THE LAW REPORTS

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*.

November 2015 (6) South African Law Reports (pp 1 – 316); [2015] 4 All South African Law Reports October no 1 (pp 1 – 130); and no 2 (pp 131 – 254); [2014] 2 All South African Law Reports June no 1 (pp 493 – 633) and no 2 (pp 635 – 726)

Heinrich Schulze *BLC LLB (UP) LLD (Unisa)* is a professor of law at Unisa.

Abbreviations

ECG: Eastern Cape Division, Grahamstown
ECP: Eastern Cape Local Division, Port Elizabeth
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Advocates

Costs – attorney and client costs: In *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) the applicant law society brought an application to remove the respondent advocate from the roll of advocates. On the first day of the hearing the respondent consented to his removal from the roll of advocates and to an order, which included provision for costs, in terms of which the respondent was directed to pay the applicant's costs on the attorney and client scale. In passing, attorney and client costs are intended to ensure that a successful party will recoup all reasonable expenses, including counsel's fees, incurred as a result of litigation. The taxing master has a discretion in this regard.

The applicant, having presented its bills for taxation, was unhappy with the taxing master's deduction of

R 246 000 from its (senior) counsel's fees of R 403 000, and requested the taxing master to state a case in respect of the disputed rulings. According to a survey by the Society of Advocates of KwaZulu-Natal, the fee spectrum for senior counsel ranged from R 2 400 to R 4 500 per hour and from R 19 200 to R 36 000 per day for consultations. The taxing master's stated case and final

report were placed before the court for determination. The applicant's main objection to the taxing master's ruling was that, although the court had ordered attorney and client costs, specified the necessary witnesses and directed that counsel's preparation and consultation fees be included in the order, the fees in question (which were necessary and reasonable) were in many instances disallowed. The respondent, in turn, argued that the taxing master had complied with the court order and that no interference with the taxed bill was warranted.

Moodley J referred with approval to earlier case law in *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) and *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 2010 (5) SA 227 (C) and held that while the decisive criterion remained the value of the work done, it was permissible to charge counsel's fees on a time-spent basis. In this regard it held that an objective assessment of the features of the case is primary, and time actually spent in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work.

The court further held that the taxing master had to assume that the agreed fees were reasonable unless there were compelling grounds for thinking otherwise. In the present case counsel's rate of R 2 400 per hour and R 24 000

per day were at the lower end of the senior counsel's fee spectrum and hence reasonable.

The court held that the applicant was correct in arguing that the taxing master should have assessed counsel's fees for the drafting of the heads of argument on a time-spent basis, which ought to be standard practice in KwaZulu-Natal. Although advice on evidence and consultations with necessary witnesses might be considered attorney and client costs, they would nevertheless be allowed in an attorney and client bill, even when payable by the unsuccessful party. The taxing master should in the present case have found that the impugned witness consultations were reasonable and necessary, though their duration and number were susceptible to assessment. While clients were expected to attend consultations between instructing attorneys and counsel, their absence did not necessarily mean that the costs incurred were unreasonable. The taxing master should not have disallowed the consultation costs.

The applicant further disputed a number of individual rulings by the taxing master. The court dealt with each of the rulings ordered that the changes allowed on review be substituted for the amounts allowed by the taxing master.

Attorneys

Misconduct: In *Law Society of the Cape of Good Hope v Randell* [2015] 4 All SA 173 (ECG) the court was asked to decide whether the respondent attorney was a fit and proper person to continue to practise as an attorney.

Seeking an order that the respondent attorney's name be struck off the roll of attorneys, the applicant law society referred to criminal proceedings against the attorney and a co-accused. The latter's plea explanation made reference to the attorney and incriminated the attorney in criminal

activity. The law society applied for leave to file a further affidavit in which the co-accused confirmed the correctness of the allegations in his plea explanation. As the co-accused was not in South Africa, the law society contended that the hearsay evidence contained in the plea explanation should be admitted in evidence in terms of
s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988 on the basis that it would be in the interests of justice.

Alkema J held that experience and common sense dictated that allegations in plea explanations are more often than not designed to shift blame to a co-accused or to underplay the accused's own involvement and overemphasise the role played by others. The potential prejudice to the attorney if the relevant documents were admitted in evidence was clear. The documents were declared to be inadmissible hearsay evidence, and were excluded in their entirety.

The facts underlying the application involved the attorney's role as trustee, member and vice-chairman of the governing body of a school. The law society contended that the attorney's personal interest conflicted with his duties to the school and he was not entitled to make a secret profit at the expense of the school.

A court derives its power to strike an attorney from the Roll of Attorneys from
s 22(1)(*d*) of the Attorneys Act 53 of 1979 (the Act). Section 22(1)(*d*) of the Act provides that if the attorney in question, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney, his name may be struck from the roll of attorneys. Thus, the essential question in this case was whether the attorney was a fit and proper person to continue to practise as an attorney.

The inquiry into whether a person is a fit and proper person, in turn, contemplates a three-stage inquiry –

- first, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities;
- secondly, if so, whether in the discretion of the court, the person is a fit and proper person to continue to practise as an attorney; and
- thirdly, if not, whether in all the circumstances the person in question is to be removed from the roll of attorneys, or whether an order suspending him from practice for a specified time will suffice.

Whether a fiduciary duty exists, depend on the facts of each case. Here the attorney at all material times had attracted a fiduciary duty to the school. Those in a position of trust who have such a fiduciary duty must act in the best interests of the beneficiaries of that trust and they may not act to their own advantage at the cost of the beneficiaries.

The attorney was found to have acted in breach of his fiduciary duties, and the court held that there was no reason not to strike his name from the roll.

Company law

***Locus standi* of creditor in winding-up:** In *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA); [2014] 2 All SA 513 (SCA) the court was asked to consider the *locus standi* of a creditor of a company that was being wound up.

Express Model Trading 289 CC (the applicant) was the owner of units in the Dolphin Ridge sectional title development outside Bloubergstrand on the West Coast. Over a long period it fell in arrears with the payment of the levies due under the sectional title scheme. This resulted in the applicant owing a substantial amount to the respondent, the body corporate. The body corporate subsequently obtained a provisional winding-up order against the applicant. An undisclosed third party settled the arrears. However, the proceedings continued and a final winding-up order was granted. The applicant appealed to the SCA, but its appeal lapsed when it failed to file heads of argument in time. It then applied for condonation. The question was whether there were prospects of success on appeal.

The applicant contented that –

- payment of the arrears by the third party – the basis of the winding-up application – caused the body corporate to lose its *locus standi*;
- its ability to pay its debts could be inferred from it being able to procure the third party to pay the arrears; and
- it had assets – which it could liquidate – which covered all its liabilities.

Ponnan JA held, regarding the applicant's first contention, that the body corporate retained *locus standi*. The levies were an ongoing obligation which, even after the payment, the applicant continued to breach.

Regarding the applicant's second contention, the court held that while a debtor's ability to raise a loan might demonstrate its creditworthiness and thence its ability to pay its debts, it might also demonstrate the opposite. It depends on the facts of each case. Here it emerged that the third party was ultimately controlled by the applicant's sole member. Creditworthiness could thus not be inferred from the fact that the applicant managed to arrange payment of its debts by a third party.

As to the applicant's third contention, the court held, on the basis of a report by the liquidator, that the applicant's liabilities exceeded its assets. The court confirmed that absent an adequate explanation for the delay and prospects of success on appeal, condonation could not be justified. The appeal was dismissed with costs.

Delict

Loss of support: In *Osman v Road Accident Fund* 2015 (6) SA 74 (GP) the plaintiff's son (the deceased) was killed in a motor-vehicle accident. The plaintiff's claim was based on the notion of indigency in that she alleged that the deceased supported her during his lifetime. The deceased at the time of the collision was 28 years old. He was married and he resided in the same house as the plaintiff. The deceased was, at the time of the collision, employed at Standard Bank of South

Africa and earned a monthly salary of
R 7 837.
Ismail J dealt with the case law relating to indigency. In *Oosthuizen v Stanley* 1938 AD 322 (at 327 – 328) the court held that: 'There is no doubt on the authorities which are quoted in *Waterson v Mayberry* (1934 TPD 210) that the plaintiff had to prove not only that [his children] contributed to his support but that there was a legal duty to contribute because his circumstances were such as that he needed the contribution. The liability of children to support their parents, if they are indigent (*inopes*) is beyond question; … Whether a parent is in such a state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income is a question of fact depending upon the circumstances of each case'. In *Fosi v Road Accident Fund and Another* 2008 (3) SA 560 (C) this duty was explained as follows: 'Simplistically put, the deciding principle seems to be whether the parent can prove that he or she was dependent on the child's contribution for the necessities of life. Indeed, what constitutes necessities of life will in turn depend upon the individual parent's station in life.'
The court held that a child's duty to support a needy parent, as recognised under African customary law, must be extended to cultures – such as Muslim and Hindu – which share African culture's societal norms in respect of parents and the elderly, and impose a similar duty on children to support their parents.
In the present case the plaintiff was dependent on her deceased son's support and awarded her an amount of R 136 060,40 as damages.

Medical negligence: In *Nzimande v MEC for Health, Gauteng* 2015 (6) SA 192 (GP) the plaintiff, Nzimande, claimed damages, both in her own capacity and on behalf of her child, arising from their treatment during and after a caesarean birth at a hospital administered by the Member of the Executive Council for Health in Gauteng (the MEC). Nzimande claimed that both she and her newborn daughter endured unnecessary pain and suffering as a result of the negligence of doctors and nurses at the hospital. It emerged from the evidence of Nzimande that her child – who was cut on an arm during the procedure – was afterwards taken to the neonatal ward without Nzimande having been allowed to see her new-born child.
When, after three days, Nzimande was finally taken to her child, she found her in a non-functioning incubator and with her wounds untreated. The child was neither fed for three days, nor was she put on a drip. The child was simply neglected. In the meantime Nzimande herself had been left untreated, in pain, and ridden with anxiety about the welfare of her child. Medical experts stated the cut on the child's arm was 'undoubtedly due to the negligence of the surgeon'; that she thereafter 'suffered pain and discomfort for three months'; and that she was left with scarring that would require further treatment and, eventually, surgery. According to expert evidence procured by

the court the whole ordeal left Nzimande with mild post-traumatic stress disorder characterised by feelings of dismay, fear and anxiety.

For his part the MEC offered no more than a bare denial of liability, and counsel for Nzimande submitted the doctrine of *res ipsa loquitur* (the matter speaks for itself) should apply to her claim. Bertelsmann J held that while *res ipsa loquitur* seldom applied in medical negligence cases, the present circumstances were unusual enough to justify its application. The evidence established a strong *prima facie* case of grave negligence in the treatment of both mother and child. The MEC, having decided to oppose the action without leading evidence to dispel the allegation that the conduct of the personnel involved was substandard, had only himself to blame if the doctrine found application. Without refutation by the MEC, the strong *prima facie* case became proof on a balance of probabilities. While the issue of the potential consequences of the negligence was not properly addressed by counsel for Nzimande, this unfortunate mistake would not be allowed to derail the claim: Expert evidence would, in the interests of justice, be obtained by the court. In addition to the mother and child's future medical expenses,

R 300 000 and R 200 000 would be awarded as general damages for the child and mother, respectively.

The court awarded attorney and client costs against the MEC as a mark of the court's disapproval of his uncompassionate and obstructive conduct.

Divorce law

Jurisdictional conflict: In *SW v SW and Another* 2015 (6) SA 300 (ECP) divorce proceedings between the applicant, the husband, and the first respondent, the wife, were pending before the regional court, when the husband brought an urgent application before the High Court in terms of r 43 of the Uniform Rules. It was opposed on the ground that it was not urgent and that it constituted an abuse of the process. The wife filed a counter-application seeking, in the event that the application was not dismissed for the reasons stated, that it be postponed to enable her to deal comprehensively with the husband's papers.

The divorce litigation between the parties was acrimonious and hard fought. A central issue in the litigation concerned the care and residence of the parties' six-year old daughter. That dispute involved allegations and counter-allegations relating to what is termed parental alienation. The question of what care and contact

arrangements were in the best interests of the minor child had been considered by several experts appointed by the parties, respectively. One of these reports was that of the family-advocate. The husband did not agree with the content of the report and it was his dissatisfaction with the report that prompted him to launch the present application.

The husband requested the court for various types of relief, the first of which was an order directing the family advocate to reinvestigate the issue of parental responsibilities in relation to the primary care and residence of the minor child and to report on the investigation.

The core issue before Goosen J was whether the present court had jurisdiction to hear the application. The court held that a litigant who is a party to a divorce action pending before another court (in this case, the regional court) cannot invoke the jurisdiction of the High Court to secure relief in terms of r 43 of the Uniform Rules of Court. The court can, however, exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order, notwithstanding such proceedings. To invoke such inherent jurisdiction the applicant (here: the husband) must establish –

- that considerations of urgency justify the intervention; and
- that intervention is necessary to protect the best interests of the minor.

It is not a jurisdiction that will be lightly exercised. The court retains an inherent discretion not to exercise such jurisdiction to avoid a multiplicity of suits with the concomitant risk of jurisdictional conflict.

The application was accordingly dismissed with costs.

Property

Sale of church property: The facts in *Savage and Others v Order of the Sisters of the Holy Cross, Cape Province and Others* 2015 (6) SA 1 (WCC); [2015] 4 All SA 199 (WCC) were as follows: The first respondent, the church, is the registered owner of immovable property, which belonged to the Catholic Church. Because of financial difficulties, the church decided to sell the property to the third respondent (the buyer). The applicants were tenants of six cottages on the property, and had lived there for many years. Their forebears had lived on the property for multiple generations as guests of the Catholic Church (represented by the second respondent), and later, the applicants occupied the property as tenants of the first respondent.

The applicants, who were paying a nominal monthly rental, sought to interdict the transfer pending an application to be brought by them. The applicants alleged that their tenancy was based on cessions of lifelong leases, which the church had concluded with their forebears. They argued that the property was under the umbrella of the church, and that canon law and common-law principles precluded the church from alienating it. They also relied on the humanistic and communitarian principles of *ubuntu*.

The church, in turn, invoked economic necessity, arguing that it had to sell because the property was an untenable drain on their strained financial resources.

According to the applicants, they feared that should the transfer proceed, the buyer might evict them, leaving them destitute. They contended further that the church had not complied with canon law governing the Catholic Church, regarding the sale of church property.

Mahomed AJ held that the applicants were required to establish the requirements for a final interdict, namely, a clear right, infringement of such right and the absence of a suitable alternative remedy.

While the courts would not interpret property rights without regard to principles of *ubuntu*, they were not compromised by the church's effort to address its financial woes by selling the cottages. Though the alleged cession agreements could not be construed on the affidavits, the applicants were able to establish *prima facie* rights emanating from the lifelong lease.

A serious factual dispute thus existed regarding the extent of the applicants' rights in the property. There were two mutually destructive versions and various disputes of fact, which could not be resolved on the affidavits.

The transfer of the property was imminent, and unless the interdict was granted the applicants' claim in the main action would be defeated. The court reasoned that the refusal of the interdict would be final to the applicants' cause, whereas its grant would not.

In the light of the circumstances of the case and having regard to the fact that the trial court would be seized with the merits of the matter, the court held that there was no other satisfactory remedy available to the applicants and that the application for an interim interdict should be granted.

Spoliation

Requirements for spoliation order: The crisp facts in *Top Assist 24 (Pty) Ltd t/a Form Work Construction (Registration No: 2006/037960/07) v Cremer and Another* [2015] 4 All SA 236 (WCC) were that the applicant, the contractor, and the respondents, the owners, agreed that the former would erect a house for the latter. Suffice it to say that the relationship soured and that the owners were unhappy with various aspects of the contractor's work.

The owners appointed an independent third party to compile a list of defects in the building project. The owners discussed the content of the list with the contractor but the parties held conflicting views on the correctness of the list. The contractor rejected the owners' cancellation of the building contract.

While the contractor was off-site, the owners convinced the contractor's foreman and site manager to hand them the keys of the house, thus depriving the contractor access to the property. The third party, acting on the owners' instruction, ordered and/or requested the site manager to vacate the site and to remove the contractor's equipment from the site.

The contractor applied for a spoliation order to restore peaceful and undisturbed control and possession of the property to enable him to complete the building project.

Boqwana J pointed out that a spoliation order is a final determination of the immediate right to possession. It is the last word on the restoration of possession *ante omnia*.

In order to obtain a spoliation order the contractor must prove that it was in possession of the property and that the respondent deprived it of the possession forcibly or wrongfully against its consent. The possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person that holds possession jointly with others, as was the case here.

Because the contractor rejected the owners' purported cancellation of the agreement between them, the court held that there was no proof that the contractor, or its site manager consented to vacate the premises.

Because the parties had joint possession of the premises immediately before the site manager handed the owners the keys (both parties had keys to the premises) the granting of a spoliation order did not give the contractor more rights that it had prior to being deprived.

The spoliation order was accordingly granted with costs. The owners were ordered to restore the contractor's peaceful and undisturbed possession of the property.

Suretyship

Limitation on surety's liability: In *Kilburn v Tuning Fork (Pty) Ltd* 2015 (6) SA 244 (SCA) the facts were as follows: The surety admitted that he had signed a deed of suretyship in favour of Kilburn Auto Enterprises (Kilburn). The company (the creditor) was later divided into five trading divisions. The surety's undertaking was in favour of one of the divisions known as the 'After Market Products division'.

It was common cause that Kilburn's indebtedness to the After Market Products division had been discharged. However, Kilburn was indebted to the Yamaha Distributors to the amount of R 800 000. Kilburn failed to make any payments in terms of this indebtedness.

When the creditor obtained a judgment against Kilburn for an unpaid debt and thereafter sought payment from the surety, the surety raised the defence that the debt had been incurred by another division of the company that traded under a different name. This defence was unsuccessful in the High Court because the court held that it was clear from the suretyship undertaking that the surety undertook liability for all the debts of Kilburn. The court pointed out that the divisions of a juristic entity (such as a company) are not, in law, regarded as distinct or severable or having separate personalities.

On appeal to the SCA, Saldulkar AJ and Meyer AJA pointed out that the *Kilburn* case turned on the interpretation of the deed of suretyship. Its provisions had to be interpreted in accordance with the established principles of interpretation. It was also important to understand 'the factual matrix within which the deed of suretyship came into existence'. The particular contract that the surety signed contained the heading 'Deed of Suretyship – Tuning Fork (Pty) Ltd t/a After Market Products'.

The court held that although the undertaking by the surety was for the 'due fulfillment by the debtor of all its obligations to the creditor of whatsoever nature and howsoever arising, whether already incurred or which may from time to time hereafter be incurred, as a continuing surety … a court should not conclude, without good reason, that words in a single document are tautologous or superfluous'.

The heading of the undertaking and the detailed provisions of the deed of suretyship had to be read together. The heading was not meaningless or superfluous and the meaning that the High

Court attributed to the concluding words of the heading 'T/A After Market Products', namely that they were intended to enhance the identification of the creditor, had no basis in its language or context.

Linguistically, when these words are read in isolation and in the context of the body of the deed of suretyship, it may be thought that they are not clear. However, clarity is achieved when the language is considered in the light of the relevant factual matrix, including the purpose of the deed of suretyship and the circumstances in which it came to be prepared and produced.

The court concluded that it was clear that the deed of suretyship came into existence only because security was required for Kilburn to buy goods on credit from the 'After Market Products division'. Kilburn was rendered personally liable on the terms set out in the deed of suretyship for only the debts incurred by Kilburn Auto in purchasing goods on credit from the 'After Market Products division'.

While there is, in law, only one creditor, there is nothing to prevent a suretyship securing only certain debts due to that creditor. The factual context, including the document's purpose and the circumstances in which it came to be prepared, had to be taken into account – and here shed light on its intended meaning. The deed was drafted because After Market required security from Kilburn for its purchases on credit – it was intended to secure debts arising from those purchases only.

The appeal was accordingly allowed with costs, and the court *a quo's* decision that Kilburn was liable to Tuning Fork for debts arising from Kilburn Auto's purchases from Yamaha Distributors, reversed.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with civil procedure, constitutional law, costs, criminal law, labour law, land law, local authorities, motor-vehicle accidents, property law, revenue and sale of land.

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December 2015 (6) South African Law Reports (pp 317 – 643); [2015] 4 All South African Law Reports October no 1 (pp 1 – 129) and no 2 (pp 131 – 254); November no 1 (pp 255 – 399) and no 2 (pp 401 – 542); 2015 (11) Butterworths Constitutional Law Reports – November (pp 1265 – 1405)

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

Abbreviations

FB: Free State Division, Bloemfontein
CC: Constitutional Court
GP: Gauteng Division, Pretoria
GJ: Gauteng Local Division, Johannesburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Company law

Provision of security for costs by plaintiff/applicant company: In *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2015 (6) SA 375 (FB) the appellant, Hennie Lambrechts (as defendant in the main action) made an application in terms of r 47 of the Uniform Rules of Court for the furnishing of security for costs by the respondent, Bombenero (the plaintiff in the main action) notwithstanding the fact that unlike the Companies Act 61 of 1973 (the old Act), the Companies Act 71 of 2008 (the new Act) does not have provisions requiring security for costs to be furnished. The application was dismissed, hence the present appeal to the full Bench. The appeal was upheld with costs. The respondent was ordered to furnish security in the amount to be determined by the Registrar of the court. The appellant was granted leave to apply for dismissal of the respondent's main claim if the required security was not provided within ten days of the Registrar's determination.

Mocumie J (Lekale J concurring while Moloi J dissented) held that the instant case presented a typical situation in which the common law had to be developed beyond existing precedent. That was particularly so as the courts have always had the discretion, depending on the circumstances of each case, and in line with the grounds set out in s 13 of the old Act and those pronounced on by the courts, to determine whether to order the respondent to furnish security. A finding, as a general rule, that an *incola* company, regardless of the particular facts which warranted the furnishing of security, was not bound to provide security would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who would be gravely prejudiced by another's refusal to furnish

security because of the unfortunate absence of the equivalent of s 13 of the old Act, would be without remedy and thus left to suffer the considerable financial consequences of such an absence, which eventually would in turn offend against the principles of equality and of 'just and equitable decisions'. The approach to an application in terms of r 47 should be that in the case of an *incola* company, unlike a natural person, the respondent should adduce all the evidence which would convince the court that it had sufficient funds to pay costs in the event of an adverse costs order. Courts should insist on more details and not the say-so of the *incola* company.
Note:

- Although only reported now, the above judgment was in fact delivered in February 2014. Since then a few other judgments have been delivered on the issue.
- As Moloi J indicated in the dissenting judgment, it would appear that continuing to apply the repealed s 13 of the old Act, which does not find an equivalent in the new Act, under the guise of development of the common law, may not be the correct approach.

Suspension of a director and conflict of interest: In *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* 2015 (6) SA 338 (WCC) the applicant, Mthimunye-Bakoro, was an executive director and chief financial officer of the first respondent PetroSA, a state owned corporation.
After the first respondent suffered an estimated R 15 billion loss, the applicant was accused of poor performance and financial irregularities. As a result a meeting of the board of directors was convened to discuss the suspension of the applicant and the group chief executive officer (GCEO). Neither the applicant nor the GCEO was given notice of the meeting, which was duly held and the two, in their absence, were put on precautionary suspension with full pay. The purpose of the suspension was to investigate the two with a view to disciplinary action. The suspension was confirmed at a second board meeting, which both the applicant and the GCEO were notified of and attended, but were excused from participating in the deliberations. As a result the applicant approached the High Court for an order declaring the two board meetings unlawful and setting aside her suspension. The application was dismissed with costs.
Davis J held that in the instant case there was a manifest conflict of interest. It could not be contended that when the decision of the board concerned the preliminary suspension of an employee, who happened to be a director, such a director did not have a conflict of interest in the deliberations, which had to be undertaken by the board. Given the breadth of the definition of personal financial interest and the existing common-law principle regarding conflict of interest, as well as the applicant's own version regarding reputational damage and the possible implications for her employment with the first respondent, she could not, by virtue of the provisions of the Act, or alternatively the common law, be permitted to participate in meetings regarding her suspension. In addition, the first respondent's articles of association expressly precluded the applicant from

participating in any decisions in respect of her contract, such as her contract of employment. There could be no rational basis for suggesting that a person who faced suspension had no conflict of interest and could deal with the matter impartially, without taking her own interest into account and only taking account of the company's interest.

Costs

No taxation of legal fees and disbursements after payment: The facts in *Werkmans Incorporated v Praxley Corporate Solutions (Pty) Ltd* [2015] 4 All SA 525 (GJ) were that the applicant, Werkmans Inc, a law firm, rendered legal services to the respondent, Praxley, in respect of arbitration proceedings which the respondent had against a third party, ODM. From time to time the applicant would issue an invoice for work done, which was duly honoured. Eventually arbitration proceedings were scheduled for five days of hearing and to that end the applicant briefed counsel. However, the arbitration proceedings did not take place as scheduled but were instead stood down for three days, during which the parties waited for the outcome of an application for appointment of a business rescue practitioner for ODM. That appointment, if made, would have suspended or stayed arbitration proceedings. Counsel for the applicant submitted an invoice for the days of standing down the matter, as he was on brief during that time and could not do other work, in an amount which after offers and counter-offers, was agreed as some R 122 000.

The respondent refused to pay the amount contending that it, together with the attorney's fees and disbursements that had long been paid, should be taxed by the Taxing Master. The respondent rejected the offer to have counsel's fees only submitted to taxation, insisting that both such fees, together with attorney's fees and disbursements, which had already been paid as indicated, should be submitted to taxation. That being the case the applicant, after giving a warning about this, applied for winding-up of the respondent on the ground that it was unable to pay the debt. The respondent filed a counter-claim alleging that the winding-up application was an abuse of the winding-up process and accordingly sought a declaration to that effect in terms of s 347(1A) of the Companies Act 61 of 1973. If the declaration was granted, it would have entitled the respondent to claim damages suffered as a result of the vexatious, frivolous or abusive winding-up proceedings. Makume J granted with costs an order requiring the respondent to pay counsels' fees as sought by the applicant and dismissed the respondent's counter-claim for declaration of the winding-up application as abusive. The court held that there was no reason for the respondent not to pay counsel's fees for the days when the matter stood down on the respondent's instructions. The respondent was not saying that the fees charged by counsel were not fair and reasonable. Instead it was saying that the fees charged by its attorneys, the applicant, were not fair and reasonable and accordingly demanded that they be submitted to taxation. The applicant's argument that it should not be compelled to tax bills that had already been paid was correct. As the respondent

received the accounts, scrutinised them, was satisfied and proceeded to pay without asking for taxation, it could not thereafter demand that the bills be taxed.

The court was also not persuaded that in launching liquidation proceedings the applicant acted maliciously or vexatiously as it had established a debt that was due and payable but which the respondent resisted on unreasonable grounds under circumstances, which raised a suspicion that it was unable to pay its debts. Accordingly, it could not be held that there was an abuse of the winding-up process.

Divorce

Motion proceedings are not permissible in matrimonial matters: In *BR and Another v TM; In re: LR* [2015] 4 All SA 280 (GJ) the second applicant (wife) and the respondent, TM (husband), were married in terms of customary law. A child (LR) was born of the marriage. A few years later the relationship between the two ended, as a result of which they parted ways to start a new life separately. Each found a new partner and married initially in terms of customary law but later according to civil law. It was at that stage that the parties were advised of the need to formally terminate their customary marriage. To solve the problem the respondent instituted a divorce action against the second applicant. Because of the resemblance between the first applicant and the minor child LR, it appeared that he was the minor's biological father, something which paternity tests confirmed. For that reason, and while the divorce action was pending, the first applicant and second applicant launched motion proceedings for an order declaring that the –

- first applicant was the minor's biological father;
- first and second applicants be accorded full parental rights and responsibilities in respect of the minor; and
- first and second applicants were sole holders of parental responsibility of maintenance in respect of the minor.

Kathree-Setiloane J declined the request for the order sought, making no order as to costs, and instead referred the issue to the divorce court for determination in the pending divorce action. It was held that all the issues raised by the order sought were also at stake in the pending divorce action and were central to its finalisation. A court would not grant a decree of divorce until it was satisfied that all issues relating to a minor or dependant children, who were born of the marriage, were resolved in their best interests. The best interests of the child standard, as prescribed in s 28(2) of the Constitution, determined the outcome of all legal proceedings concerning a child. The courts have consistently held, on grounds of public policy, that motion proceedings were not permissible in matrimonial causes since it was undesirable for a court to grant a divorce action without hearing oral evidence of the parties, first because not only was the status of the parties themselves involved, but also those of the children, and second because of the interests of the state in the preservation of the

binding nature of marriage. A court rarely granted a divorce without having had the opportunity to

hear evidence of at least one of the parties in a divorce action, particularly if there were minor or dependent children involved.

It was essential that the parties to a contested divorce action be given the opportunity to testify and put evidence before the divorce court on issues that were raised for determination. Where the paternity and parental rights and responsibilities of a husband were in dispute in divorce proceedings, it was important that he be given the opportunity to present evidence in the divorce action for consideration and evaluation by the court presiding therein. It was not appropriate for a party to attempt to circumvent a pending divorce action by applying to have matters, whether disputed or not, which were raised in the divorce action, determined by a court in motion proceedings. Any attempt to pre-empt the findings of a divorce court by instituting motion proceedings to deal with matters that were in issue in the divorce action and concerned the parties to the divorce would

effectively fetter the discretion of the judge presiding in the divorce action to hear oral evidence, consider and evaluate it, something which was undesirable.

Revenue

Conservancy and anti-dissipation order: In *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA); [2015] 4 All SA 131 (SCA) the Australian Tax Office (ATO), acting in terms of a double taxation agreement (DTA) concluded between Australia and South Africa, and doing so on behalf of the Australian Commissioner of Taxation, requested the respondent Commissioner, South African Revenue Service (Sars) to obtain a preservation and anti-dissipation order against the assets of the first appellant, Krok. The order was duly granted by the GP per Fabricius J in terms of the Tax Administration Act 28 of 2011 (the Act) and a *curator bonis* was appointed to take care of the property. The first appellant appealed against the High Court order on the ground that as the amendment to the DTA, which made provision for request for recovery of a tax debt in South Africa by ATO through Sars, came into

effect on 1 July 2010 whereas the tax debt sought to be recovered arose between 2003 and 2010, the tax claimed by the ATO fell outside the scope of DTA. The second appellant, Jucool Inc, contended that as the assets generating income and/or the income thus generated had been sold by the first appellant to it, they could not be preserved for a debt due by the latter. The appeal against that order was dismissed with costs by the SCA.

Maya JA (Mhlantla, Wallis JJ, Dambuza and Meyer AJJA concurring) held that it was open to the parties to the DTA to apply the provision on assistance in the collection of taxes to revenue claims arising before that agreement came into force and that the question was whether it was their intention that the agreement should have that effect. In the instant case all indications were that such was the intention. The effect of the amendment to the agreement was plainly prospective as it could only be invoked when the parties so agreed and its provisions came into effect. Tax claims that arose in the past in respect of which assistance was sought would also be covered. It was a

firmly established principle of the law that a statute was not retrospective merely because a part of the prerequisites for its action was drawn from time antecedent to its passing. When the amendment came into effect on 1 July 2010, it applied to a revenue claim, that is, an amount owed in respect of taxes of every kind and description. Therefore, the first appellant's jurisdictional challenge to the preservation order had to fail.
Turning to the second appellant's contention it was held that the assets and income still belonged to the first appellant, and not the second appellant, as there had been no transfer in the deeds office, in the case of immovable, delivery in the case of movables and cession in the case of incorporeal assets.

Jurisdiction of the tax court in tax matters: In *Ackermans Ltd v Commissioner, South Africa Revenue Service* 2015 (6) SA 364 (GP) the respondent Commissioner raised additional assessment in the amount of some R 185 million on tax to be paid by the applicant taxpayer, Ackermans Ltd. The respondent alleged that the applicant had engaged in a series of transactions including a loan agreement, subscription agreement, sale of shares agreement and swap agreement, all of which were simulated transactions intended to evade tax by claiming purported interest deductions. It was alleged that having regard to the true nature and substance of the transactions, which had been misrepresented or were not disclosed, the applicant ought not to have claimed interest deductions as it did.
The applicant approached the High Court for an order reviewing and setting aside the additional assessment on the ground that, as administrative action, it should have been done within a reasonable time as required by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). That was so as instead of raising the additional assessment within three years as required by s 79 of the Income Tax Act 58 of 1962 the respondent did do only after some six years, which was very late. Moreover, in terms of s 237 of the Constitution all constitutional obligations are required to be performed diligently without delay. The respondent raised the point in *limine* that as raising additional assessment was a tax issue, objection against it should have been taken to the tax court and not the High Court. Moreover, as there was misrepresentation or non-disclosure of material facts on the part of the applicant, the three-year period of limitation did not apply.
Mothle J held that because the review application under PAJA raised the issue of fundamental right in terms of the Constitution, which empowered the High Court to decide on any constitutional matter, the High Court had jurisdiction to hear the application. For that reason the point in *limine* had to fail. However, as the respondent contended that there was misrepresentation or non-disclosure of material facts while the applicant argued that such was not the case, there was a dispute of fact that was relevant to deciding whether, apart from other explanations, the delay in raising additional assessment fell or did not fall within the three-year period of limitation as provided for in s 79. If it was to be concluded, on the resolution of the disputed facts, that there

was misrepresentation or non-disclosure on the part of the applicant, the delay by the respondent in raising additional assessment would be covered by s 79 and would as a result be reasonable. If, on the other hand, it was to be found that there was no misrepresentation or non-disclosure of material facts the delay, which occurred before additional assessment was raised, would be unreasonable and hit by the three-year period of limitation. That being the position the disputed facts and issues raised in the application required the expertise of a tax court, and not the High Court, to adjudicate. Accordingly, the court dismissed the review application, ordering each party to pay own costs. As the court did not deal with the merits of the case it was indicated that the applicant could proceed to the tax court by way of appeal against the additional assessment raised by the respondent.

Sentencing

Interests of young children when sentencing their primary caregiver: In *NDV v S* [2015] 4 All SA 268 (SCA) the appellant NDV pleaded guilty to 31 counts of fraud and one of contravening s 4(*b*)(i) of the Prevention of Organised Crime Act 121 of 1998 (the Act). That was after she, as a paralegal, stole trust money amounting to some R 1,4 million from her employer, an attorney. She was 28 years of age, a mother of two children aged eight and ten years, and in the process of divorce. The death of her father when she was nine years old had seriously affected her. At the age of 14 years she started using marijuana, after finishing school, she experimented with heroin and cocaine. Her husband, a hardened drug addict, was not able to assist her or her minor children. Her father-in-law was an unrehabilitated insolvent while her mother was a senior citizen (66 years of age), had very little income which could not support the minor children, was ill, had psychological problems and abused prescription medication (sleeping pills). Moreover, the appellant made two suicide attempts on her life. Because of the plea of guilty the only issue left was sentencing. By that time she had repaid the money, which benefited her personally, while the assets bought with the proceeds of her crime had been forfeited to the state in terms of the Act. The regional magistrate sentenced her to eight years of imprisonment, three of which were suspended on the usual terms. An appeal to the GJ was dismissed with costs by Tshabalala and Monama JJ.

A further appeal to the SCA was upheld. Her sentence was reduced to three years' imprisonment from which she was eligible for placement under correctional supervision (house arrest) in the discretion of the Correctional Services Commissioner or a parole board. Lewis JA (Mhlantla, Leach, Majiedt and Petse JJA concurring) held that the courts were guilty of grave misdirections. For example, the regional court failed to have regard to any of the expert reports and material evidence before it and did not, as it should have done, consider the interests of the children. The evidence and reports were those of a social worker who was also a probation officer, a clinical psychologist and general physician.

The children's rights were paramount and more important than anything else but that did not mean that everything else was unimportant. When a custodial sentence of a primary caregiver was in issue the court had four responsibilities, namely to –

- establish whether there would be an impact on the children;
- consider independently the children's best interests;
- attach appropriate weight to those interests; and
- ensure that the children would be taken care of if the primary caregiver was sent to prison.

In a number of decisions where a woman (as primary caregiver) had been convicted of theft or fraud, sentences were set aside on appeal and reduced or remitted to the trial court to consider sentence afresh, taking into account properly the interests of minor children.

In the instant case the fraud committed by the appellant against her employer, when she was in a position of trust, was such that a custodial sentence was required. Society had to be assured that persons who abused positions of trust for their gain would not be allowed to walk free. At the same time, taking into account the best interests of the appellant's very young children, the period of imprisonment should not be lengthy and should take into account the period for which she was incarcerated after her appeal to the full Bench failed and before she was again released on bail. Also, she had to be given an opportunity to make arrangements for her minor children's care and support before her incarceration.

Telecommunication

Statutory right of network operator to use municipal infrastructure to install network:

Section 22 of the Electronic Communications Act 36 of 2005 (the Act) provides among others that: 'An electronic communications network service licensee may –

(*a*) enter upon any land … ;

(*b*) construct and maintain an electronic communications network or electronic communications facilities…; and

(*c*) alter or remove its electronic network or communications facilities.'

In doing so the licensee is required to have due regard to the applicable law and environmental policy of the country. To carry out any of the above activities the licensee is required, in terms of s 24, to give the local authority or person owning or responsible for the care and maintenance of any street, road or footpath where the work is to be done, a 30-day written notice period. The section further grants the local authority or person the right, at all times while the work is in progress, to supervise the work and receive payment of reasonable expenses incurred in connection with any alterations caused or supervision of the work involved.

In *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) the respondent Link

Africa, which was an electronic communications network service licensee, gave the applicant City of Tshwane Metropolitan Municipality (Pretoria) (hereinafter referred to as the City) the required

30-day written notice that it was going to install telecommunication network infrastructure in the form of fibre-optic cables and subsequently started doing so, completing the first phase thereof. The City approached the High Court for an interdict restraining the respondent from continuing with its network installation as well as for removal of cables already installed. It was the City's contention that the licensee was required to seek its consent before installing the cables and that doing so without such consent amounted to arbitrary deprivation of property. The constitutionality of both ss 22 and 24 was also challenged. The GP per Avvakoumides AJ dismissed the application and denied leave to appeal. That leave was also denied by the SCA, hence an approach to the CC, which granted leave to appeal but dismissed the appeal itself with costs. Reading the majority decision Cameron and Froneman JJ (Khampepe, Madlanga JJ, Molemela and Theron AJJ concurring) held that ss 22 and 24 of the Act were not constitutionally invalid, nor did the Act permit an arbitrary deprivation of property, as the minority judgment of Jafta J and Tshiqi AJ (Moseneke DCJ and Nkabinde J concurring) found. The majority agreed with the minority that a licensee did not need the consent of the City before installing network infrastructure. Both private and public law recognised that the law could grant to one person a right in the property of another, entitling the former to use and enjoy the other person's property or to prevent the latter from exercising certain entitlements flowing from the usual right of ownership. However, where the law imposed that obligation on landowners it required fair procedures and equitable compensation in appropriate circumstances. In the present case s 24 did just that. First, the licensee was required to provide 30 days prior written notice of its intention to construct, maintain or alter electronic communications facilities. Second, the notice had to specify the manner in which the infrastructure was to be constructed and maintained. Third, the notice could provide for compensation for all reasonable expenses incurred or any supervision of work relating to such alteration, where applicable. Because of the landowner's multiple safeguards, both substantive and procedural, the deprivation of property was entirely reasonable and was not arbitrary.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with business rescue, claim by sub-contractor for payment for services rendered, correction of incorrectly recorded servitude, declaration of portion of national road as toll road, defamation of public official, discretion of court to allow new matter to remain in replying affidavit, duty of property owners to protect visiting children from injury or harm on their property, extradition, identification of headmen, leave to intervene in proceedings, no obligation on Legal Aid South Africa to fund legal representation before commission of inquiry, obligation of Department of Education to provide education to youth at child care and youth care centres, onus of proof, relief aimed at giving proper effect to court order already granted, service of summons on company after

liquidation and supplementing written agreement by oral agreement and e-mails and usage of cellular telephone communication as evidence.