
- the dynamics of *organisational politics* and how to manage this reality;
- thinking and acting *strategically*;
- *emotional intelligence* and interacting effectively at different levels; and
- facing the *challenges/obstacles* for women leaders and how to overcome these.

The programme will be intensive and interactive, running over two sessions – of three days in November 2014 and two days in February 2015 – with facilitators that are dynamic tutors in their areas of specialisation.

The first pilot course will be offered in Johannesburg (after which LEAD will consider expanding this course to other centres).

Applications from women lawyers with at least eight years' practical experience, who are interested in growing their leadership skills, will be considered.

For more information on the women lawyers in leadership course, e-mail jeanne-mari@LSSA.org.za and indicate your potential to be a significant leader in your chosen field.



LEAD launches pilot workshop on writing for the media and law journals

There is a growing need for attorneys to make valuable input to and address current issues in practice, and to contribute information to the public through the print media, thus promoting access to the law and justice. In recognition of the above, the Law Society of South Africa's Legal Education and Development (LEAD) division has launched a pilot writing course that will enable attorneys to publish articles, letters, case notes and other pieces in the print media (in *De Rebus*, other law journals and in newspapers). The course will be facilitated by tutors who specialise in media and law journal publication, and will be aimed at providing practitioners with the practical skills needed to get their names in print.

The course will focus on –

- choosing a topic;

- planning the layout (conveying the crux of the message in plain, practical language);
- choosing a title;
- choosing the correct medium for publication;
- publication requirements for *De Rebus*, mainstream media and journals; and
- plagiarism, copyright, referencing and fact-checking.

The course will be practically orientated and will allow participants to apply what they have learnt, with feedback from the facilitators. The first pilot courses will be offered in Johannesburg and Pretoria at the end of October 2014.

- For more information, e-mail jeanne-mari@LSSA.org.za to express your interest in attending the course or access the registration form on www.LSSALEAD.org.za

People and practices

Compiled by Shireen Mahomed



Shepstone & Wylie in Umhlanga has appointed David Coleman as a partner in the corporate and commercial law department. He specialises in banking finance transactions, acquisition finance, property finance and preference share finance.

Fasken Martineau in Johannesburg has two new appointments.



Simon Pratt has been appointed as a partner in the litigation and dispute resolution department. He specialises in litigation, dispute resolution and commercial law.



Bianca da Costa has been appointed as an associate. She specialises in commercial litigation, commercial and construction law.



Sefalafala Attorneys in Hyde Park has appointed Bukhosi Sibanda as an associate in its litigation department.

Please note: Preference will be given to group photographs where there are a number of featured people from one firm in order to try and accommodate everyone. □

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- The article must be published between 1 January 2014 and 31 December 2014.
- The Editorial Committee of *De Rebus* will consider contributions for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

Any queries and correspondence should be addressed to:
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 Tel: 012 366 8800, Fax: 012 362 0969, Email: derebus@derebus.org.za

IC006/14

The meaning of debt for actions against organs of state

By
Vhelaphi
Peter
Muthevuli

In terms of s 1(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) a 'debt' means 'any debt arising from any cause of action -

(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any -

i. act preformed under or in terms of any law; or

ii. omission to do anything which should have been done under or in terms of any law; and

(b) for which an organ of state is liable for payment of damages, whether such debt became due before or after the fixed date'.

Subsections 3(1) and (2) require that a notice of intended legal proceedings must be given to the concerned organ of state by the creditor within six months from the date on which the debt became due. This is a preemptory step before legal proceedings can be instituted.

Before compliance with the requirement of s 3(1) is needed, it must be ascertained whether the claim at hand constitutes a debt in terms of s 1(1). This presupposes that there are claims against organs of state which are not debts as envisaged in s 1(1) of the Act.

In *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs and Another* 2012 (4) SA 91 (KZD) at para 11, the court held that: 'Paragraph (a) of the definition [of the Act] is widely worded and makes it

clear that a debt is any liability whatsoever. It is, however, followed by para (b) and the question which arises is how the two paragraphs relate to each other. They can be read either disjunctively or conjunctively. The paragraphs are linked by "and" and not "or". Ordinarily, paragraphs or phrases linked by "and" are read conjunctively and those by "or" disjunctively. Accordingly, although the courts have read "and" to mean "or" and *vice versa* in appropriate circumstances, there must be compelling reasons to change the words used by legislature'.

The court in para 12 held that: 'Using the ordinary meaning of the words in the definition, therefore, the two paragraphs must be read conjunctively. When that is done, para (b) qualifies or limits the generality of para (a) in two ways. First, it restricts debts to those which constitute a liability to pay damages and, secondly, it restricts debts to those where an organ of state is the debtor. On an ordinary reading of the definition it boils down to this. A debt is the liability of an organ of state to pay damages, arising from any cause of action'.

In the *Zulu* matter, what was claimed against the organ of state was arrear rental in terms of a lease agreement. The court held that s 3(1) of the Act was not applicable as arrear rental was non-damages debt, but the claim for arrear rental was one for specific performance.

The Supreme Court of Appeal quoted paras 11 and

12 in the *Zulu* matter with approval in *Vhembe District Municipality v Stewarts & Lloyds Trading (Booysens) (Pty) Ltd* (SCA) (unreported case no 397/13, 26-6-2014) (Van Zyl AJA). This means that all the claims arising out of a contract with an organ of state, as long as they are for specific performance and not damages, are not covered by the word 'debt' under s 1(1) of the Act. Consequently, this means that the Act would not be applicable and creditors need not comply with its provisions.

I submit that, as soon as a claim for specific performance or non-damages is due, the creditor may immediately proceed with an ap-

plication to enforce payment or issue summons, without wasting time and costs by complying with the Act, as such compliance would be legally unnecessary.

See also *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* 2010 (3) SA 90 (NWM) and *Director-General, Department of Public Works v Kovacs Investment 289 (Pty) Ltd* 2010 (6) SA 646 (GNP) for more.

Vhelaphi Peter Muthevuli LLB (University of Venda) is an attorney at Kern & Dekker Inc in Louis Trichardt/Makhado. □

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Electronic delivery of communications to taxpayers: Is SARS toeing the line?

By
Alan
Lewis

Many taxpayers would have received an sms informing them that the South African Revenue Service (SARS) has issued an assessment on them, or that it has issued some notice to them, and that they can find these documents on the e-filing system.

Unfortunately, some taxpayers became aware of such documents, which have been filed on their e-filing profiles, only when SARS informed them of that, and as a result of their failure to respond, SARS intends to take legal action against them.

Is SARS obliged to deliver documents to a taxpayer by electronic means in a particular manner?

The law

Section 252 of the Tax Administration Act 28 of 2011 (the Act) contains the following provisions:

'If a tax Act requires or authorises SARS to issue, give, send or serve a notice, document or other communication to a company, SARS is regarded as having issued, given, sent or served the communication to the company if -
... sent to the company or its public officer's last known electronic address, which includes the -

- last known e-mail address; or
- last known telefax number.'

Similar provisions, in s 251 of the Act, regulate the electronic delivery of documents, notices and other communications to taxpayers who are not companies.

The Act does not define the term 'electronic address'. The website Dictionary.com defines this term as 'the electronic mail designation for a recipient who uses that mail software' (dictionary.reference.com/browse/electronic+address, accessed 2-9-2014), while Wikipedia defines an 'email address' as 'an email box

to which email messages are delivered' (en.wikipedia.org/wiki/Email_address, accessed 2-9-2014).

In the light of these definitions, I submit that SARS' e-filing system is not an electronic address, but simply a server on which certain documents can be filed. In my opinion, this conclusion is supported by the terms of the new tax court rules, which are discussed below.

The new tax court rules

These rules, which prescribe the procedures which are to be followed in lodging an objection and appeal against an assessment, were promulgated in terms of the Act on 11 July 2014, and are effective from that date. They define 'deliver' by SARS, in terms of the rules, as follows:

"deliver" means to issue, give, send or serve a document to the address specified for this purpose under these rules, in the following manner:

(a) by SARS ... in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;

(b) by SARS, *if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment*, by posting it on the electronic filing page of the taxpayer or appellant ...' (my emphasis) (GN550 GG37819/11-7-2014).

Summary

It appears that ss 251 and 252 of the Act are clear: As far as electronic communications are concerned, with the exception of those particular communications which are referred to in the rules, SARS must send the particular notice or document to the taxpayer's last known e-mail address or last known telefax number.

However, if a taxpayer elects to dispute an assessment by using SARS' e-filing service, then only may SARS deliver documents and notices to that taxpayer

by posting them on that taxpayer's e-filing page.

SARS may apparently only deliver those notices and communications in this manner which follow the process of objection and appeal, after the taxpayer has delivered the notice of objection.

Both ss 251 and 252 of the Act place a legal duty on SARS to prove that it has delivered documents, notices and communications in the prescribed manner and in the absence of proof of such delivery, SARS would be hard pressed to demand that a taxpayer must comply with any such notices or communications.

For example, if SARS fails to deliver an assessment, as prescribed by the Act, it may be unable to enforce the assessment and claim payment of any assessed taxes. In handing down its decision in the matter of *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA), the Supreme Court of Appeal confirmed that, in the absence of the taxpayer receiving notice of an assessment, SARS cannot institute legal proceedings to recover the assessed taxes (para 14 - 19).

In the light of this judgment, I submit that a taxpayer can lawfully receive notice of an assessment only if it is delivered electronically by SARS as prescribed by ss 251 and 252 of the Act.

In my opinion, neither the provisions of the Act nor the new tax court rules, authorise SARS to deliver an assessment to a taxpayer by posting it on a taxpayer's e-filing page on SARS' electronic filing service.

Alan Lewis *BProc (UFS) LLB (UFS) LLM (Tax)(UP)* is an advocate and a tax law consultant in Johannesburg. □



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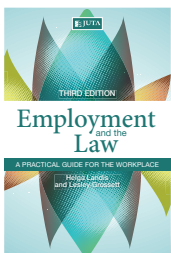
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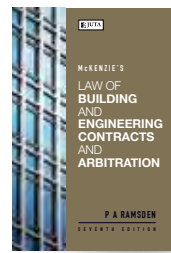
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Courtroom of the future – *virtual courts, e-courtrooms, videoconferencing and online dispute resolution*

By
Izette
Knoetze

The future of the courts is greatly dependent on technology and how technology can improve their functioning. According to Jeff Aresty ('State Courts and the Transformation to Virtual Courts' *Litigation* Spring 2013 vol 39(2) 50) there are three general categories of changes in courtroom technology:

- There are the technologies that legal representatives use to present evidence and arguments.
- The existence of electronic documents has fundamentally changed the discovery process.
- Lawyers can use new technology outside the courtroom to start their cases, maintain their cases and get word out

about their cases. E-filing, social media and legal research have transformed the traditional work of lawyers.

Virtual courts

According to Keith Kaplan ('Will Virtual Courts Create Courthouse Relics?' *The Judges' Journal* 2013 vol 52(2) 32) a virtual court is a conceptual idea of a judicial forum that has no physical presence but still provides the same justice services that are available in courtrooms. Access to virtual courts would, however, be limited to online access, videoconferencing and teleconferencing.

Expert testimony through videoconferencing

Videoconference technology allows witnesses to testify at trial without being physically present in the courtroom. In contrast to a traditional, in-person witness, the videoconference witness is not physically present in the courtroom, but 'virtually present' through the use of technology. This enables the witness and those in the courtroom to interact (F Weber 'Complying with the confrontation clause in the twenty-first century: Guidance for courts and legislatures considering videoconference testimony provisions' *Temple Law Review* Fall 2013 vol 86(1) at 151).

The use of videoconferencing technology in both criminal and civil cases is discussed below.

In many criminal cases it is necessary to have testimony from fingerprint or chemistry experts usually stationed in major cities. They are assigned to cases throughout the country and are often requested to testify on the same day in courts that are kilometres apart. Often, a trial in a small town may have to be postponed because the expert must testify in another town. If, however, closed circuit TV (CCTV) were used, the expert could work in the laboratory until needed to appear on the screen in either of the two towns. The saving in time for many people, namely the presiding officer, legal representative and witness - and the improvement of the trial calendar are obvious advantages in this situation. With real-time reporting, expert witnesses can respond instantaneously across the country.

The availability to experts of their own laboratory equipment, which may be immovable or transported only at great cost, may also be most helpful in clarifying their testimony. A former American Presiding Judge, Colin F Campbell, indicated that 'widespread use of technology during trial enhances the way evidence is presented, allowing facts, concepts and ideas to be more readily understood by jurors, litigants, spectators, lawyers and the Court' (Kaplan *op cit*).

In Canada, videoconferencing technology has been used to receive witness testimony in civil trials for over a decade (Amy Salyzyn 'A New lens: Reframing the conversation about the use of videoconferencing in civil trials in Ontario' *Osgoode Hall Law Journal* 2012 vol 50(2) 431). The Ontario Rules of Civil Procedure allow for witnesses in civil trials to testify remotely using videoconference technology. Rule 1.08 of the Ontario Rules of Civil Procedure provides that a witness's oral evidence at trial may be received by videoconference if the parties consent; and that in the absence of consent, evidence may be received by videoconference upon motion or on the court's own initiative. The receipt of evidence through videoconference is subject to the discretion of the court. According to Salyzyn (*op cit* at 433) the court, in exercising its discretion, takes the following factors into account, namely -

- the general principle that evidence and argument should be presented orally in open court;
- the importance of the evidence to the determination of the issues in the case;
- the effect of the telephone or videoconference on the court's ability to make findings, including determinations about the credibility of witnesses;
- the importance in the circumstances of the case of observing the demeanour of a witness*;
- whether a party, witness or legal representative for a party is unable to attend because of infirmity, illness, or any other reason;
- the balance of convenience between the party wishing the telephone or videoconference and the party or parties opposing; and
- any other relevant matter.

Judges have, however, exercised caution with regard to this technology and it has not become routine in the Ontario civil courts.

I submit that presentation of the testimony of expert witnesses through closed circuit techniques or videoconferencing would be most helpful in South African courts, as it is a cheaper and more flexible way to receive expert testimony. This technology will also improve access to justice. The factors used in Ontario could be considered as guidelines for South African courts.

Online dispute resolution

Online dispute resolution (ODR) may be the way tomorrow's lawyer resolves his or her client's disputes without even leaving the office or home. ODR refers to a process that may be applied to alternative dispute resolution (ADR) techniques

*See also pages 10 and 51 of this issue.

'A virtual court is a conceptual idea of a judicial forum that has no physical presence but still provides the same justice services that are available in courtrooms.'

and can be defined as any method by which parties attempt to resolve disputes online. ODR uses technology, particularly the internet, to augment ADR processes.

The different methods of ADR mainly negotiation, conciliation, mediation and arbitration have proven to be an effective, speedy and cheaper way to avoid the heavy burden imposed by judicial procedures. ODR has directly developed as an online extension of ADR (M Albornoz 'Feasibility Analysis of Online Dispute Resolution in Developing countries' *University of Miami Inter-American Law Review* Fall 2012 vol 44(1) 43). According to Frank Fowlie ('Online Dispute Resolution and Ombudsmanship' *Journal of International Ombudsman Association* 2011 vol 4(2) 50) ODR may be applicable to disputes that emanate from either online or real-world activities. For example, ODR may be used as a vehicle to handle consumer disputes relating to online purchase of goods, or may be used as a resolution system for small claims in direct business-to-consumer transactions. ODR is a vehicle that allows the parties to a dispute to resolve the matter, with





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or without the participation of third parties.

According to Alborno (op cit at 47), the main types of ODR are the following:

- Assisted negotiation – refers to an online, computer-assisted negotiation in which technological tools enhance the probabilities of reaching an agreement. Due to the absence of a human third party, technology assists the parties in order to provide a solution by asking questions, suggesting answers and sending reminders.

- Automated negotiation – is a specific type of assisted negotiation. It is also called 'blind-bidding' negotiation. This method is, however, limited to monetary claims where money is the only variable of the dispute. The proceeding is conducted online without any human assistance. Every party makes a confidential bid at each round of the negotiations. If the system finds that the offer of the opposing party is equal to or less than the complainant's offer for a round, the case is automatically settled.

- Online mediation and online arbitration – both methods refer to a voluntary mediation proceeding or an arbitration proceeding that is conducted over the internet with the assistance of a human third party. In the case of online arbitration the parties must have an express agreement to arbitrate.

In the United States, for example, the

'Virtual courts can eliminate this barrier not only by allowing 24-hours-a-day, seven-days-a-week access to electronic filing and other case processing online, but litigants will also be able to participate in trials by videoconference.'

Federal Mediation and Conciliation Service (FMCS) and the National Mediation Board (NMB) have both taken notice of ODR. The FMCS pioneered the use of online tools to negotiate contracts, while the NMB has offered secure online tools in lengthy, complex negotiations among parties spread across the country. Private firms offer flexible platforms that allow lawyers and other dispute resolvers to do traditional face-to-face work online and thus expand their practices to areas unique to the new technology-rich environment.

It should, however, be emphasised that ODR is not a replacement for courtrooms, and seems to have the greatest potential in e-commerce and small-claims disputes.

E-courthouses

Another development is the implementation of e-courthouses in the US. Maricopa County Superior Court in Phoenix, Arizona, recently moved into a new courthouse that utilises e-courtrooms. These courtrooms have microphones throughout, flat-screen monitors for the court and jurors, two-way videoconferencing to allow for court appearances from locations other than in the courthouse, evidence display systems with touch screens that allow exhibits to be highlighted and annotated, and full audio and visual digital recording facilities (Kaplan op cit at 32).

I submit that advances in technology can improve the courts and the public's access to court services. Not only will new technology allow for greater access to the courts, but it can also improve the efficiency of the courts operating in difficult financial times.

Advantages of technology

Some of the greatest benefits of a virtual court are the cost savings and hours of service availability. Traditionally, courts are open to the public only on business days. This is, however, restrictive in that many litigants who need to access the courts also work on business days. Virtual courts can eliminate this barrier not only by allowing 24-hours-a-day, seven-days-a-week access to electronic filing and other case processing online, but litigants will also be able to participate in trials by videoconference. No longer will litigants be forced to leave work to attend court as they will access proceedings from their home or office.

Thus, virtual courts would save on overheads and costs associated with operating court facilities, thus improving access to justice.

I submit that by utilising technology, courts have already reduced the need for people to access the courts physically. As video technology improves, courts are

'Not only will new technology allow for greater access to the courts, but it can also improve the efficiency of the courts operating in difficult financial times.'

beginning to use it for postponements in criminal matters in order to reduce the costs of transporting accused from correctional facilities to courtrooms.

It is foreseeable that more courts will begin to use video technology to replace the need for appearances in court. In the future, trials may occur through videoconferencing with all parties' securely accessing the court from locations of their choosing. Courts, as they are currently viewed, may become virtual and not require litigants or staff to attend court physically.

Disadvantages of technology

In order to implement virtual court procedures and case processing, existing case-management systems will need to be modified or replaced to allow for new technology and remote access.

It should, however, be noted that reporters of digital recording devices are sometimes unable to record statements because they are inaudible.

Conclusion

Some members of the legal profession may view these modern communication devices as a threat; others may dismiss them as mere gadgetry. It should, however, be viewed as an opportunity for imaginative and constructive use in furthering our goal of administering justice properly and promptly. Digitising of the legal world will not only improve access, but also change the way litigators practise law.

It should be noted that the legal representative and the courtroom will continue to play the lead roles; as cases are simply too difficult for computers to handle alone. The client needs understanding, responsiveness and advice that technology simply cannot provide.

It is evident that with these new tools, lawyers need to work harder than ever to stay abreast of changes in the practice of law.

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Reform, reintegrate, rehabilitate

By
Tafadzwa
Mukwende

Balancing restorative justice and juvenile offender rehabilitation

The introduction of the Child Justice Act 75 of 2008 (the Act) set new standards for the protection of the child offender by establishing the Child Justice Court. Flowing from the juvenile justice reforms is the principle of restorative justice entrenched by the Act in the criminal justice system with respect to children who are in conflict with the law. One of the primary objects of the Act articulated in s 2(c), is to provide special treatment of children in the justice system. It is designed to break the cycle of crime and promote safe communities by encour-

aging re-socialisation and re-education programmes for juvenile offenders as held by the court in *S v FM (Centre for Child Law as Amicus Curiae)* 2013 (1) SACR 57 (GNP) at para 28. Key international instruments - such as Article 17.3 of the African Charter on the Rights and Welfare of the Child - provide that the essential aim of treatment of every child offender shall be his or her reformation, reintegration into his or her family and social rehabilitation.

Generally, child offenders are uniquely capable of rehabilitation possibilities as compared to adult offenders, as illustrated by the court in *Centre for Child*

Law v Minister of Justice and Constitutional Development and Others 2009 (6) SA 632 (CC) at para 35. Judicial officers must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his or her family or community wherever possible according to *S v Nkosi* 2002 (1) SA 494 (W) at 505I.

It is shocking to note that juvenile offenders are being subjected to strikingly similar lengthy custodial sentences as those imposed on adult offenders for the same offences, considering that most of these juvenile offenders are first offenders without a criminal history or previ-

ous convictions. The Supreme Court of Appeal in *Fredericks v S* 2012 (1) SACR 298 (SCA) held at para 15 that 'the trial court and the High Court misdirected themselves by imposing a lengthy sentence of imprisonment ignoring that the appellant was a child at the time of the commission of the offences'. The Constitutional Court in *Mandla Trust Mpofu v Minister of Justice and Constitutional Development* 2013 (2) SACR 407 (CC) at para 58 stated that the Constitution draws a sharp distinction between children and adults in the criminal justice system.

The sentencing court must observe that the actions of a juvenile offender should be treated as such or as those of a child, and not equated to those of an adult in accordance with the principle of proportionality, which requires the sentence to fit the crime as well as the criminal (see *S v Kwalase* 2000 (2) SACR 135 (C)). Children should be treated differently from adults not for sentimental reasons, but because of their greater physical and psychological vulnerability to pressure from others as held in the *Centre for Child Law* case at para 26.

Comparable foreign systems of justice

The general considerations mitigating the treatment and punishment of child offenders find resonance with comparable systems of justice as stated in the *Centre for Child Law* case at para 33. In declaring the death penalty unconstitutional for offenders under 18 years of age, the Supreme Court of the United States of America held that, 'as a category, children are less culpable' and thus 'more vulnerable or susceptible to negative influences and outside pressures including peer pressure', according to *Roper, Superintendent, Potosi Correctional Center v Simmons* 543 US 551 (2005) at 567 and 569. Similarly, the Supreme Court of Canada found that children are entitled to a presumption of diminished moral culpability because of their 'heightened vulnerability, relative lack of maturity and reduced capacity for moral judgment' in the case of *R v DB* 2008 SCC ((2008) 293 DLR (4th) 278) 25 at para 41. The court upheld a constitutional challenge based on the Canadian Charter of Rights against the presumptive offences regime which imposed a reverse onus on a juvenile accused to convince the Youth Justice Court not to impose an adult sentence in *R v DB* at para 78.

On the contrary, s 226 of the United Kingdom Criminal Justice Act, 2003 provides for the detention for public protection or for life in relation to serious offences committed by those under 18 years. The court, when determining an appropriate sentence in respect of a

12-year-old girl convicted of murdering her grandmother in *Director of Public Prosecutions KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) at para 9, stated that it is not inconceivable that some of the courts may be confronted with cases that require detention. The court then referred to the case in the United Kingdom of *R v Secretary of State for the Home Department, Ex Parte Venables; R v Secretary of State for the Home Department, Ex Parte Thompson* [1997] 3 All ER 97 (HL) in which two ten-year-old boys were convicted of the murder of a two-year-old boy in appalling circumstances and were sentenced to ten years.

Legal consequences of the minimum sentencing regime

Primarily, the object of the minimum sentencing regime is that it prescribes the imposition of harsh and heavy sentences on juvenile offenders in relation to scheduled crimes as emphasised in *S v Dodo* 2001 (5) BCLR 423 (CC) at para 11. The effect of the minimum sentencing regime leads to disproportionate sentencing, thereby exposing child offenders to consistently longer and tough sentences which limit the child's rights enshrined in s 28 of the Constitution, according to *Vilakazi v S* [2008] 4 All SA 396 (SCA) at para 18.

Section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) distinguished between adult offenders and child offenders. In terms of s 77(2) of the Act, a child justice court is required to deal with a child convicted of an offence in accordance with the provisions of s 51 of the CLAA if the child is 16 years or older at the time of commission of the offence referred to in sch 2 of the CLAA. The Constitutional Court in the *Centre for Child Law* case at para 78, declared the provisions of the minimum sentencing regime, which are ss 51(1), 51(2), 51(5)(b) and 51(6) of the CLAA unconstitutional and invalid to the extent to which they apply to persons under the age of 18 years at the time of commission of the offence.

Sentencing objectives and factors to be considered

The child justice court must consider the constitutional imperatives of s 28(1)(g) of the Constitution, read with the standard international sentencing guidelines in art 37 of the United Nations Convention on the Rights of a Child, which prescribes in similar terms that every child has the right not to be incarcerated except 'as a measure of last resort and for the shortest possible time' according to the *Fredericks v S* case at para 5. The court in *S v Williams and Others* 1995

'It is shocking to note that juvenile offenders are being subjected to strikingly similar lengthy custodial sentences as those imposed on adult offenders for the same offences, considering that most of these juvenile offenders are first offenders without a criminal history or previous convictions.'

(7) BCLR 861 (CC) at paras 22 - 23 emphasised that South Africa's child justice legislation should incorporate accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards. The objectives of sentencing and the factors that should be considered are set out in s 69 of the Act.

When considering the imposition of a sentence involving imprisonment in terms of s 77 of the Act, the child justice court must mainly consider the seriousness of the offence, protection of the community and severity of the impact of the offence on the victim. The court is also obliged to consider the circumstances pertaining to a specific child when considering an appropriate sentence according to *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) case at para 42. It has become established practice for the court to consider a probation officer's report; to enable it to determine the most appropriate form of punishment in the case of a juvenile offender as articulated by Botha JA in *S v Jansen and Another* 1975 (1) SA 425 (A) at 427H - 428A.

Special protection under the automatic review procedure

The Supreme Court of Appeal in *Ntaka v S* [2008] 3 All SA 170 (SCA) held at para 39 that the extension of special protection arising from automatic review to all juvenile offenders sentenced to detention will promote the spirit and objects of the Bill of Rights in line with the objects identified in s 2(c) of the Act. The Constitutional Court in the *S v M* case at para 15 held that a child who is sentenced by a regional court to a form of imprisonment that is not wholly suspended or any sentence of compulsory residence in a child and youth care centre providing a programme contemplated in s 191(2)(j) of the Children's Act 38 of 2005, is also subject to the automatic review pro-

cedure under the provisions of s 85 of the Act, as well as ss 302 and 304 of the Criminal Procedure Act 51 of 1977 (the CPA). Section 85(1) of the Act provides that automatic review applies to criminal proceedings in the lower courts in respect of all children convicted in certain cases where the child was under the age of 16 years (s 85(1)(a)), or older than 16 years but under 18 years (s 85(1)(b)), at the time of the commission of the alleged offence.

Appropriate and alternative sentencing options

Section 290(1) of the CPA empowers a court sentencing juveniles to consider alternative sentencing options such as supervision by a probation officer or other person and detention in a reform school. Alternative sentencing options under the Act include the following:

- Diversion programme - Under exceptional circumstances provided for in s 52 of the Act, a matter may be diverted from formal court procedures in a criminal matter by means of procedures established by chapters 6 and 8 of the Act.

- Restorative justice sentences - s 73(1) of the Act provides for restorative justice sentences where a child justice court that convicts a child of an offence may refer the matter to a family group conference in terms of s 61 of the Act and/or for victim-offender mediation in terms of s 62 of the Act.

- Child and youth care centre - a child justice court may sentence a child of offender to compulsory residence in a child and youth care centre. The child may remain in a youth care facility only until the age of 21 years in terms of s 76(2) of the Act.

- Correctional supervision - in terms of s 75(a) and (b) of the Act, a child justice court that convicts a child of an offence may impose a sentence involving correctional supervision in terms of s 276(1)(h) of the CPA for children under 14 years or s 276(1)(i) of the CPA in the case of a child who is 14 years or older.

Conclusion

It has been recommended that the child justice court should be encouraged to follow the restorative justice-oriented and community-based sentencing op-

tions as opposed to the custodial sentencing approach. In addition, the Constitutional Court, in the *S v Williams* case at 883, endorsed the development of alternative sentences of a non-custodial nature, after considering current sentencing options and trends in child justice and penology. Consequently, this distinctive approach to juvenile sentencing was adopted in the case of *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (E) at 438J - 439B. Subjecting a juvenile offender to direct imprisonment exposes the child to many detrimental effects of incarceration that would be counter-productive to the prospects of rehabilitation as held in *S v Blaauw* 2001 (2) SACR 255 (C) at 262I - 263C. Correction, guidance and rehabilitation can best be achieved outside the prison environment in a community setting, as stated in the *S v Nkosi* case at 147F - I.

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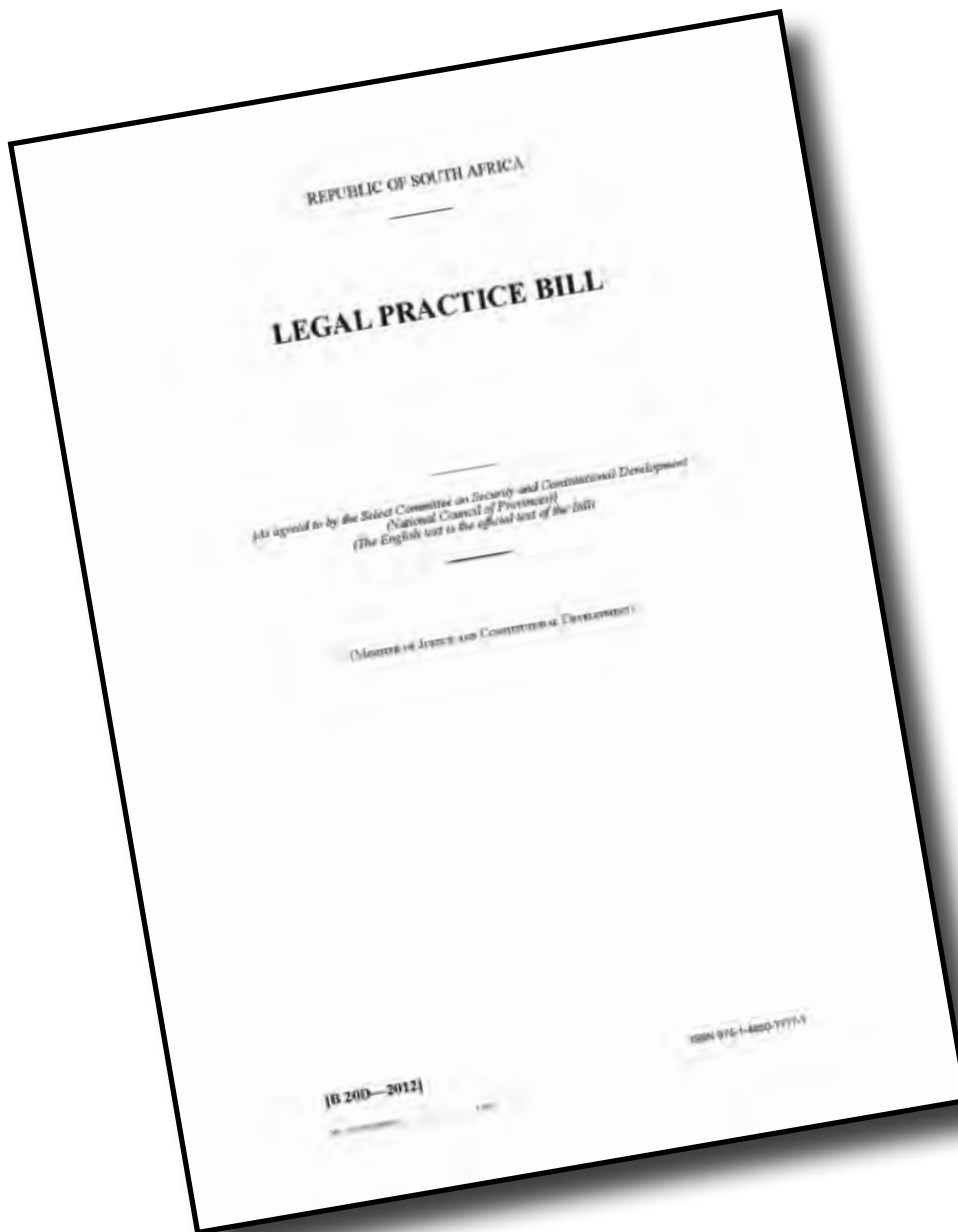
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The link between the Legal Practice Bill and access to justice



By
Jacques
Halbert

The State has a Constitutional mandate to take progressive measures towards realising the rights contained in the Bill of Rights. The Bill of Rights is a cornerstone of democracy in South Africa, which enshrines the right of all citizens to access courts as stipulated in s 34 of the Constitution. The State is en-

trusted with promoting and fulfilling the rights contained in the Bill of Rights and affording all citizens the equal protection and benefit of the law. More pertinent, the State must endeavour to eliminate the obstructions inhibiting access to justice and in particular, those difficulties which impede the poor, illiterate and indigent.

Since the advent of our democracy the executive, the legislature and the judiciary have combined their efforts by putting measures in place, as well as institutions and programmes with the objective of broadening access to justice. The Legal Practice Bill (the Bill) is a product of the continued collaboration between the three branches of State and ultimately

a progressive measure taken to amplify access to justice by the ordinary citizen.

The Legal Practice Bill

The Bill was passed by the National Assembly on 12 March 2014 and at the time of writing this article it was before the Presidential office for signing. The Bill is an example of how government, through the use of legislation, aims to enhance access to justice by giving effect to the transformational imperatives envisaged by the Constitution.

In its present form, it creates a framework, which allows for the implementation of various mechanisms to broaden and amplify access to justice. One of the key objectives for the introduction of the Bill is to augment access to affordable legal services which is a continuation of efforts of the legislature to realise the ideal of a legal system which affords all citizens equal opportunities to exercise their right to access justice.

Advocates permitted to accept instruction direct from the public

Clause 34 of the Bill allows an advocate to render legal services in expectation of a fee, commission, gain or reward, on receipt of a request direct from a member of the public for that service, if that advocate is in possession of a Fidelity Fund certificate. This provision seems to eradicate the traditional distinction between an advocate and attorney, and members of the public will no longer be required to use the services of an attorney prior to engaging an advocate as they will have the choice of approaching either legal professional. Attorneys will no longer necessarily play the middleman between members of public and advocates, who are engaged to argue on their behalf.

The Law Society of South Africa (LSSA) initially submitted that if the advocates' profession is to be kept a referral profession, advocates should not accept instructions (briefs) direct from the public, except with the approval of the Legal Practice Council (LPC). It further submitted that such approval should only be given in appropriate circumstances where it is in the interests of public, in this way hoping to avoid irregularities, which had occurred in the past through unregulated advocates taking instructions from the public.

In 2012 as a result of a meeting between the LSSA and the General Council of the Bar of South Africa (GCB) the two branches of the profession agreed that there should be a unified profession, but not a fusion. Also, the two branches of the profession should remain separate and independent, allowing for legal prac-

'Clause 34 of the Bill allows an advocate to render legal services in expectation of a fee, commission, gain or reward, on receipt of a request direct from a member of the public for that service, if that advocate is in possession of a Fidelity Fund certificate.'

tioners with Fidelity Fund certificates and legal practitioners who work on a referral basis only, ultimately keeping the distinction between the two professions unblurred, although both would be regulated by one body – the LPC. The GCB was of the view that advocates had no interest in the regulatory affairs and administrative affairs of the attorneys' profession and *vice versa*. Members of GCB appeared to agree that they had chosen to become advocates to avoid the administrative burden carried by attorneys, namely, dealing direct with the client, applying for a Fidelity Fund certificate, operating a trust account and employing the services of an accountant or auditor to keep proper accounting records.

Members of the GCB appear positive that the relationship between advocates and attorneys will not feel the impact of the elimination of the distinction, and that attorneys will continue to brief them, as the referral system is a system that has been effective to this day. It is in the interests of the public that advocates and attorneys work together and not in competition. The GCB is of the view that the so-called 'rebel' advocates who deal directly with the public by sidelining attorneys could end up costing clients more, for instance if the advocate charges his or her hourly rate to index and paginate the court file in preparation for trial.

The Centre for Law and Society was of the view that advocates and attorneys deliver different services and need different qualifications. As a general rule, attorneys are regarded as general practitioners, while advocates are regarded as specialists in particular fields of law. It is for this reason that it is often argued that fusion of the legal profession will result in the loss of expertise in specialist fields.

The Independent Association of Advocates of South Africa (IAASA) – now called the National Bar Council of South Africa – believes that since attorneys secured the right to appear in the High Court, it was only fair that advocates be

allowed to take instructions direct from the client. In practice it is rare that attorneys will appear in the High Court and may prefer rather to brief advocates to appear on their behalf.

Members of IAASA believe that the existence of a dual profession merely perpetuates an unnecessary financial burden, which is borne by the client and results in the duplication of costs and, therefore, supported fusion of the legal profession. They believe that the inclusion of clause 34 protects advocates and citizens from undue exploitation. In its submissions, IAASA was of the view that the following instances dictate that an advocate should be briefed direct by the public: All criminal matters, specialised areas of legal advice, opinions, drafting of complicated contracts, drafting of wills, drafting of memoranda of incorporation, matters concerning the Consumer Protection Act 68 of 2008, arbitration and mediation, maintenance matters et cetera. IAASA further proposed that all legal practitioners should have compulsory indemnity insurance.

Community service

Clause 29 of the Bill provides that the Minister must, after consultation with the LPC, prescribe the requirements for community service. Community service may be a component of practical vocational training (articles) or a minimum period of recurring service by legal practitioners on which continued enrolment as a legal practitioner is dependant. Community service may, among others, include the provision of legal education and training on behalf of the LPC, service without remuneration, as a judicial officer in the case of legal practitioners, service at the South African Human Rights Commission and service in the State, approved by the Minister in consultation with the LPC. In the same vein, legal practitioners, as well as candidate legal practitioners may be exempt from community service on application and good cause shown.

Clause 27 allows the LPC to create rules in respect of payment of remuneration, allowances or stipends to all candidate legal practitioners. Future candidate

'The Bill, in its present form, creates a framework, which allows for the implementation of various mechanisms to broaden and amplify access to justice.'

'Community service may, among others, include the provision of legal education and training on behalf of the LPC, service without remuneration, as a judicial officer in the case of legal practitioners, service at the South African Human Rights Commission and service in the State, approved by the Minister in consultation with the LPC.'

legal practitioners fear that they will not be compensated for community service and in that event will be unable to support themselves and their families.

It is interesting to note that advocates are included in the definition of legal practitioners and accordingly will have to undertake community service. The intentions of the legislature in providing for the implementation of community service as a requirement to be admitted or to continue to practise are laudable in that it is directed at providing countless people, who could otherwise not afford legal services, with access to justice.

It is necessary to consider the ethics and implications of compulsory community service and how to balance the right to access justice and the need to ensure quality legal services for those who desperately need it. The question is raised whether it is ethical to require fresh law graduates, who have not yet qualified as attorneys and who have limited practical experience, to give legal advice? What mechanisms will be implemented to monitor the quality of the legal services delivered, how will the hours for community service be captured and by whom? Seasoned legal practitioners believe that, given law students' current legal education which affords them limited exposure to the law in practice, it would be unethical for them to perform community service, because as it stands, they are ill-equipped to give any form of legal advice. Candidate legal practitioners could rather be involved in educational programmes focussing on citizen's rights and the exercise of those rights.

Most law students are of the view that community service will go a long way in developing socially conscious legal graduates who understand the law in light of the vision of the Constitution and the goals of transformation. They have suggested that a one-year community legal service programme be implemented and structured to provide for the placement,

supervision and remuneration of candidate legal practitioners, similar to the compulsory service year in the medical profession. The period of one year may seem excessive, but for purposes of continuity it remains reasonable, although many matters take longer than a year to reach finalisation.

The effectiveness of compulsory community service will depend heavily on how it is implemented and how the resources to fund the supervision of community service are found.

One of the major debates that has occupied members of the legal profession has been whether, in pursuing community service as a strategy for expanding access to justice, a voluntary or mandatory system should be adopted. A mixed system may possibly offer the best solution, similar to a carrot and stick approach. Incentives are used in all industries and professions to motivate and compel members to participate in activities that benefit the less fortunate and uplift the community. A mixed system - where a minimum is prescribed and incentives are put in place to motivate members of the legal fraternity to go beyond what is required of them - may potentially yield fruitful results, more so than a compulsory system.

Academics feel that law students should be subjected to community service in their final year of study. The programme at Nelson Mandela Metropolitan University expects final-year law students to present a minimum of ten street law lessons to high school pupils over a period of six months and thereafter to attend the law clinic or Rights Refugee Centre for a period of six months. Both programmes are appropriately supervised and law students gain valuable knowledge and practical experience. After such programmes, law students could apply to be exempt from community service during their vocational training programme as this may constitute good cause for exemption.

The notion of community service has been welcomed by members of the legal profession but how it will be imposed is uncertain and how it will be regulated is worrisome.

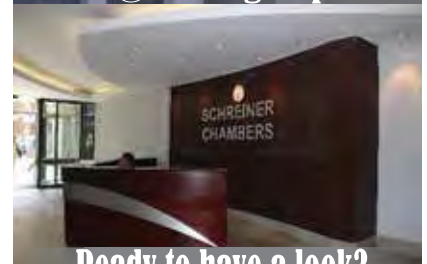
Generally, I believe that fusion of the legal profession is nonsensical and both professions working together offer independent, valuable and indispensable services to members of the public which will result in access to justice becoming a reality.

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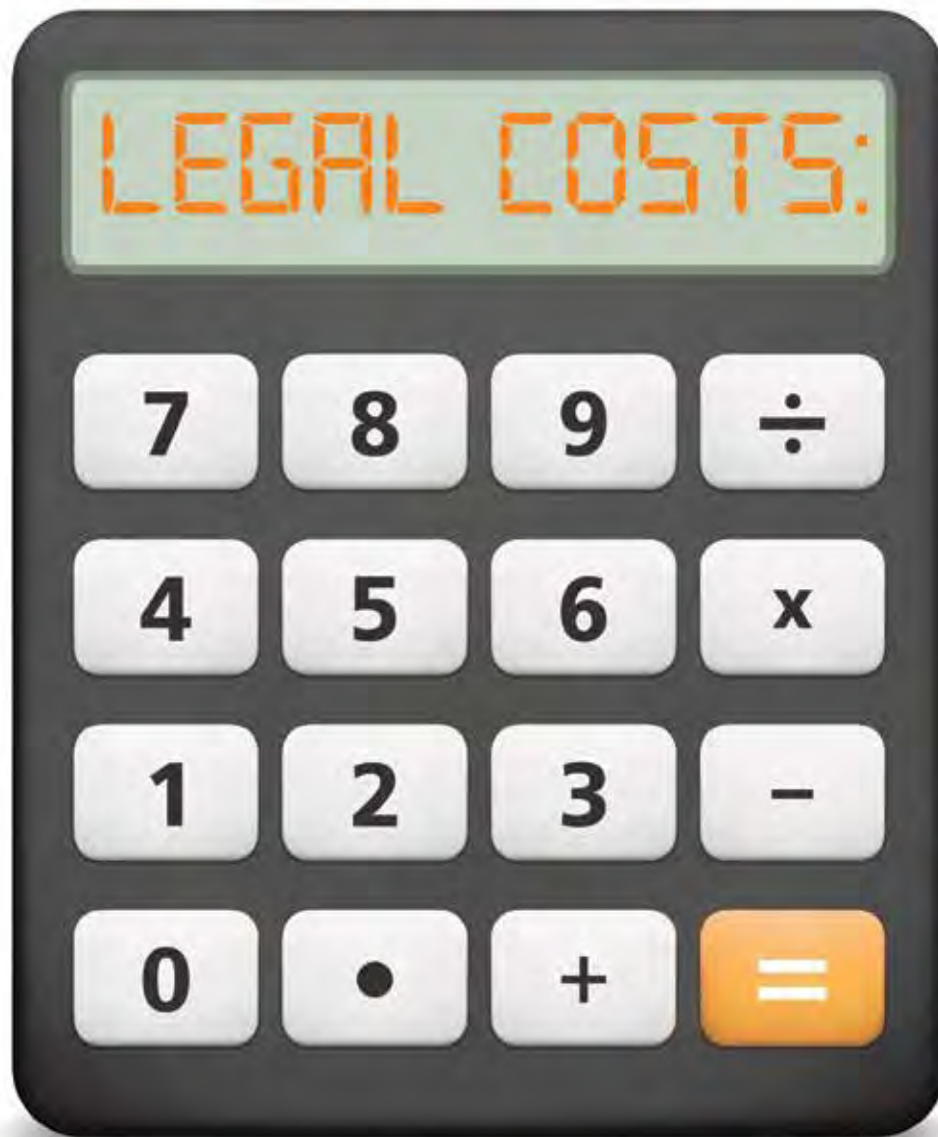


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By
Gerhard
Buchner

CHANGING THE WAY WE CHARGE

Clause 35 of the Legal Practice Bill (the Bill) will lead to the close scrutiny of the charging of legal fees by attorneys and advocates, as well as the criteria used for calculating them by the professions and officialdom.

Anxiety was expressed in this regard by a number of prominent members of the advocates' and attorneys' professions in the August issue of *De Rebus* in the article 'The LPB, costs and fees scrutinised at LSNP workshop' (2014 (Aug) DR 6).

The party-and-party tariffs prescribed by the Minister for litigious matters, have always been viewed with great scepticism by most members of the attorneys' profession. Where the tariffs fall short, the short-fall is simply made up by charging attorney-and-client fees.

Everyone will probably agree that tariffs have very little to do with the reality of running a legal practice and the actual costs of rendering a legal service to the client.

Ironically, it is also true, as is pointed out in the article, that the more incom-

petent an attorney may be the bigger the bill of costs he or she can possibly produce.

The question may therefore be asked: Is there a more practical basis for the calculating or costing of legal services?

In my opinion there is.

Some years ago American clients began to question hourly billing rates charged by their attorneys. This resulted in the appearance of the so-called 'value billing or alternative fee arrangements - AFA's' as an alternative method for charging legal fees instead of hourly rates.

The charging of hourly rates is problematic in that a client, more often than not, has no idea what the service will cost at the taking of instructions. To quote CP Fourie in the above-mentioned article: 'Would you engage the services of someone who cannot tell you what something is going to cost you because they do not know how long it will take? You too would be afraid, because you do not know what it will cost you.' In my opinion nothing has damaged the image of the legal profession more than this.

'Value billing' is an attempt to calculate the cost of the service to the client in advance and to give the client, at the time of the taking of instructions, a fairly accurate estimate of the costs of the service to be rendered subject to certain conditions.

But how can the costs of the service be calculated in advance to be able to present a client with a fairly accurate estimate of what the charges will be?

The first step is to calculate the number of possible billable hours per annum as follows:

- From the 365 days in the year, deduct the number of days representing all weekends and public holidays. This leaves the number of working days during the year.
- Thereafter, deduct a further number of working days to provide for annual leave, namely, 15 working days (three weeks holiday) or as many days leave as you wish to take.
- Deduct a further five working days to provide for absence from work due to possible illness.

One should then have approximately 240 working days for the year. This is the figure used for the calculations in this example.

It is estimated that the average number of billable hours an attorney can achieve during a normal working day is approximately five hours on average. This means of the 240 working days referred to above, a fee earner will have an average of 1 200 billable hours per annum.

The next step is to calculate an administration contribution per fee earner as follows:

It is important to remember that in this context a 'fee earner' is also any staff member that deals directly with the clients of the firm, and debits his or her own fees for work done. A litigation professional assistant (PA) or conveyancing paralegal are examples.

To illustrate how the administration contribution per fee earner is calculated, I will use an example of a firm with only two fee earners, which could be a partner and a litigation PA. The calculation is as follows:

- Prepare an expense budget for the firm covering a 12-month period. It must include all the usual expenses such as office rent, leases on equipment, stationery, library, auditors, telephone costs etcetera, including all staff salaries plus a monthly salary for the partner.

- From the total expenses, deduct the total of all the salaries that have been budgeted for (the expense budget without salaries).

- To this balance, after deduction of all salaries including those for the partner, add back the salaries of all the staff that provide services in common to all the fee earners, such as kitchen staff and cleaners, the bookkeeper, the receptionist, the messenger, filing clerks - if there is central filing - a driver or whoever else.

- The total of these expenses which have been added together must now be divided by the number of fee earners, in this instance, two. You now have a figure representing the fee earners' share of the annual expenses, namely, the fee earners' annual budgeted administration contribution.

The next step is to calculate the fee earners' break-even hourly rate as follows:

- To the fee earners' annual administration contribution, as calculated above, must now be added the annually budgeted salaries peculiar to that fee earner's department (cost centre). For example, the PA may have two secretaries working for him or her exclusively and the department may have its own filing clerk that is dedicated to work for that department only. The PA's own annual budgeted salary plus those of the dedicated staff are now added to his or her administration contribution. The same is done in respect of each other fee earner, in our example, the partner.

- Each of the fee earner totals, administration contribution plus salaries of dedicated staff as set out above, is now divided by 1 200, being the number of estimated annual billable hours calculated.

- The figure that has thus been calculated is, therefore, an estimate of what the fee earner should earn per hour during the course of the year to pay his or her own salary and to cover the expenses allocated to his or her department. This is referred to as the fee earner's break-even hourly rate.

A monthly fee target for the fee earner based on the value of the number of billable hours for his or her department during the month can now easily be calculated. It is done by multiplying the total break-even hourly rate for one day (five hours) by 20 (working days per month) to provide the monthly fee target for the fee earner. This represents the minimum amount of fees that the fee earner has to

write and collect monthly to pay his or her own way in the firm.

Alternative fee arrangements or value billing

Although the break-even hourly rate is a hypothetical calculation, it does give the firm some basis for the charging of fees instead of doing it on unrealistic government tariffs or attorney-and-client fee estimates based on totally subjective criteria.

When the break-even hourly rate, as calculated above, is used to bill, it will cover only the break-even costs of the practising fee earner, but it does not provide for any profit.

It is easy to add a profit margin to this hourly rate by increasing it percentage wise, namely, by adding 50% or 100% or whatever is decided on.

A different rate could be calculated for any particular instruction, depending on its complexity and the client's willingness and ability to pay, as long as the break-even hourly rate is used as the basis for doing the calculation.

These calculations must then be used to enter into a fee agreement with the client in respect of the particular service to be rendered by the attorney.

For the successful implementation of value billing it is very necessary that a fairly accurate estimate is made at the outset of the number of hours that would be needed to complete a matter on behalf of a client. This is not as difficult as it may first appear.

To estimate the average number of hours needed to finalise an undefended divorce action would be fairly easy if one has experience of this type of matter. (A fee agreed with counsel beforehand must always form part of the fee estimate.) The same could apply to the costing of a defended litigation matter. Once you have experience of such matters, a projected time allocation for the different stages of the trial, should not be all that difficult to estimate.

Using an appropriate hourly rate that you have decided on you should be able to calculate an estimated fee for the client to agree to for every stage of the litigation. Remember also to get your counsel to agree on an estimate of his or her fees so that provision can be made for this in your estimate to the client. Below is an example of an architect's pre-estimated bill which was rendered to a client as part of a fee arrangement at the time of the engagement of his services.

'We have broken the services down into the seven architectural stages of work. These are as follows:

- Stage 1: Measuring up existing. R 7 750 for delivery of as-built plans.
- Stage 2: Sketch design. R 9 500 on approval of concept.

- Stage 3: Design development. R 10 750 for detailed design drawings.
 - Stage 4: Municipal submission. R 21 560 (for submission to council).
 - Stage 5: Municipal approval. R 7 190.
 - Stage 6: Supervision of construction. A base fee R 2 000 per month for one visit per week.
 - Stage 7: Collect the builder's guarantees. Close the contract.
- Note: Any additional services will be charged at R 250 per hour.
Disbursements: Travel charged at R 4,50 per km. Printing is cost + 10%.

Once you have counsel also co-operating with you by giving a fee estimate for the various stages of the matter, it would be a fairly simple matter to calculate an upfront fee estimate to present to your client. This fee estimate must be set out clearly in your engagement letter which must be presented to your client at or shortly after the initial stage of the taking of instructions.

There are two aspects regarding this procedure that you should be very attentive to:

- The fees you mention in your letter of

engagement should always be an *estimate and not a quotation*. If you quote a fee and the client accepts, you are bound by it. A fee estimate must always be conditional on the right of revision should unforeseen complications arise during the course of the matter. This could be caused by unforeseen complications that will result in much more time having to be spent on the matter than originally estimated. There is always a possibility that something unforeseen can happen during the course of litigation. Your client must not be under any illusion about this. You must incorporate a clearly worded 'escape clause' in your engagement letter and your client's attention must be drawn to this during the taking of your initial instructions*.

- You must debit fees for every stage of the case as soon as the stage has been completed.

Where you have difficulty in obtaining payment from your client you must advise your client in writing that no further work will be undertaken in respect of the matter, until such time as you have received payment. This condition must

also be clearly set out in your engagement letter and must be explained to the client at the initial consultation.

You must also ensure that your client accepts the terms and conditions set forth in your initial engagement letter by requesting a written confirmatory reply to it.

Although this method of agreeing fees with your client up front can be criticised, it should be more advantageous than a complete thumb suck based on a number of subjective criteria.

The only possible way of making the civil courts more accessible to the general public, in my opinion, would be to introduce a contingency fee system akin to the American system as is propagated by CP Fourie in the *De Rebus* article, but subject to certain legislative constraints.

* See 2014 (Sept) *DR* 24 for more information on engagement letters.

Gerhard Buchner BA LLB (*Stellenbosch*) is an attorney at Gerhard Buchner Attorney in Johannesburg. □

BOOK REVIEW

Taxation of Legal Costs in South Africa

Of all the books currently available on legal costs, this book provides clear and practical guidance on the taxation of costs.

The author has gone to great lengths to assist and guide the reader in approaching and determining reasonable costs in accordance with the existing rules and tariffs. Although it is common knowledge that taxation entails the quantification of legal costs, there is still much debate on the underlying applicable principles in preparing the different kinds of bills of costs and the taxation of these. This is where the book excels in explaining the processes of taxation on a step-by-step basis so that the user may arrive at taxed fees and costs that are reasonable.

The book identifies the main elements of taxation. The author deals in detail with and explains the practices, rules, tariffs and judgments, as well as the discretion of the taxing master and the principles relied on in reviewing taxations. The book contains an analysis of the maximum tariffs that legal practitioners may charge and practical alternatives for solutions to specific issues that arise in practice. It is commendable that the author has invested enormous effort in achieving the intended aim, which is to make the law on taxation of legal costs easier to understand and to pro-

vide practical tips and helpful hints to legal practitioners.

This book, in my view, is of equal benefit to all legal practitioners - irrespective of seniority - judicial officers or even members of the public who wish to acquaint themselves with the legal principles applied in the taxation of legal costs. In recent times there has been an increasing public interest in the computation of legal costs and how such costs are taxed and assessed. In my view, this book is an invaluable tool for persons to acquaint themselves with the legal principles of the taxation of legal costs.

The book contains extracts from applicable legislation and cases. In doing so, the main aim is to assist practitioners who practise mainly as costs consultants. The book succeeds in doing just that. In setting out all the practical steps of taxations of bills of costs - which include taxation in general, attorney's costs and alternative methods to taxation, parties at taxation, process of taxation, the role of the taxing master in general and his or her discretion, reviews of taxations etcetera - the author highlights the consequences that flow from these. Case studies are included and the importance of how bills are prepared is stressed and that the latter should not be taken lightly, even by the more experienced legal costs consultant.

By Rochelle Francis-Subbiah
Cape Town: Juta
(2013) 1st edition
Price: R 550 (incl VAT)
442 pages (soft cover)



The book is without doubt a useful aid for all those concerned with taxation of legal costs. The author is to be commended for the meticulous attention paid to the table of contents, index, bibliography and schedule of case references, and the arrangement of these.

Sophia Avvakoumides is an attorney at Sophia Avvakoumides Attorney in Pretoria. □

THE LAW REPORTS



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August 2014 (4) *The South African Law Reports* (pp 319 – 636); [2014] 3 *The All South African Law Reports* July no 1 (pp 1 – 114); and no 2 (pp 115 – 257); 2014 (5) *Butterworths Constitutional Law Reports* May (pp 511 – 640); 2014 (6) *June* (pp 641 – 739); and 2014 (8) *August* (pp 869 – 995)

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

Abbreviations

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
KZP: KwaZulu Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Appeal

An appeal must have practical effect or result: Section 21A(1) of the Supreme Court Act 59 of 1959 (the Act, which has since been repealed by the Superior Courts Act 10 of 2013) provided that if the issues in an appeal were of 'such a nature that the judgment or order sought would have no practical effect or result, the appeal could be dismissed on that ground alone'. In *Absa Bank Ltd v Van Rensburg and Another* 2014 (4) SA

626 (SCA) apart from the provisions of the section, there were two other grounds on which the appeal could be dismissed. The appellant, Absa Bank, sued the respondents, Van Rensburg and another, for moneys owing in terms of secured loans. The appellant attached mortgage loans and deeds of suretyship to its simple summons against the respondents but not the underlying credit agreements. Holding that it was necessary to have attached the underlying credit agreements as well, the full Bench of the WCC (Griesel, Fourie and Saldanha JJ) postponed the application for default judgment so that the appellant could amend the papers and attach the credit agreements. The appellant appealed against that order. In the meantime, the matters were settled between the parties, with the result that there was nothing left to appeal against. Nevertheless the appellant persisted with

the appeal, contending that as the issue of attachment of a credit agreement was likely to arise frequently, its determination had practical effect or result.

The appeal, which was not opposed by the respondents, was struck off the roll. The SCA, per Maya JA (Shongwe, Saldulker JJA and Mathopo AJA concurring while Leach JA filed a separate concurring judgment), held that the provisions of s 21A(1) set a direct and positive test, namely, whether the judgment or order would have a practical effect or result and not whether it could be of importance in a hypothetical future case. As a result a court would not make determination on issues that were otherwise moot merely because the parties believed that, although the decision or order would have no practical result between them, a practical result could be achieved in other respects. However, the section conferred a dis-

cretion on the court. Therefore, depending on the facts of each case, while the parties could have resolved all their differences, a court of appeal could still entertain the merits of the appeal if, for example, important questions of law which were likely to arise frequently were at issue and their determination could benefit others.

In the instant case a determination as to whether a credit agreement had to be attached to a simple summons could be made by the Rules Board for Court of Law, established in terms of the Rules Board for Courts of Law Act 107 of 1985, which had the power to make, amend or repeal the Uniform Rules of Court. Furthermore, the effect of an order postponing the hearing of an application for default judgment in order to give the appellant the opportunity to take further steps to augment its case, was merely a direction from

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the court as to the manner in which the matter was to proceed before the main action could be entered into. It neither amounted to a refusal of default judgment nor had a direct bearing on or dispose of any of the issues in the main action and was thus not a dismissal of the appellant's action.

Urgent application for appeal against interim order: In *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC), the applicants bringing an urgent application for leave to appeal against an interim order were informal traders in the City of Johannesburg, the city, who were joined by two associations representing traders' interests. The application to the CC was launched after the GJ per Monama J struck an urgent application for interim relief against the city and its functionaries off the roll on the ground that it was not urgent. That meant that the application had to be placed on the ordinary motion roll and would be heard a few months later. The applicants were street vendors who had permission to ply their trade. However, in October 2013 the mayor of the city issued instructions to metro police to remove the applicants from the stalls and confiscate their goods. As a result negotiations followed, agreement was reached and the traders were required to be verified and reregistered, which was done. This notwithstanding, the metro police continued to prevent the traders from carrying on their trade. An application for urgent interim relief against the conduct of the respondents was, as already indicated, struck off the roll for lack of urgency. Hence the present direct appeal to the CC.

The court granted leave to appeal and upheld the appeal itself with costs. Reading a unanimous decision of the court, Moseneke ACJ, held that as a general rule, an urgent appeal to the CC against an interim order would be permitted as a last resort and

when it had been shown that the High Court or the SCA did not provide a proper urgent procedure which could result in the relief pursued by an applicant. The question whether a particular interim order was appealable was not novel. The applicable test was whether hearing the appeal served the interests of justice. In making that determination the court had to weigh all relevant circumstances carefully. In the instant case it was in the interests of justice to hear the appeal on an urgent basis. If leave to appeal were not granted the applicants would suffer severe irreparable harm and yet the balance of convenience favoured them. The order sought by the applicants would not anticipate any part of the main proceedings to be determined before the High Court in normal motion proceedings, nor would it prejudice such proceedings. On the contrary, without such an urgent interim order from the CC, damage to the applicants in the interim period would be so severe that their ability to obtain relief from the High Court would substantially be rendered nugatory. The order sought in the instant case was no more than a 'status quo order' granted in the interest of justice to prevent what could otherwise be substantial prejudice to the applicants.

• See also 2014 (Aug) DR 25.

Companies

In the absence of a provision to the contrary business rescue plan discharges liability of a surety: In *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* 2014 (4) SA 521 (WCC); [2014] 3 All SA 500 (WCC), the defendants, Greeff and another, were directors of a certain company for whose debts they stood surety. After the company encountered financial problems it was put under business rescue and a business rescue plan was adopted. The plan provided that concurrent creditors – the plaintiff, Turning Fork being one of them – would receive 28% of their debt in 'full and final' settlement. After adoption of

the plan, but before its implementation, the plaintiff instituted proceedings against the defendants to recover the part of the debt that could not be recovered from the company and applied for summary judgment. The application for summary judgment was dismissed with costs and the defendant granted leave to defend.

Rogers J held that a deed of suretyship could provide that the claim against the surety would survive a compromise with the principal debtor. The instant case was, however, not one such case as the sureties' debts had been discharged. If the principal debt was discharged by a compromise with or release of the principal debtor, the surety was released unless the deed of suretyship provided otherwise, which was not the position in the instant case. This general principle also applied to a compromise or release pursuant to a statute, unless such statute provided otherwise.

Accordingly, if a business rescue plan provided for the discharge of the principal debt by way of a release of the principal debtor, and the claim against the surety was not preserved by such stipulations in the plan as would be legally permissible, the surety was discharged. In the instant case the business rescue plan was reasonably to be construed as one by which the company, as principal debtor, had been discharged from its liability to the plaintiff. Since the position of sureties for the company was not addressed in the plan, the defendants, as sureties, had on this construction of the plan been discharged.

Because the obligation of a surety was accessory, the general position was that extinction of the principal obligation extinguished the obligation of the surety. Apart from the obvious case of discharge following payment in full by the principal debtor, the rule found application, for example, where the principal debt was discharged by settlement or was extinguished by prescription. The court emphasised the

fact that adoption of a business rescue plan as such did not affect a creditor's rights against the surety. It all depends on an application of the general principles of the law of suretyship to the actual provisions of the business rescue plan.

Security for costs: Section 13 of the repealed Companies Act 61 of 1973 provided that, where a company or other body corporate was the plaintiff in any legal proceedings the court could, at any stage, if it appeared by credible testimony that there was reason to believe that the company or body corporate would be unable to pay the costs of the defendant if it was successful in its defence, require sufficient security to be given for those costs and could stay all proceedings until the security was given. The Companies Act 71 of 2008 does not have similar provisions. Therefore, the question which arises is whether a court can order that security for costs be furnished if the defendant asks for it against a plaintiff company that appears not to be in a position to pay costs if proceedings against the defendant were to founder.

In *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP) the plaintiff company, Boost Sports, instituted proceedings against the defendant, South African Breweries, for damages for breach of contract and, in the alternative, for payment of a licence fee. That was after the defendants allegedly used confidential information provided by the plaintiff to exploit an advertising concept known as 'Fans' Challenge Sport' in which fans of a football club would vote for a team to take part in a friendly game and the substitutions to be made. The defendant pleaded that there was no such contract and that the concept did not contain confidential information as it lay in the public domain.

Fairly late in the proceedings, and after the plaintiff had made discovery of the documents it intended using at the trial, the defendant

established that the plaintiff was in financial difficulty and would not be able to pay the costs if a costs order were made against it. As a result the defendant applied for an order directing the plaintiff to furnish security for its costs. The plaintiff candidly admitted that it was not in a position to pay the defendant's costs if it were to lose the case, but contended that in terms of the Companies Act of 2008 there was no obligation on it to furnish security.

Hassim AJ granted with costs, an order requiring the plaintiff to furnish security for the defendant's legal costs, the form, amount and manner was left to the registrar of the court to determine. The court also ordered a stay of proceedings until such security was provided within 20 days, failing which the defendant was granted leave to apply for the action to be dismissed. The court held that it had unfettered discretion to decide applications for security. Even if the defendant demonstrated that the plaintiff company would not be able to pay an adverse costs order the court had, in the exercise of its discretion, to carry out a balancing exercise, weighing on the one hand the injustice to the plaintiff if it were prevented from pursuing a proper claim by an order for security, and on the other hand, the injustice to the defendant if no security was ordered.

Some of the factors that a court would have regard to when deciding an application for security for costs included questions going to the merits of the claim and the late stage at which the application was made.

The common law did not afford defendants the right to demand security from an *incola* (resident) plaintiff company. With the repeal of s 13 of the Companies Act, 1973 by the Companies Act, 2008 plaintiff companies were once again immune to a demand for security for costs. The absence of a statutory right did not deprive a defendant of the right to demand security from an *incola* company where the defendant was

brought to court to defend a vexatious or unmeritorious claim. A defendant's right to claim security stemmed from the court's inherent jurisdiction to regulate its own process and prevent abuse by discouraging vexatious or unmeritorious claims by ordering a plaintiff to file security. Where litigants were compelled to litigate, whether as plaintiffs or defendants, they should as a matter of fairness and reasonableness be indemnified against the costs of pursuing or defending unsuccessful proceedings. It would neither be just nor equitable for a plaintiff company with doubtful financial strength to litigate with impunity.

Constitutional law

Separation of power between the executive and judiciary:

In *Capricorn District Municipality and Another v South African National Civic Organisation* 2014 (4) SA 335 (SCA), residents of Lebowakgomo Zone A in Limpopo experienced water shortages due to ageing infrastructure and inaccurate water statement accounts. The water pipes were leaking and water meters not functioning properly. It was also alleged that far from taking meter readings, employees of the second appellant, Lepelle-Nkumbi Municipality, were merely making estimation of water consumed and as a result prepared inflated water billing accounts.

This being the position the respondent civic organisation, the South African National Civic Organisation (SANCO), acting on behalf of the residents of Zone A, sought a High Court order mandating the appellants - Capricorn District Municipality and the local municipality, Lepelle-Nkumbi - to repair or replace the water pipes and install new water meters within a period of 12 months. During that period the residents were to pay a flat monthly rate of R 70 per household or business unit, which amount was later to reduce to R 50 per month, irrespective of the amount of water consumed. The GP per Legodi J granted the *mandamus* sought. An appeal against that order was

upheld with costs by the SCA.

Mthiyane DP (Lewis, Bosielo, Petse and Willis JJA concurring) held that in the present matter the first appellant, the district municipality, had commissioned a firm of consulting engineers to conduct a study which would ultimately lead to rehabilitation of the entire reticulation system in the affected area. In doing so, the municipality was performing an executive function and the order of the High Court, which had the effect of fast-tracking the process, offended against the doctrine of separation of powers and the legal framework within which the municipality was working. The measures taken to address the problem of water leakages and shortages occurred in the course of the municipalities' exercise of its executive powers.

The High Court also erred in respect of the imposition of the flat rates. In terms of s 74(1) and (2) of the Local Government: Municipal Systems Act 32 of 2000 (the Act) a municipality was obliged to adopt and implement a tariff policy on the levying of fees for municipal services, including water, taking into account, among others, that consumers paid for services in proportion to their use of that service and that the tariff had to reflect the costs reasonably associated with the rendering of service, including capital, operating maintenance, administration and replacement costs. It was therefore clear that the High Court order flew in the face of the above provisions of the Act. The orders imposing a flat rate for water consumption were completely out of kilter with the foundational principles of our constitutional order as articulated by the courts and with the applicable legal framework, and were thus not competent.

Consumer credit agreements

Validity of summons issued and served without compliance with s 129(1)(b) of the National Credit Act of 2005: Section 129(1)(b) of the National Credit Act 34 of 2005

(the NCA) provides, among others, that when the consumer is in arrears, the credit provider must give the consumer notice of the default and various measures that may be taken to resolve the default before instituting legal proceedings to enforce payment. Section 130 provides that if proceedings are instituted without compliance with s 129 the court must adjourn the proceedings so that there may be compliance.

In *Investec Bank Ltd t/a Investec Private Bank v Ramurunzi* 2014 (4) SA 394 (SCA); [2014] 3 All SA 34 (SCA) the appellant, Investec Bank, gave the respondent, Ramurunzi, the required s 129 notice before instituting legal proceedings. The respondent contended that he did not receive the notice as he had changed his address. As a result, the proceedings were adjourned for service of a new s 129 notice. By that time, the period of three years for the running of prescription had lapsed. The issue before the court was whether a summons issued and served before delivery of a s 129 notice was valid and thus interrupted prescription. The WCC held, per Savage AJ, that the summons was not valid and had not interrupted the running of prescription. An appeal against the High Court order was upheld with costs.

The SCA held per Lewis JA (Ponnan, Bosielo, Saldulker JJA and Mocumie AJA concurring) that service of summons on the respondent interrupted the running of prescription. Section 130(4) was unusual as it required a court to pause (adjourn) the proceedings so that the service provider could give the consumer the benefit of notice as to his or her options, a notice that should ordinarily have been given before the summons was issued and served. Thus the proceedings had a life and were not void despite the absence of a s 129 notice. The very fact that a court had to make an order as to how proceedings were to be continued indicated the validity of the summons rather than its nullity. The purpose of s 130(4) was to

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ensure that even though summons had been served, the consumer was still provided with a s 129 notice so that he or she knew what options were available to resolve the matter before the debt could be enforced.

Divorce

Amount of an accrual claim: Section 4(1)(a) of the Matrimonial Property Act 88 of 1984 (the MPA) provides, among others, that 'the accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of the marriage exceeds the net value of his estate at the commencement of that marriage'. The application of the section was dealt with in *MM and Others v JM* 2014 (4) SA 384 (KZP) where the plaintiff husband (MM) and the defendant wife (JM) were married to each other out of community of property with the accrual system. When the plaintiff sought a decree of divorce, the defendant made a claim in reconvention in which she claimed for an order directing the plaintiff to pay her an amount equal to 50% of the amount by which the accrual of his estate exceeded that of her estate.

The issue before the court was whether assets in a family trust should be taken into account in the determination of the accrual of the plaintiff's estate. That was so as both parties were trustees and beneficiaries of the family trust although, over time, the plaintiff took full control of management of the trust and allegedly used it as his *alter ego* to benefit himself. The plaintiff and other trustees of the trust excepted to the defendant's claim in reconvention on a number of grounds, but the main one was that the property belonging to the trust could not be taken into account in determining the value of the plaintiff's accrual.

The main exception was upheld and the defendant granted leave to amend. The other many exceptions having failed, the plaintiff and other trustees were ordered to pay costs. Ploos Van Amstel J held that the defendant's

case was not that the assets ostensibly owned by the trust were in truth the property of the plaintiff or that the trust was a sham. Had the defendant pleaded that the assets of the trust were in truth her husband's property, then her claim that those assets had to be taken into account in determining the accrual of her estate would have been in order. However, the defendant's case was that the trust assets should be taken into account in determining the accrual of the plaintiff's estate as he had the power and ability to use those assets for his sole benefit. The problem was that the amount of an accrual claim was determined on a factual and mathematical basis and not as a matter of discretion. What the spouse's estate consisted of was a factual inquiry. There was no warrant in the MPA to have regard to assets which did not form part of the estate of a spouse on the basis that it would be just to do so. There was no legal basis for an order that assets which in fact did not form part of the spouse's estate should be deemed to be part thereof for the purposes of determining the accrual of that estate. If the defendant had averred that the trust assets in truth belonged to the plaintiff, without challenging the validity of the trust, such a claim would not have been excipiable.

Housing

Protection of home consumers against unregistered builders: Section 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 (the Housing Protection Act) provides that -

'no person shall

(a) carry on the business of a home builder; or

(b) receive consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder'.

The application of the section was dealt with in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC), where the applicant, Cool

Ideas, entered into a contract with the respondent, Hubbard, to build her a house at a cost of some R 2,6 million. The problem was, however, that the applicant was not registered as a home builder as required by s 10(1). Nevertheless, the applicant entered into a subcontract with V corporation, a registered home builder, which duly did the construction of the house and payments were made as work progressed.

In the meantime, the parties entered into an arbitration agreement in terms of which any disputes would be referred to arbitration. After practical completion of the work, the respondent refused to make final payment of R 550 000 citing the quality of elements of the building works as her complaint, and claimed payment of R 1,2 million as the cost of remedial work.

She referred the dispute to arbitration in which she sought payment for contractual damages from the applicant. At that stage the applicant registered as a home builder. The arbitrator found in favour of the applicant and ordered the respondent to pay the outstanding R 550 000. Relying on s 10(1), the respondent refused to comply with the arbitration award, contending that as the applicant had not been registered as a home builder at the time of conclusion of the contract, it was not entitled to payment. The applicant approached the High Court and obtained an order making the arbitration award an order of court so that it could be enforced. The respondent appealed to the SCA which held that, while s 10 did not nullify the contract between the parties, it nevertheless disentitled an unregistered home builder from receiving consideration. In other words, the contract was valid but payment to the home builder in terms thereof could not be enforced.

The CC granted the applicant leave to appeal against the decision of the SCA but dismissed the appeal itself with costs. Reading the main judgment Majiedt AJ (Jafta J

concurring in a separate judgment while Froneman J, with Cameron J, Dambuzza AJ and Van der Westhuizen J concurring in a dissenting judgment) held that the purpose of the Housing Protection Act was to protect housing consumers. The entire legislative scheme was predicated upon a building contract between a registered home builder and a housing consumer being concluded. The statute was not capable of being construed as permitting after-the-fact registration of a home builder when construction had already commenced or was completed and the home builder sought payment from the housing consumer. The protection was optimally achieved in requiring registration of home builders upfront and not during the course of or at the end of construction. Registration should occur prior to and not during or at the end of construction.

The underlying building contract remained extant in order to render protection to the consumer in respect of what had already been erected and to the home builder for what had already been received. The parties were therefore entitled to retain what had been done or given, as the case might be. No restitution was legally tenable in those circumstances as would have been the case with an invalid agreement. In brief, the underlying building contract remained valid and extant. That was so even though the home builder was in law precluded from seeking consideration for the work done due to its failure to register as a home builder prior to the commencement of the building works.

Local government

Division of powers between provincial and municipal government: Section 44 of the Land Use Planning Ordinance 15 of 1985 (LUPO) of the Western Cape gives municipalities planning powers in the form of, among others, making zoning and subdivision of land-use within their area of jurisdiction. However, an appeal against a decision of the municipality lies with

the relevant provincial Minister and not a person or body within the municipality. In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC), 2014 (5) BCLR 591 (CC), the issue was the constitutionality of s 44. Two cases were consolidated and heard together.

In the first case a certain company, Gordonia Properties, sought approval from the City of Cape Town (the city) to develop a residential estate. When the city failed to respond timeously the developer appealed to the applicant Minister of Local Government, Environmental Affairs and Development Planning who upheld the appeal and gave the company permission to rezone and subdivide the property in terms of LUPO.

In the second case, a trust, Gera Investment Trust, sought to redevelop a building of historical significance in the city centre of Cape Town. Special consent is required to redevelop historical building, and faced with objections from the respondent, Habitat Council, a non-profit organisation, the city refused the special consent. An appeal to the Minister was upheld and the trust given the required special consent. As a result the city instituted High Court proceedings for an order declaring s 44 unconstitutional and invalid. The order was granted by the WCC which held that the order did not have retrospective effect and was suspended for a period of 24 months. The court also followed the reading-in approach, this having the result that in some instances the Minister still retained appellate power so as to supervise planning activities of municipalities.

The order of invalidity, and its non-retrospectivity, was confirmed by the CC. However, the court declined to confirm the reading-in approach as doing so would have given the Minister appellate powers over decisions of municipalities. No order was made as to costs.

Reading a unanimous decision of the court, Cameron J held that s 44 could not withstand constitutional scrutiny as the provincial appellate capability impermissibly usurped the power of local authorities to manage municipal planning and intruded on the autonomous sphere of authority which the Constitution accorded municipalities. It also failed to recognise the distinctiveness of the municipal sphere. Municipalities were responsible for zoning and subdivision decisions while provinces were not. All municipal planning decisions that encompassed zoning and subdivision, no matter how big, lay within the competence of municipalities. The constitutional scheme did not envisage the province employing appellate power over municipalities' exercise of their planning functions. That was so even where the zoning, subdivision or land-use permission had province-wide implications.

Trusts

Piercing the trust veneer where a trust is a sham or is used as an alter ego: In *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC), Kaye (K) was a trustee of the JGN Trust, and a sole director of a company known as Bella Densel. After sequestration of K's estate, the provisional trustees approached the High Court for an order declaring that the property of the trust and that of the company should fall into his insolvent estate. That was to be so as it was alleged that K had used the trust as his *alter ego* and that the trust was a sham. The application was dismissed with costs.

Binns-Ward J held that establishing that a trust was a 'sham' and 'going behind the trust form' entailed fundamentally different undertakings. The expressions '*alter ego* trust' and 'sham trust' were often used interchangeably and with confusing effect. When a trust was a sham, it did not exist and there was nothing to 'go behind'. In the instant case the applicants

had confused and conflated the concepts in their founding papers. Maladministration of an asset validly vested in a properly founded trust did not afford a legally cognisable basis to contend that the trust did not exist, or that the asset no longer vested in the duly appointed trustees. Thus, for the applicants to be able to establish that the property did not vest in the trust they had to prove that the trust was a sham. Holding that a trust was a sham was essentially a finding of fact. Inherent in any determination that a trust was a sham had to be a finding that the requirements for the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation. In the present case there was no reason to hold that the trust had not been legitimately founded or that the property had not been validly vested in it.

Going behind the form, on the other hand, entailed accepting that the trust existed but disregarding for given purposes the ordinary consequences of its existence. That could entail holding the trustees personally liable for an obligation ostensibly undertaken in their capacity as trustees, or holding the trust bound to transactions ostensibly undertaken by the trustees acting outside the limits of their authority or legal capacity. Going behind the trust form or 'piercing its veneer', as the concept is sometimes described, essentially represented the provision by a court of an equitable remedy to a third party affected by an unconscionable abuse of the trust form. It is a remedy that would be afforded in suitable or appropriate cases. It is an equitable remedy in the ordinary sense, being one that lent itself to a flexible approach to address fairly and justly the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that would generally be given when the trust form was used in a dishonest or unconscionable manner to evade liability or avoid an obligation.

Unlawful occupation of land

Direct and substantial interest in eviction proceedings:

In *Zulu and Others v eThekweni Municipality and Others* 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC), the third respondent, the MEC for Human Settlement and Public Works in KwaZulu-Natal – being the owner of the affected property – sought a court order against the first respondent, the eThekweni Municipality (Durban municipality) and the second respondent, the Minister of Police. The appellants, Zulu and others, were unlawful occupiers of the property and accordingly sought leave to intervene in the proceedings. Leave was denied by the KZD per Kruger J after which the MEC was granted the order which prevented invasion of the property and also authorised eviction of unlawful occupiers.

Application for leave to appeal against denial of intervention was rejected by the High Court. So was a petition for leave to appeal rejected by the SCA. However, the CC upheld the appeal with costs and granted the appellants leave to intervene. The order of Kruger J having been an interim interdict, the appellants were accordingly in a position to be heard on its return day.

The argument of the respondents was that, as the appellants were already in occupation of the property, they could not be affected by the interdict which was aimed at new land invasion. However, that was only a trick as a day after the hearing of the CC appeal and before judgment was delivered, the first respondent started the eviction of established unlawful occupiers in terms of an order that she had assured did not apply to them.

The majority of the CC held per Zondo J (Van der Westhuizen J, with whom Froneman J concurred, dissenting) that the interim order granted by the High Court authorised the first respondent municipality and the second respondent to take all reasonable steps

to prevent any person from, among others, occupying the property. There was nothing in the order to suggest that the occupation of the property that was to be prevented did not include continuing occupation that commenced prior to the grant of the order. Indeed, the order was wide enough to include the prevention of continuation of such occupation. That meant that in terms of that part of the order the appellants could be prevented from continuing to occupy the property. Preventing the appellants from continuing to occupy the property would amount to eviction because they would be pre-

cluded from either returning to their homes after a temporary absence or they would be removed from their homes to prevent them from continuing to occupy the property. This meant that, to that extent, part of the interim order was an eviction order. Therefore, the appellants had a direct and substantial interest in the interim order proceedings and in its discharge, and should accordingly have been granted leave to intervene.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases

dealing with appealability of court order, co-existence of civil, criminal and administrative liability in financial services sector, consumer credit agreement, customs and excise, legal professional privilege, procedure for passage of Bill, proceedings by liquidator, prohibition of use of confession of accused against co-accused, proof of customary marriage, referral of dispute of fact to hearing of oral evidence in motion proceedings, registration of credit provider, reviewing and setting aside of regulations made by the Independent Communications Authority of South Africa, right to

basic education, right to fair trial, setting aside of administrative action, simulated contract, unconscionability, undue influence or duress relating to contract and voidable disposition.

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Author

ALLEN WEST

Mr West is a well-known authority on conveyancing matters in South Africa. He was the Chief of Deeds Training from 1 July 1984 to 30 September 2014 and is presently a property law specialist at MacRobert Attorneys in Pretoria.

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NEW LEGISLATION



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Legislation published from
1 August – 25 August 2014

PROMULGATION OF ACTS

Appropriation Act 33 of 2014. *Commencement:* 14 August 2014. GN627 GG37913/14-8-2014.

Labour Relations Amendment Act 6 of 2014. *Commencement:* To be proclaimed. GN629 GG37921/18-8-2014.

Local Government: Municipal Property Rates Amendment Act 29 of 2014. *Commencement:* To be proclaimed. GN630 GG37922/18-8-2014.

SELECTED LIST OF DELEGATED LEGISLATION

Banks Act 94 of 1990

Designation of an activity not falling within the meaning of 'The Business of a Bank' (a group of persons between the members of which exists a common bond). GN620 GG37903/15-8-2014.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations, 2011. GN R641 GG37935/22-8-2014.

Collective Investment Schemes Control Act 45 of 2002

Determination of securities, classes of securities, assets or classes of assets that may be included in a portfolio of a collective investment scheme in securities and the manner in which and the limits and conditions subject to which securities or assets may be so included. BN90 GG37895/8-8-2014.

Capital requirements with which a manager of a collective investment scheme in securities must comply. BN91 GG37895/8-8-2014.

Advertising, marketing and information disclosure requirements for collective investment schemes. BN92 GG37895/8-8-2014.

Electronic Communications Act 36 of 2005

Promotion of Diversity and Competition on Digital Terrestrial Television Regulations. GenN682 GG37929/22-8-2014.

Health Professions Act 56 of 1974

List of classified and certified psychological tests. BN93 GG37903/15-8-2014.

Housing Development Agency Act 23 of 2008

Housing Development Agency Regulations. GN R610 GG37899/12-8-2014.

Medicines and Related Substances Act 101 of 1965

Exclusion of certain medicines from the operation of certain

provisions of the Medicines and Related Substances Act. GenN637 GG37900/11-8-2014 and GN643 GG37938/22-8-2014.

Declaring certain medicine undesirable: Phenyl Butazone. GN609 GG37898/7-8-2014.

General Regulations relating to bonusing and sampling. GN R642 GG37936/22-8-2014.

National Environmental Management: Protected Areas Act 57 of 2003

Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites Amendment Regulations, 2014. GN R622 GG37904/15-8-2014.

National Road Traffic Act 93 of 1996

Determination of type of plate to be used in the Province of North West. GN659 GG37920/18-8-2014.

Road Accident Fund Act 56 of 1996

Language policy. BN89 GG37889/8-8-2014.

Small Claims Courts Act 61 of 1984

Establishment of small claims courts for the areas of Southern Harts and Christiana. GN603 GG37889/8-8-2014.

Establishment of small claims court for the area of Glen Grey. GN604 GG37889/8-8-2014.

Establishment of a small claims court for the area of Calitzdorp. GN605 GG37889/8-8-2014.

World Heritage Convention Act 49 of 1999

Procedure for the nomination of world heritage sites in the Republic of South Africa. GN638 GG37903/15-8-2014.

Tax Administration Act 28 of 2011

Rules for electronic communication prescribed under s 255(1) of the Act. GN644 GG37940/25-8-2014.

Draft legislation

Draft social inclusion policy framework for public post-school education and training institutions in terms of the Further Education Training Colleges Act 16 of 2006. GenN681 GG37928/21-8-2014.

Draft rules made in terms of s 33(3) of the Petroleum Pipelines Act 60 of 2003. GenN707 GG37931/22-8-2014.

Draft national appeal regulations in terms of the National Environmental Management Act 107 of 1998. GenN709 GG37937/22-8-2014.



Employment law update



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Compensation in unfair discrimination cases

In *South African Airways (Pty) Ltd v GJJVV* [2014] 8 BLLR 748 (LAC) an airline pilot, Van Vuuren, reached the retirement age of 60 on 5 August 2005. At the same time a collective agreement with the union was being negotiated in terms of which the retirement age would be increased to 63. Agreement on the increased retirement age of 63 was in fact reached on 19 August 2005, but the collective agreement was signed only in November 2005. While the collective agreement was being finalised Van Vuuren was asked to remain at home on standby. When he resumed his duties in December 2005 he received a reduced salary which was lower than that of his younger colleagues who performed the same work. The collective agreement further provided for a reduction in rank and status of pilots over the age of 60 who flew internationally. Van Vuuren approached the Labour Court alleging unfair age discrimination. At the same time, he also referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) as his period of absence while he remained at home on standby, pending the finalisation of the collective agreement was incorrectly deducted from his accumulated annual leave.

The Labour Court found that in terms of the Employment Equity Act 55 of 1998 (the Act), unfair discrimination is prohibited and the only two permissible defences to unfair discrimination are –

- the taking of affirmative action measures consistent with the Act; or
- exclusion on the basis of inherent requirements of the job.

South African Airways (SAA) argued that age was an inherent requirement of the job and that the reduction in salary was justified as it was intended to limit costs. SAA also argued that the reduced salary did not constitute unfair discrimination as the employees all had the choice whether to retire at the age of 60 or to continue with employment on reduced terms and conditions.

The Labour Court, per Shaik AJ, held that the exercise of a choice that results in unfair discrimination cannot render the discrimination fair. A contractual term that violates the Constitution is by definition contrary to public policy and therefore unenforceable. The fact that the discriminatory provisions were contained in a collective agreement was therefore no justification. Thus, the Labour Appeal Court found that the Labour Court had correctly found that Van Vuuren had been unfairly discriminated against.

As regards the relief granted, the Labour Court awarded the difference in the amount that Van Vuuren earned and the amount that he would have earned had the unfair discrimination not taken place. In addition, he was awarded compensation equal to 12 months' remuneration, approximately R 1,4 million (see 2013 (Dec) DR 45).

SAA took issue with the relief ordered. The Labour Appeal Court, per Coppin AJA, noted that the Act empowers the Labour Court to award both damages and compensation, and thus contemplates patrimonial and non-patrimonial loss. The award of damages is based on the actual financial loss suffered and is aimed at restoring the employee to the position he would have been in had the unfair discrimination not occurred. On the other hand, compensation for the

purposes of the Act is awarded for non-patrimonial loss such as injury to human dignity (*solatium*). Courts are generally more conservative with regard to awarding compensation for non-patrimonial loss. The Labour Appeal Court found that when awarding both compensation and damages there must be a balance of the two to ensure that the total amount is fair to both the employee and the employer, and that there is no duplication of relief. In this case, the employee had sought relief in the amount of R 100 000. However, the Labour Court had awarded compensation of over R 1,4 million, which was in addition to the damages awarded for the difference in salary. The Labour Appeal Court held that there was not a sufficient explanation as to why this relief was granted.

In the circumstances, the Labour Appeal Court found that the compensation that had been granted by the Labour Court was grossly excessive because there was no reasonable relationship to the injury suffered. It also exceeded the amounts awarded in previous similar cases. It was accordingly found that this was an exceptional matter that required the Labour Appeal Court to interfere with the compensation award and determine an appropriate amount afresh as it was in the interests of justice to do so. It was found that compensation of R 50 000 was just and equitable for non-patrimonial loss and the compensation was reduced accordingly. It was also pointed out that, in unfair discrimination cases, it is preferable to award an actual Rand amount rather than to link the amount to a certain number of months' remuneration.

Admission of telephonic evidence

In *Simmers v Campbell Scientific Africa (Pty) Ltd and Others* [2014] 8 BLLR 815 (LC) the commissioner in an arbitration allowed a complainant in a sexual harassment case to give evidence telephonically because she was in Australia. The applicant instituted review proceedings in respect of the arbitration award alleging that the admission of evidence via telephone was irregular. The Labour Court considered the fact that the complainant had time to compose herself while giving evidence because of delays and broken connections and that the commissioner was unable to observe her demeanour. Nevertheless, the Labour Court found that these were arbitration proceedings and it would have been ex-

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tremely expensive to fly the complainant to South Africa to give evidence. Steenkamp J was of the view that the commissioner had dealt with the matter in an appropriate and expedient manner. It was found that the complainant could be cross-examined and therefore it did not prevent the employee from having a fair hearing. Thus, the admission of telephonic evidence did not constitute a reviewable irregularity.

- See page 28 of this issue.



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

Question:

Section 49(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) allows for an employer and employee to replace or exclude a basic condition of employment to the extent permitted by the BCEA.

Can you provide a list of what provisions in the BCEA can be excluded or replaced by agreement between an employer and individual employee, and in particular if the amount to be paid for overtime or time off given in lieu of payment for overtime, can be varied by agreement?

Answer:

The right to overtime is contained in Chapter 2 of the BCEA. I shall respond directly to the question posed and thereafter discuss other issues pertaining to Chapter 2 of the Act, which practitioners should be aware of.

There are certain instances in which an employer and employee can agree to vary certain rights in this chapter, but they are limited to the following:

In terms of s 9 an employee may not work more than 45 hours per week. Subsection 2 states that an employee whose duties include serving members of the

public, may agree to extend his or her working hours by 15 minutes a day but not more than 60 minutes per week, to enable him to continue with such duties after his ordinary hours of work.

Meal intervals are governed by s 14 which states that an employer is obliged to give a meal interval of one continuous hour to an employee working for five continuous hours. Subsection 5 allows for a written agreement that reduces the meal interval to not less than 30 minutes – or dispense with it – if the employee works for fewer than six hours a day.

Section 15 deals with daily and weekly rest periods. In terms of a daily rest period, an employer must give an employee 12 consecutive hours in-between consecutive shifts, and 36 consecutive hours off within a week, which should include a Sunday. Subsections 2 and 3 allow for an agreement between employer and employee to change this to ten hours between shifts and 60 hours every two weeks respectively.

Section 16 provides that an employee should be paid double his or her rate for working on a Sunday. However subs 3 allows parties to agree that the employee receives his or her normal rate of pay plus paid time off equivalent to the difference in value from what he or she received to what he or she was entitled to receive.

Section 10 states that any overtime worked must be by consent of the employee. Subsection 2 says that an employee must receive at least 1 1/2 times his or her normal rate of pay for any overtime worked. However subs 3 allows for an agreement between the individual parties whereby an employee would be paid their normal rate of pay for the overtime worked and receives 30 minutes time off with full pay for every hour of overtime worked.

Other than this limited leeway, individual parties would not be entitled to reduce the rate of pay for overtime further. A collective agreement, concluded at a bargaining council and which applies to all the role players within such sector, can reduce overtime further in terms of s 49(1). For example a certain category of employees in the motor industry receives 1 1/3 times their normal rate for any overtime worked.

It would be prudent to point out that s 49(3) must be read with ss 4 and 5 of the Act.

Section 4 states that a basic condition of employment constitutes a term in an employment contract, unless other applicable laws provide a more favourable term or parties have agreed to more favourable terms or a basic condition has been excluded, varied or replaced in accordance with the provisions of the Act.

Section 5 states that the Act takes precedence over any agreement concluded before or after the Act came into effect.

Therefore the circumstances in which individual parties can agree to vary basic conditions are limited to what the Act provides. Any agreement that is contrary to what the Act provides and which leaves the employee with a less favourable term, would be invalid.

In October last year one of the issues the Labour Court had to decide in *Ludick v Rural Maintenance (Pty) Ltd* (2014) 35 ILJ 1322 (LC), was whether an employee is entitled to his leave pay upon resignation after he had, in his employment contract, agreed that he would forfeit any leave that had not been taken within a specific period of it being due to him. A term in his employment contract held that any leave that had not been taken within 30 days from the employer's financial year end (that being 28 February each year) would be forfeited. The employee's leave cycle ended in January every year and he resigned more than a month after the financial year end but within six months from when his previous leave cycle ended. On the strength of the aforementioned agreement; the employer did not pay out any accrued leave due to the employee from his previous leave cycle. The court examined this agreement and found it to be contrary to s 20(4) of the Act which states that an employer must grant an employee leave not later than six months after the employee's previous leave cycle. The court held:

'The Act imposes an obligation on an employer to grant leave before the expiry of the six-month period. ... The Act does not contemplate that an employee who does not take leave accrued in an immediately preceding leave cycle at an agreed or determined time during the six-month period following that cycle is necessarily denied that leave, or on termination of employment, its value.

A provision in a contract would ... seem to me therefore to deny the plaintiff the benefit of a statutory basic condition of employment, which in terms of s 4 of the Act, must be read down into his employment contract.'

The court ordered the employer to pay the employee all leave which he did not take in his previous leave cycle despite the controversial term in the employment contract.

While I am mindful that the word 'exclude' appears in s 49(3), in my view, this should not be interpreted to mean that by agreement individual parties can abandon certain rights and obligations set out in the Act. It would be more appropriate to interpret the word to mean

parties can exclude a specific right and obligation and replace it with what the Act provides.

Having said that an employer can be excluded from certain obligations set out in the Act by way of a Ministerial variation as contemplated in s 50 of the Act.

In *National Union of Mineworkers v Namakwa Sands - A Division of Anglo Operations Ltd* (2008) 29 ILJ 698 (LC), when faced with a segment of its workforce engaged in industrial action, the employer requested non-striking employees to work overtime. The employer's operations ran continuously for 24 hours a day, which meant that those who agreed to work overtime were limited to a maximum of ten hours overtime per week, as provided for in s 10(1)(b) of the Act. This caused the employer to apply for a determination in terms of s 50 whereby the employer's obligation to limit an individual employee's overtime to ten hours a week was extended to 20 hours a week.

Employers under the jurisdiction of a bargaining council can likewise apply to a duly appointed panel within the council to be exempt from certain obligations contained in a collective agreement.

Chapter 2 of the Act

In terms of s 6 of the Act, the rights contained in Chapter 2 - with the exception of s 7 which regulates working time - do not apply to senior managerial employees, travelling salespersons that regulate their own working hours and employees working less than 24 hours a month.

In addition to this, certain rights listed in Chapter 2 are not applicable to employees earning in excess of the Ministerial threshold, which as of 1 July 2014 is set at R 205 433,30 per annum.

These rights, (as indicated by the footnote associated with these rights in the Act) are:

- Section 9: Limitations on ordinary hours of work.
- Section 10: Overtime work and payment.
- Section 11: Compressed working week.
- Section 12: Averaging of hours of work.
- Section 14: Provision of meal intervals.
- Section 15: Daily and weekly rest period.
- Section 16: Pay for work on Sundays.
- Section 17(2): Night work.
- Section 18(3): Public holidays.

While those employees earning above

the threshold cannot lay a statutory claim to these rights, nothing prevents them, by way of an agreement with the employer, to incorporate any one of these rights specifically into an employment contract.

A variation of a basic term and condition can be varied only if the employee has a statutory right to the term and condition in question and not only a contractual right to same.

- The author of the question posed two unrelated questions. I shall respond to the second question in a later edition.

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Abbreviations:

SAJHR: *South African Journal on Human Rights* (Juta)

TSAR: *Tydskrif vir die Suid-Afrikaanse Reg* (Juta)

PER: *Potchefstroom Electronic Law Journal* (North West University)

ILJ: *Industrial Law Journal* (Juta)

Banking law

Du Toit, SF 'Reflections on the South African code of banking practice' (2014) 3 *TSAR* 568.

Sonnekus, JC 'Huweliksvoorwaardes én kontrakteervryheid onder druk *Bath v Bath* (952/2012) [2014] ZASCA 14 (24-03-2014) (ongerapporteur)' (2014) 3 *TSAR* 580.

Child law

Elphick, R, Elphick, J and De Sas Kroppinicki, Z 'Substantive equality and caregiver responses to discrimination against children with disabilities in Orange Farm' (2014) 30(2) *SAJHR* 221.

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Henderson, A and Van der Linde, K 'Uncertificated shares: A comparative look at the voting rights of shareholders (part 1)' (2014) 3 *TSAR* 496.

Constitutional law

Rautenbach, IM 'The private law, commercial law and public law contents of constitutional court orders from 1995 to 2012 (part 2)' (2014) 3 *TSAR* 459.

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Brits, R and Van der Walt, AJ 'Application of the housing clause during mortgage foreclosure: A subsidiarity approach to the role of the National Credit Act (part 2)' (2014) 3 *TSAR* 508.

Otto, JM '*Fiat lux in tenebris*. Common-law leases and the National Credit Act *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC* 2013 (3) SA 426 (SCA)' (2014) 3 *TSAR* 597.

Criminal law

Buthelezi, MC and Bernard, RB 'The court knows the law *The Teddy Bear Clinic for Abused Children & RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions* 73300/10 2013 ZAGP-PHC 1 (unreported) (04-01-2013)' (2014) 3 *TSAR* 625.

Du Toit, P 'Die toelaatbaarheid van intieme visitering van die liggaam van 'n gearresterde persoon *Yanta v Minister of Safety and Security* 2013 JDR 1378 (OKG)' (2014) 3 *TSAR* 639.

Jordaan, L 'Die legaliteitsbeginsel en die toelaatbaarheid van regterlike aktivisme by die ontwikkeling van die substantiewe strafreg (deel 2)' (2014) 3 *TSAR* 447.

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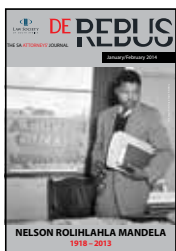
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Failing the objectives of the MPRDA

By
Malusi
Mkhize

On 23 June 2014, the longest mining sector strike in South African history ended when the Association of Mineworkers and Construction Union (AMCU) accepted a revised wage offer from platinum producers. The economic and social costs of the strike were crippling. It is reported that the platinum producers lost over R 24 billion in revenue, while employees lost wages of over R 10,6 billion. These figures do not include the loss of investor confidence and the impact of the strike on local businesses or the families of the striking workers.

So what went so terribly wrong and how do we, as South Africans, prevent this from happening again? In considering this question it is important to have regard to the objectives set out in chapter 2 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) which, *inter alia*, include to:

'(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

...

(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;

(f) promote employment and advance the social and economic welfare of all South Africans'.

State's custodianship

The MPRDA extinguished private ownership of mineral rights and proclaimed that mineral and petroleum resources are the common heritage of all the people of South Africa. The state is the custodian of the resources for the benefit of all South Africans. The state, through the Minister of Mineral Resources (the Minister), is tasked with ensuring that the objectives of the MPRDA are met. South Africa is endowed with the largest *in*

situ mineral deposits in the world and, as custodian, the Minister has a duty to ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standard while promoting economic and social development. No other government body or institution is entrusted with this duty.

It became evident towards the latter stages of the strike, which lasted over five months, that although the state is responsible for administering and managing mining and prospecting rights, its attempts to resolve the strike were proving futile. This was not due to a lack of effort, which saw the President, the newly appointed Minister of Mineral Resources and even a Labour Court judge attempting to mediate the negotiations and bring an end to the strike. Perhaps of more concern, was that there was no clear strategy or mechanism of how to resolve the deadlock. Neither the MPRDA nor the South African labour laws provide for a maximum period that a strike can continue without intervention of some kind.

The MPRDA does not give the Minister or any other government official any powers to take action or intervene in situations of prolonged strike action. In fact, South African law does not recognise the concept of 'prolonged strike action', yet we are aware that it is possible in an economic environment where trade unions have a substantial presence, and where mining companies are seen by some as having failed to manage worker expectations through the trade unions.

The Commission for Conciliation, Mediation and Arbitration (CCMA) was also unable to assist in resolving the prolonged strike action. The CCMA's director differentiated between South Africa's labour laws and those of other jurisdictions in that bodies similar to the CCMA in other jurisdictions can force parties to stop strike action. In terms of South African labour laws this mechanism simply does not exist.

Expanding opportunities, economic growth and promotion of employment

In exercising its role as custodian, the state is required to expand opportunities substantially and meaningfully so that all South Africans may benefit from the exploitation of resources. These opportunities simply cannot be nurtured in the midst of crippling strike action. The strikes defeat various objects of the MPRDA.

The prolonged strike has had severe consequences for South Africa, a member of the BRICS (Brazil, Russia, India, China and South Africa) countries of emerging national economies. It is reported that the South African economy contracted by 0,6% in the first quarter of 2014 and the prolonged strike added extra pressure. The mineral resources of South Africa have long been earmarked as a means of developing not only the mining sector, but also other sectors of the economy. This is in line with government's objective to boost industrialisation and local beneficiation. The Minister has suggested that any legislation passed should work towards that goal.

At the end of March 2014, 25,2% of the South African population was unemployed. Ironically, members of AMCU were striking for a better wage while others did not have employment at all. AMCU was unsuccessful in attempting to secure a moratorium on mining companies restructuring following the strike (with one of the effects of that being retrenchments). It is inevitable that retrenchments will follow as the mining companies attempt to return to profitability. The question then arises as to whether we are on a sustainable path to promoting and meeting the objectives of the MPRDA?

Conclusion

The Minister has recently alluded to the fact that it is time that our legal system provides clear mechanisms to assist all stakeholders in trying to meet the

objectives of the MPRDA. A failure to regulate strikes better and the inability of the state or other parties to intervene in prolonged strike action does not support achieving the objectives of the MPRDA aimed at promoting economic growth and mineral development, employment and the social and economic welfare of all South Africans.

The legislative environment should be susceptible to prevailing market conditions and strikes must be managed. This

does not mean that one should detract from employees' right to strike, but rather the ability to say when enough is enough. The mineral resources of South Africa were and continue to be pivotal in the country's development. Prolonged strike action threatens economic growth and will inevitably result in increasing unemployment. This would be failing the objectives of the MPRDA. An effective mechanism allowing parties to intervene in prolonged strike action would certainly go a long way in aiding

all stakeholders within the mining industry to promote and ultimately meet the objectives in the MPRDA in the interest of our country and all its people.

Malusi Mkhize LLB (UKZN) is a candidate attorney at Webber Wentzel in Johannesburg.

Is theft a competent verdict on a charge of fraud?

By
Michael
Miller

In the case of *Kok v S* (WCC) (unreported case no 14552, 2-7-2014) (Henney J), the accused had been charged with fraud. It was alleged that he fraudulently obtained payment of an amount of R 98 668,98 from the Government Employees Pension Fund (GEPF) after he had been dismissed by the South African Police Service (SAPS).

The accused pleaded not guilty to the charge. Before plea, the court 'warned' the accused of a possible competent verdict on a charge of theft. This, the court said, was in terms of s 256 of the Criminal Procedure Act 51 of 1977 (the Act). It is important to note that the accused was not charged in the alternative with theft (as is common practice).

A number of witnesses were called. The nature of their evidence does not appear from the judgment, but it would

appear that the eventual conviction resulted mainly from the admissions made by the accused after he obtained the services of a new attorney.

At that stage, admissions were made in terms of s 220 of the Act. The effect of these was that the accused admitted that, although he was not guilty of fraud, he was guilty of the theft of the said amount. On this basis, he was convicted of theft and sentenced to an effective sentence of five years' imprisonment. The five-year sentence was suspended for a period of five years on certain conditions, which included the repayment of the amount to the complainant in full, before 31 July 2013.

Subsequently the matter went on special review in terms of s 304(4) of the Act. That subsection provides for the review of (as opposed to appeal against)

a conviction or sentence where the procedure in the trial court was not in accordance with justice. Although the review dealt with the sentence imposed, the court *mero motu* raised the question of whether the conviction should also be reconsidered.

The question arose whether theft was indeed a competent verdict to fraud. This was because the accused had been charged only with fraud, but was convicted of theft, a crime with which he had not been charged. The magistrate purported to convict the accused of theft because he was of the view that in terms of s 256 of the Act, theft was a competent verdict to fraud.

Where the prosecution does not prove the crime charged but proves some other crime, then provided certain conditions are met, an accused person may be con-



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victed of the other crime, even though it was never charged. Basically there are two rules which must be followed in deciding whether a conviction on a competent verdict is appropriate.

The first is that in terms of Chapter 26 of the Act (ss 256 - 270) it must be provided that it is competent to convict an accused person of such other charge. The sections referred to provide in great detail exactly which crimes an accused person may be convicted of if the crime charged is not proven (competent verdicts). Thus, culpable homicide is a competent verdict to a charge of murder.

The second is that, even though such other offence is indeed a competent verdict, its commission must be proven beyond reasonable doubt. Thus if murder is not proven, but culpable homicide is proven beyond a reasonable doubt, the accused person may be convicted of culpable homicide.

In casu, there was no doubt that - because of the accused's admission to this effect - the crime of theft had been proven beyond reasonable doubt. The question was whether in terms of ss 256 - 270, theft was indeed a competent verdict to fraud.

Henney J (with Le Grange J concurring) looked in the first instance at s 256 of the Act (under which the magistrate purported to act). That section merely provides that, where a person is charged with a certain offence but only an attempt to commit the offence so charged is proven, then an accused person may be convicted of such attempt. It makes no provision that an accused person charged with fraud may be convicted of theft.

There is indeed no section that provides for competent verdicts on a charge of fraud.

Henney J, however, confirmed the theft conviction on the basis of s 270 of the Act which provides for offences not specified in ss 256 - 269. That section provides that: 'If the evidence on a charge for any offence not referred to in the preceding sections [in sections 256 to 269] does not prove the commission

of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved'.

This section has been interpreted in a number of cases referred to by Henney J as meaning that, as long as the essential elements of the lesser offence are included in the offence charged (the more serious offence), an accused may be convicted of the lesser offence.

The main case in this connection is *S v Mavundla* 1980 (4) SA 187 (T) where Le Grange J stated at 190H - 191A as follows (my own translation from Afrikaans) -

With respect I suggest that the question is simply whether the alleged (lesser) offence by reason of its essential elements is incorporated in the offence charged. The inquiry is in the first instance directed at the essential elements of the (lesser) offence, in other words the definition of the crime. The second step is to determine if those (essential) elements are included in the offence charged.

What must, therefore, be considered is whether the essential elements of theft are included in the crime of fraud.

According to Snyman CR *Criminal Law* 5ed (Durban: LexisNexis 2008) at 531 'fraud' is 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.

Snyman lists the elements of the crime as following:

- a misrepresentation;
- prejudice or potential prejudice;
- unlawfulness; and
- intention.

According to the same writer at 484, the definition of 'theft' is -

'A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which

(a) belongs to, and is in the possession of, another;

... provided that the intention to appro-

priate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.'

Snyman lists the elements of the crime as:

- an act of appropriation;
- in respect of a certain type of property;
- which takes place unlawfully; and
- intentionally.

A brief look at the elements as outlined above, shows immediately that the essential elements of theft are not included in the essential elements of fraud. There is, in the crime of fraud, no element of appropriation. Nor is it required that fraud be in respect of movable, corporeal property. Nor does the intention in fraud cases have to be to deprive the person entitled to the possession of the property, of such property.

It follows that a person charged with fraud cannot, on the basis of a competent verdict in terms of s 270, be convicted of theft.

Nevertheless, Henney J confirmed the conviction on the charge of theft on the basis of s 270. He agreed with the magistrate that it was proper to convict the accused of theft. However, he differed with the magistrate in holding that to arrive at such a competent verdict on the basis of s 256 was incorrect.

In my view, Henney J was wrong in confirming the conviction on theft as a competent verdict in terms of s 270. As indicated above, the essential elements of theft are not included in the essential elements of fraud.

Accordingly, the conviction on the charge of theft should, in my view, have been set aside. The prosecution, if so advised, would then be at liberty to charge the accused again because the setting aside of the conviction would not be based on the merits of the case.

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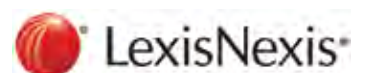
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