OrdeNuus Society News

THE LAW SOCIETY OF THE NORTHERN PROVINCES • DIE PROKUREURSORDE VAN DIE NOORDELIKE PROVINSIES

September/October 2006 • September/Oktober 2006

No. 119 UP TO DATE NEWS OF YOUR LAW SOCIETY
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MESSAGE FROM THE PRESIDENT

Ronald Bobroff
President

1. THE INTERNATIONAL BAR ASSOCIATION CONFERENCE : CHICAGO – 17 SEPTEMBER 2006

1.1. One of the perks of being President of the Law Society is that the position normally includes an overseas trip to attend an International Conference and I was fortunate in having the Council send me to Chicago together with our Director Thinus Grobler to attend the IBA Conference. The International Bar Association is the premier and in fact, I suppose, the only truly functional international body of lawyers. Those of us who had attended the Durban IBA Conference came away exhilarated and it was with a sense of great anticipation that I took my cattle class seat in an aircraft departing from Johannesburg Airport.

1.2. The Chicago McCormick Conference Centre is too big to fully comprehend and absorb in one go. The entrance alone soars over seven floors high and I in fact needed my specs to see the ceiling. The opening session in the grand hall attended by over 3000 lawyers was truly amazing. Real American pomp and ceremony filled the air with excitement and Thinus and I could have been attending the opening of a rock concert with a superb orchestra, flashing lasers and so on. The opening addresses were thought provoking and related primarily to the Rule of Law and the current world situation.

1.3. The conference extended over five full days and many sessions ran parallel so that one was forced to make a choice. The session on class actions was fascinating. Jan Schlichtman, the attorney played by John Travolta in the movie "A Civil Trial" was one of the speakers. He demonstrated what powerful tool class actions are specifically in the context of "toxic tort" litigation, and how class actions balance the scales by enabling those who have no power or influence to obtain redress against those who do have vast power and influence. He queried why so much concern is expressed about lawyer's fees, usually by insurance companies, big business or their surrogates and why no concern is expressed about the obscene earnings of the so called "captains of industry" whose corporations plunder and pollute and usually get away with it. He was a sparkling speaker and had the audience in stitches with his wit and humour, including the observation that John Travolta made more money out of playing him, than he made being himself in his own professional life. He left us with the observation that claimants come to tort lawyers because they were abused by power and class tort actions are about civilising power through the law.

1.4. He was followed by “Mr Class Action”, Mel Weise. A small and quietly spoken man, Mel was recently reported in Forbes magazine as being at the very top of the pyramid in this area of practice. His successes included a one billion dollar settlement against Drexel Burman and a one point seven billion dollar settlement against Prudential Life Insurance. He is lead counsel on the Exon Valedez case. He spoke eloquently about corporate greed and how people are dependant on those far removed from them for their well-being and safety. The law provides a means of helping victims, as governments are unable to protect victims against civil wrongs. There are many areas of abuse which make ordinary people victims and class actions equal the playing field and provide just reward to lawyers based on the risks taken. The salutary effects of early consumer litigation by Ralph Nader against General Motors in the 1960's concerning its then unsafe cars and documented in Mr Nader's book, “Unsafe At Any Speed”, was discussed. It is only because of the efforts of Ralph Nader and others that our cars have seatbelts, collapsing steering columns, safer fuel tanks, ABS brakes and so on. Class actions taught the motor industry the lesson that the cost of producing safer cars was cheaper than paying punitive damages to the victims of personal injury caused by dangerous cars.

1.5. A lawyer representing insurance companies then addressed the audience. Young, intense and the very image of a petulant Wall Street lawyer, the speaker launched into a vigorous attack on plaintiff lawyers and what he called abusive process. He called for a loser pays costs system so as to “deter and inhibit frivolous actions”. He dismissed actions holding directors liable for the fraudulent manipulation of share prices as ill founded and maintained that share prices rise and fall on account of reasons other than manipulation – “that's capitalism, not fraud”. The panel comprised lawyers from France, Italy, Sweden and Canada. I came away with a new appreciation of just how advanced American jurisprudence is in protecting the weak against the strong compared to all other jurisdictions where legal positivism in the sense of class actions or group tort actions are just in their infancy. The signs however are positive and it seems clear that fertilisation of ideas provided by such conferences give great impetus to the international spread of this engine of redress against abusive power.

1.6. There were fascinating sessions on practicing law after 50!!!! Most major international law firms retire partners at 50 – 55 unless they happen to be the major rainmakers or possess unique skills. A very fascinating session on the management and marketing of law firms was addressed by the Chairman of Baker & McKenzie who related how that firm, comprising thousands of partners and even more thousands of employed lawyers' functions. It practices throughout the world and it has expertise in every area of the law. The managing partner of a 450 partner London practice detailed the English perspective and this was followed by an address by the senior partner of a major French law firm. By and large the principles of successful practice are the same for a small practice as for a mega practice. First-rate skills, ongoing study, customer service and niche branding usually leads to success. Echoes of GATTS entered my mind and I wondered how most South African law practices would cope with competition from these jurisdictions. We have a lot to learn and we better learn fast as the world is a village and our walls will soon be breached. I commend all of you to visit the IBA website and to read the fascinating papers to be found there.

2. PERSONAL OBSERVATIONS CONCERNING THE UNITED STATES

2.1. I did not sail past the Statue of Liberty on arriving in America for the IBA Conference but arrived by air at the amazing O'Hare Chicago Airport. I have visited America many times previously and during my three weeks stay this time I was again reinforced in my observation and conviction that this is truly the land of the Free and the Brave. The message given by the Statue of Liberty to millions and millions of refugees over the last 150 years or so as they sailed past her outstretched arm remains as valid and genuine today as it ever was. America truly is the land of hope and glory and uniquely placed in its Constitution is not only enshrined the right to life and liberty but also the right to happiness.

2.2. Now more than ever the kaleidoscope of races and nations populating America flows from all corners of the earth with the best and brightest of all nations voting with their feet and entering America seeking to embrace the American Dream of freedom, liberty, unlimited opportunity and happiness for themselves and their families. In a very real sense America is the fountainhead of democracy, of learning in the social and physical sciences and the place from which anything of real consequence to mankind originates and proceeds

to permeate its benevolence throughout the entire world. It is truly the Rome of our time. Upon whom does the world rely for assistance concerning natural disasters anywhere in the world, including ironically, the very countries who are America's most vocal and bitter critics. American know how, with regard to medicine, farming, travel, disease prevention and virtually every field of discipline is willingly and freely shared with the entire world. Which other nation has the resources to start preventative planning against the very real prospect of all life being destroyed in a flash consequent upon an asteroid striking the Earth as occurred 65 million years ago and which wiped out the dinosaurs and most other forms of life. To whom does the world turn for the development and distribution of vaccines against the anticipated avian flu pandemic or any other disease which emerges anywhere in the world and particularly in Africa with its unfortunate vast range of terrible diseases including lassa fever and other exotic maladies and of course AIDS?

2.3. On a cultural level every civilised or developing country emulates merican dietary trends, clothing fashions and lifestyles and voraciously consumes American movies, music, entertainment and literature. The dream of mankind from time immemorial to soar into the cosmos has for the first time been realised thanks to the vision, courage and fantastic scientific enterprise of America's scientists. The need and the dream of mankind to spread itself beyond this world so that our species should not perish when this small globe we call home eventually dries up and burns out is being addressed through the international space station project. All the major developed nations of the world are benefiting from the shared American expertise and the opportunity to participate in the beginning of the greatest adventure ever to be experienced by mankind. The space station will serve as the launching platform for manned missions to Mars and beyond within the lifetime of most of us.

2.4. Of course, no nation is perfect and America has many faults but it is unarguably, free, civilised, clean, first world and continually advancing in every possible way and perhaps most significantly, its people are overwhelmingly highly skilled, compassionate, articulate, safe and happy. Not for nothing does America have to erect fences and impose strict control on its borders to stem the human tide seeking to enter and share in the universal dream embodied by the word "America". It is equally significant that exactly the opposite is true of most of America's critics and enemies and whose borders are tightly closed so as to prevent those land's oppressed, unhappy and desperate citizens from escaping to a better life.

2.5 Would it not be a good thing if there came into being a United States of Africa? The continent has unlimited natural resources and vigorous and energetic people. All that it requires will be a flourishing of true democracy, and an end to corruption and tribal strife and a realisation that the future of the continent is absolutely unlimited. Why should Africa not also together with India and China become one of the new economic giants of the world? May providence bestow upon South Africa the benevolence and good fortune enjoyed by the United States and its people and may we similarly become the magnet to which the best and brightest of other nations will be drawn, as are moths to a flame.

3. OVERVIEW

The year of my Presidency has simply flown. Major issues faced by the Profession and which will still have to be addressed concern the ongoing Road Accident Fund challenge, the Legal Services Charter, predations and new initiatives to be expected from the Legal Aid Board, the Legal Practice Act, safeguarding the Constitution and the Rule of Law, enhancing standards of practice and education, streamlining modernising and refining the Council's disciplinary functions, establishing effective practice support mechanisms including bookkeeping support for newly admitted attorneys, addressing serious deficiencies in the administration of justice particularly in the criminal courts, combating the physical degradation of court buildings and facilities, providing proper support infra structures for the judiciary, reporting on the abysmal state of our prisons and assisting prisoners in exercising their Constitutional rights to basic humanitarian treatment, revising the Council's rules, modernising advertising and marketing guidelines, establishing a new legislation monitoring committee so as to keep Council and members fully and timeously informed, establishing an effective lobbying facility at Parliamentary level, furthering public relation initiatives by extending the Professions media visibility and availability to counter the usually unfounded negative perceptions of the Profession. Lastly but most importantly the Profession as a whole and every lawyer individually needs to do everything possible to prevail on Government to properly, forcefully and competently address the violent crime which is now clearly out of control.

As at 2005 :-

- **18793 MURDERS,**
- **55114 RAPES,**
- **24516 ATTEMPTED MURDERS,**
- **217614 ROBBERIES,**
- **13 500 HIJACKINGS,**
- **9391 HOUSE ROBBERIES,**
- **332212 BURGLARIES**
- **and hundreds of thousands of other crimes are simply not acceptable!**

The Council had to deal with numerous other issues and it was an eye opener to have direct insight into the complex machinery of your law society. I have reported in greater detail on the Council's work in the President's Annual Report and Council hopes that as many members as possible would have attended the Annual General Meeting at Sun City on 04 November 2006. If you did not make it this year you should make every effort to attend the AGM of your local circle council, attorneys association and of course the LSNP in 2007. None of us like change but change is coming to our Profession – rapid and bewildering change. If you ignore this you will be overtaken by events and your Practice might not survive. Unity is truly strength and by joining with your colleagues and contributing towards the development of your Profession you will both ensure your survival as also derive much satisfaction and perhaps even pleasure from becoming involved in the affairs of your profession.

I hope that you have found some food for thought in various topics I have addressed during this and previous editions of Society News. If I have motivated just a few of you to become involved and to commit yourselves to serving our Profession I will have succeeded in my endeavour. It has been a privilege and a unique honour to have served as President of your Law Society for the 2005 / 2006 year. I have every confidence that the incoming President and your Council will continue to go forward in its selfless service to you, to the Profession and to South Africa.

Sincerely,

RONALD BOBROFF
PRESIDENT OF THE LAW SOCIETY OF THE
NORTHERN PROVINCES
02/11/06

ATTORNEY PRACTICE LEARNERSHIP

PURPOSE

The Learnership is aimed at the combination of quality assured course and workplace training. It requires a training contract which envisages the enhancement of the law graduate's practical competence and his/her productivity in the firm, and which eventually leads to the qualification National Certificate: Attorneys Practice (NQF Level 7), (the admission as an attorney)

WHO AND HOW

In terms of the Skills Development and Skills Development levies acts, the contract is concluded between the employer (practices) the learner (LLB/BProc graduate) and the training provider (L.E.A.D). The employer must be compliant with the Acts or exempted on the basis of a salary bill of below R500 000.

Training is based on a qualification which is registered with SAQA, which corresponds with the standards for admission.

MODELS

2 years articles or community service including 5 weeks training course at L.E.A.D

OR

1 year articles or community service plus attendance of School for Legal Practice (L.E.A.D.) of 6 months.

Note: Candidates are not compelled to register a learnership. It is recommended, however.

BENEFITS

- Tax rebate and
- Grants to financially deserving candidates.

COMMENCEMENT

Contract must be signed prior to employment of the candidate attorney.

STEP BY STEP PROCEDURE

The employer obtains an application form from SASSETA. Fax (011) 805 6630 or website www.sasseta.org.za

↓

After application, SETA provides parties with a contract, for signature.

↓

Graduate applies for attendance of the day or evening L.E.A.D School (Jan or June) before end September or March respectively, or 5 weeks course L.E.A.D website www.lssalead.org.za

↓

Employer sends signed contract to SETA for registration

↓

Employer provides SETA with quarterly progress report

↓

L.E.A.D provides SETA with performance report

↓

Learnership ends when candidate is admitted as an attorney

THE SPACE *RES* FIFTH PART

[First part of the *Cosmos 954 Incident*]

Despite the presence of thousands of satellites either orbiting our planet and other space objects penetrating the remote known and unknown corners of the universe , we are not aware of any collisions and other "normal" (body to body) accidents or collisions having taken place in space. The reason for this is quite obvious namely that logistical planning and co-operation by the space administrations, the predetermined trajectories of the different space objects as well as above all, the unfathomable size of the universe outside our planet, contribute to the relative space safety experienced by astronauts and space objects and reduce accidents of such nature to a large extent, if not to zero for the very discernible future.

However certain incidents which had taken place since the early times of space travel, do constitute "space accidents" or incidents, which indeed justify our attention. Moreover , in view of the very interesting and important legal principles applicable, it is imperative to discuss these here as it logically forms a very important part of any space law curriculum.

The incident being discussed here (and which will, due to the extent of the interesting facts and legal principles involved , be dealt with in more than one issue) concerns the circumstances surrounding the launching and disintegration of Cosmos 954 . Apart from other physical and logistical considerations, the important aspect concerning Cosmos 954, is the fact that it was a nuclear powered satellite [NPS]. The use of such space vehicles are not questioned in principle . They are preferred to conventionally powered satellites because they are more compact, reliable, endurable and are able to withstand extremely hostile environment. There are two types : the radio-isotope and reactor systems.

Despite it's relative engineering safety, there are nevertheless questions to be answered. If one took into consideration that by 1986 there was a total of some 12 000 kilograms of uranium 235 in use in NPS and a estimated total of three metric tons of fuel and fission products in orbit by 2000 , there is no doubt that certain pertinent legal questions would ensue, one of which is : *While there is no doubt that such satellites cannot result in a nuclear explosion, could not the radio-active damage which it might cause, be equated to such explosion ?*

There is no question that any NPS which is used as a *weapon*, would be in contravention of Article IV of the Outer Space Treaty, the latter which also renders the right to explore the universe a relative and not absolute right. According to the most eminent authors on space law, of which professor Reijnen is one, such satellite is totally permitted within the ambit and purpose of the 1967 Outer Space Treaty as it complies with the legal requirement of "*equipment or facility necessary for the peaceful exploration of the moon and other celestial bodies.* Hurwitz however remarks that the space lawyer is here confronted with the problem that the treaty deals with the *moon and other celestial bodies* and not with outer space , and specifically earth orbits , where the Cosmos 954 was orbited. The latter author is of the opinion that the basis to permit space vehicles must be found elsewhere.

The Cosmos 954 nuclear powered satellite was launched by the Soviet Union on 17 September 1977 for maritime observation. This mission was scheduled to last for approximately 70 days, after which period it would have been steered into a higher orbit , consequent upon which it would then "naturally" decay during a period of some 600 years and the time by which its nuclear power source of 55 kilograms of uranium 235 would become inert. Due to malfunctioning however, the satellite went out of control and re-entered the atmosphere of the earth 24 January 1978. Although most of the several tons of weight of the satellite and radio-active material burnt up on entry, approximately 65 kilograms of such radio-active material survived and were scattered in the northern areas of Canada, over an area the size of Australia.

One can only imagine the seriousness of the legal and diplomatic questions to be resolved. But apart from those, the accident involved a massive and very complicated physical clean up operation with the code name of Operation Morning Light . It had to take place in two phases : the first phase during the period of ice and snow and the second after the melting. The area of the clean up operation was divided into 8 equal sectors , taking place by temperatures as low as -40 degrees Celsius (-100 degrees Celsius with the wind chill factor). But this operation was furthermore complicated by the fact that since Canada is rich with mineral wealth, it was difficult to distinguish between radiation signals originating from the minerals and those possibly originating from the accident debris. By March 1978 the operation was completed and literally thousands of pieces of radio-active debris collected.

The re-entry of Cosmos 954 was not unexpected as the USA through its satellite surveillance system, detected the malfunctioning of the satellite and followed it's disintegration to the last moment. Following secret talks between the USA and Russia as to the nature of the reactor involved , the USA took it upon themselves to inform all countries concerned, NATO , etc. The main issue however between Russia, the launching state and Canada, the victim state, was that concerning the duty of the launching state to provide information to the victim state . The USA assisted Canada in the clean up operation but the Soviets , according to the available sources, only offered assistance after the clean up operation had begun. It's offer was however rejected by Canada *but the Russians were requested to supply Canada with details as to the reactor utilised.*

According to the sources consulted, the information required, which included additional details apart from those received by Canada from the USA, was not forthcoming until March 1978. The spokesman for the Russians , Leonid Sedov , explained that the Cosmos 954 had apparently collided with another object in early January 1978 , had suffered a sudden depressurization, and entered the atmosphere of the earth through the dense layers above Canada and then disappeared. The Soviets however gave the assurance that if any debris was found, the radiation would be minimal and that Russia was not interested in return of the debris.

The major Soviet complaint against Canada was the latter's refusal to permit Russia to participate in the clean up operation. The Soviets held the view (and one which the writer respectfully agrees with) that the clean up operation should be a joint operation between the launching and victim states. The

Canadian's standpoint (one which the writer, cannot, especially on the basis of transparency and the principle *audi alterem partem* , agree with) was that the victim state should have the right to select who it desires to join the clean up operation.

Whilst Canada was not at all satisfied with the explanations of Russia, the USA , surprisingly, in fact was. The USA shared the Soviet opinion that there was no duty on a launching state to warn any other state except the leading state of a hostile alliance as well as , and more importantly , that the launching state is only under obligation to furnish *such details as would be necessary to assist in the clean up operation.* It is Hurwitz's viewpoint that no country is immune from damage being caused on its nationals and territory and that this lack of security can only be countered by universal co-operation and the Cosmos 954 incident showed a clear failure of the system.

In the following issue attention will be given to the very important and interesting aspect of the submission of the claim by Canada.

PIETER VAN R COETZEE

Attorney to the High Court, member of the Criminal Law Committee, student of Space Law, past member of the Astronomical Society, lectured on aspects of Space Law i.e. On occasion at the Society and on radio talk, Member of South African Board of International Youth Project on Space Science and Law /Participation in International Video Conference on Space Science and Space Law

Reference works:
State Liability for Outer Space Activities in accordance with the 1972 Convention on International Liability for Damage Caused by Space Objects , Bruce A Hurwitz. , Mathinus Nijhoff Publishers Dordrecht.

PLEDGING OF SHARES

1. Introduction:

1.1 Shares can be ceded or pledged in *securitatem debiti* to secure a loan of debt. Traditionally, people refer to the "pledging" of "shares", although it is actually the share certificate that is pledged and the rights in the shares (a share is an "incorporeal right") that are ceded *in securitatem debiti*.

1.2 The usual way of pledging shares in the ***paper environment*** is by handing the pledge the scrip, together with a transfer form (signed in blank by the pledger), but without registering the pledge (creditor) as a member in the register of members.

1.3 There are no legislative or formal requirements for the pledging of certificated shares; the common law applies. The handing over of the share certificate is a practical arrangement that fits in with the statutory transfer procedure for certificated shares. This arrangement enables the pledge to sell off the shares if the pledger as agreed between the parties does not repay the debt.

1.4 Furthermore, the South African Common Law requires that in order to protect the rights of third parties, "publicity" be given to the pledge.

- In the case of immovable property, the public register in the Deeds Office is used to give effect to the publicity requirement.
- "Possession" of the movable property by the pledge generally satisfies the requirement, although this has been widely criticized by legal writers due to various modern practices. (The argument is that there are many different ways to give effect to publicity, e.g. by introducing a central computerised registration system as proposed by the Legal Commission.) The delivery to the pledge of the share certificate (which records the right to be pledged), satisfies the requirement for a valid pledge.

1.5 Thus, the profession of the share certificate by the pledge (i) satisfies the publicity function, and (ii) secures control over the pledged property.

1.6 To protect the rights of shareholders in the **CSD environment**, section 43 of the Securities Services Act 30 of 2004 ("the SSA") makes provision for a pledge or cession of securities to secure a debt.

2. Pledge in the CSD environment

2.1 It is often asked what legal protection is given to a pledge in the STRATE environment without the possession of a share certificate and where a participant administers the uncertificated securities accounts.

2.2 In terms of the SSA, the pledge or the cession is effected n terms of the CSD rules by an applicable entry in the securities account of the relevant shareholder. The entry in the securities account of the pledger or cedent must contain the name of the pledge or cessionary, detail of the actual securities pledged or ceded and the relevant date thereof.

2.3 It is submitted that the entry is made on a securities account in the sub register, which in terms of section 91A of the Companies Act forms part of the register of members; it therefore fulfils the "publicity requirement" of the Common Law.

2.4 It is also submitted that as in the case of certificated securities where the share certificate and transfer form are delivered to the pledge, "control" over the pledged uncertificated securities has been given to the pledge. The SSA determines that once the securities have been flagged (or "blocked") by the participant as being pledged or ceded, the securities cannot be transferred without the written consent of the pledge or cessionary.

2.5 Section 43 (3) of the SSA provides that the pledge or cessionary of such securities will be entitled to all rights of a pledge or cessionary of movable property. In other words, shareholders in the CSD environment have not lost any of their Common Law rights. The security interest in the pledged securities will be enforceable and can be transferred to the pledge if the pledger does not fulfil his/her obligations in terms of the (written) security agreement.

2.6 In order to ensure a comprehensive framework for pledge in the CSD environment, STRATE expanded on the framework provided in the SSA and published rules on the practical implementation of a pledge as well as Practice Notes to as guidance on an interpretation of Section 43 of the SSA as well as Rules 6.7.3 and 6.7.4.

2.7 This expanded framework now also caters for a pledge affected on the Securities Ownership Register (SOR) where the pledge will be recorded not only in the account of the legal owner but also the beneficial owner (this being the same account on the SOR).

3. **Conclusion**

3.1 Securities pledged or ceded in the CSD environment are more secure than the delivery of share certificates and broker forms in the paper environment.

3.2 The rights of the respective pledger and pledge are protected in the CSD environment as:

- The shareholder (pledger) remains the member of the relevant company, since the pledger securities are not transferred to the pledge.
- By flagging the account of the pledger, the pledge is formally endorsed and valid. The participant must ensure that the pledged securities are not transferred to any third party, without the pledgee's consent.
- A comprehensive framework has been drafted to which participants must adhere covering all forms of uncertificated securities.

The practice notes in respect of Rule 6.74 and Rule 7.8 of STRATE Rules (Pledge) are available from Ms A Cook at anette@lsnp.org.za

SECONDMENT PROJECT JOHANNESBURG STOCK EXCHANGE

The Johannesburg Stock Exchange (JSE) is offering a **1 day seminar / workshop** in conjunction with the Company Law Committee of the Law Society of the Northern Provinces.

This offer is available to 30 attorneys. Preference will be given to PDI attorneys. Please note that applications will be dealt with on a **first come first serve basis.**

THE CLOSING DATE FOR APPLICATIONS IS 30 NOVEMBER 2006.

Interested members can contact Ms A Cook on (012) 338 5800 or anette@lsnp.org.za for more information.

COMPANY LAW COMMITTEE

ADVERT

Any institution or person that can produce CD and DVD recordings of seminars/worships is invited to contact, with a pricelist:

The Director

L.E.A.D

Nic@lssalead.org.za

IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION)

CLOSING OF THE CIVIL COURT TRIAL ROLL

By direction of the Deputy Judge President of this Division, the following Practice Note shall be operative:

1. The daily Civil Court trial roll closes at 13h00 on the day preceding the trial date allocated for the case to be heard.
2. The provisions of Rule 62(4) must at all times be strictly complied with.
3. This Practice Note shall be operative as from 21 September 2006

Dated at Johannesburg on 12 September 2006.

J C H MULLER
ACTING CHIEF REGISTRAR

ATTORNEYS FIDELITY FUND

A. **DOEL VAN DIE FONDS:**

Die Getrouheidsfonds vir Prokureurs ("die Fonds") beskerm die publiek teen diefstal van trustfondse deur praktisyns. Hierdie unieke sekuriteit moedig die publiek aan om met vertroue van regsdienste gebruik te maak.

DIE FONDS WAARDEER DIE AKTIEWE BETROKKENHEID VAN ALLE PRAKTISYNS OM 'N GESONDE FONDS TE HANDHAAF.

Die Fonds se inkomste is afkomstig van die rente op prokureurs se trustrekenings verdien en stel die Fonds in staat om waardevolle finansiële ondersteuning aan die beroep te bied.

The fund:
- Protects the public against theft.
- Provides unique professional security against negligence claims.
- Offers executor bond at no costs to allow practitioners, and compete in the area of administration of deceased estates.
- Promotes risk management through the *Risk Alert* bulletin and other programmes.
- Provides cost free *Prescription Alert* service to warn of impending prescription of time barred matters.
- Refunds costs incurred in maintaining trust account.
- Sponsors the distribution of *De Rebus* to all practitioners.
- Offers bursaries to improve professional qualifications.
- Promotes academic excellence at universities.
- Ensures lower registration fees for Continuing Legal Education Programmes.
- Funds practical Legal Training for candidate attorneys.

Die fonds:
- Beskerm die publiek teen diefstal
- Voorsien unieke professionele sekuriteit ten opsigte van nalatigheidseise.
- Bied kostelose sekerheidstelling vir eksekuteurs om praktisyns in staat te stel om op die gebied van boedelberedderingte kompeteer
- Bevorder risikobekamping deur middel van die "*Risk Alert*" bulletin en ander programme
- Voorsien 'n kostelose verjaringswaarskuwingsdiens wat praktisyns teen nadere verjaring in tydstersake waarsku
- Vergoed praktisyns vir koste aangegaan met die bedryf van trustrekeninge
- Borg die verspreiding van "*De Rebus*" aan alle praktisyns
- Bied beurse aan om professionele kwalifikasies te verbeter
- Bevorder akademiese voortreflikheid by universiteite
- Verseker laer registrasiegelde vir Voortgesette Regsopleiding programme
- Befonds die Praktiese Regsopleiding afdeling vir die kandidaatprokureurs.

C. **INTEREST COLLECTED IN ORDER TO ENSURE THE FINANCIAL WELL BEING OF THE FIDELITY FUND**

I furnish the following relevant particulars regarding interest *per capita* per Provincial Circle Councils, as well as percentage interest contributed per Circle. The comparative figures for 2005 appear between brackets.

MPUMALANGA DID IT AGAIN
MPUMALANGA DOEN DIT WEER

INTEREST PER CAPITA PER CIRCLE	2006	%	2005
GAUTENG PROVINCE			
Nett Interest received			
01\07\2005 30\06\2006	R123 297 657	(+4.2%)	(R118 319 168)
Total persons at 30\06\2006)	7 820	(+5.4%)	(7 420)
Therefore interest per capita	15 767	(-1.7%)	(15 946)
MPUMALANGA PROVINCE			
Nett Interest received			
01\07\2005 30\06\2006	R 10 502 48	(+28.1%)	(R 8 196 690)
Total persons at 30\06\2006)	535	(+7.7%)	(497)
Therefore interest per capita	19 631	(+19%)	(16 492)
LIMPOPO PROVINCE			
Nett Interest received			
01\07\2005 30\06\2006	R 5 245 886	(+27.1%)	(R 4 128 539)
Total persons at 30\06\2006)	464	(+6.9%)	(434)
Therefore interest per capita	11 306	(+15.2%)	(9 513)
NORTH WEST PROVINCE			
Nett Interest reveived			
01\07\2005 30\06\2006	R 6 649 270	(+14.3%)	(R 5 815 643)
Total persons at 30\06\2006)	469	(+5.6%)	(444)
Therefore interest per capita	14 178	(+8.3%)	(13 098)

PERSENTASIE VAN BYDRA ENDE FIRMAS PER SIRKEL	2006	%	2005
GAUTENG PROVINSIE			
Totale aantal firmas	3 651	(+4.1%)	(3 508)
Totale getal firmas wat oorbetaal het vir 2004\2005	2 119	(+18%)	(1 796)
Persentasie van firmas wat bygedra het	58%		(51%)
MPUMALANGA PROVINSIE			
Totale aantal firmas	305	(+1%)	(302)
Totale getal firmas wat oorbetaalhet vir 2004\2005	189	(+13.9%)	(166)
Persentasie van firmas wat bygedra het	62%		(55%)
LIMPOPO PROVINSIE			
Totale aantal firmas	291	(+4.3%)	(279)
Totale getal firmas wat oorbetaal het vir 2004\2005	136	(+17.2%)	(116)
Persentasie van firmas wat bygedra het	46.7%		(42%)
NOORDWES PROVINSIE			
Totale aantal firmas	260	(+3.6%)	(251)
Totale getal firmas wat oorbetaal het vir 2004\2005	160	(+3.2%)	(155)
Persentasie van firmas wat bygedra het	61.5%		(62%)

D. **REGULATION FOR PAYMENT OF TRUST INTEREST**

The Fund must enhance it's cash flow in order to maintain it's ability to meet future funding commitments. This will be partially achieved by harnessing improvement in banking technology as described below.

The Fund has in consultation with the banking industry developed enhancements to the preferential banking arrangements offered by the four major banking groups with respect to Section 78(1) trust current banking account.

In this regard all major banking groups are in the process of enhancing their trust current banking accounts products in order to provide for monthly automated transfer of trust interest to nominated Law Society banking.

The Fund's Board of Control has resolved to admit a draft amendment to Regulation 8(1) to the Department of Justice and Constitutional Development making it compulsory for practitioners to pay over interest earned on their Section 78(1) trust accounts on a monthly basis. At present the Regulation 8(1) provides that such interest shall be paid over annually.

The banks have not yet completed their monthly transfer systems. It is expected that this process should be complete by the end of 2006. The Board has accordingly resolved to provide practitioners with a blanket exemption from compliance with the monthly transfer system, until such time as all the "big four" banks have introduced and bedded down their systems.

At this point in time, ABSA and First National Bank have monthly transfer systems available. Nedbank and Standard Bank will follow shortly. Practitioners are requested to convert to an appropriate monthly system at their earliest opportunity. With regard to Section 78(2)(a) trust investments will be impractical for interest earned on term deposits to be paid over on a monthly basis. Accordingly, as in the past, this interest should be paid over by the last day of May of each year at the latest.

E. ACTIVITIES OF THE MONITORING UNIT OF THE LAW SOCIETY OF THE NORTHERN PROVINCES

FOR THE PERIOD 1 APRIL 2006 TO 30 JUNE 2006

FINANCIAL INVESTIGATIONS CONDUCTED AT ATTORNEYS FIRMS

Number of Investigations

During the period under review, a total number of 56 firms were investigated. The visits and investigators to Attorneys' firms varies in the scope of mandate, from assessing the status of a practise and/or specific complaints and/or full financial investigations. The reason for an investigation and information obtained during the initial interview will determine the scope of investigation.

SOURCE OF INFORMATION

The following source of information is identified which resulted in investigations.

i.	Qualified audit reports	16 (29%)
ii.	Failure to submit auditors report	12 (21%)
iii.	Formal complaints and information from the South African Police Services:	23 (41%)
iv.	Informal information	4 (7%)
v.	Absconding from office	4 (7%)
vi.	Failure to appear before a Disciplinary Committee	2 (4%)

Trust shortages were identified with 17 (30%) of the firms investigated. In 9 (16%) matters we were unable to determine the true position due to the state of the accounting records or the unavailability of the accounting records. In 2 matters investigated, it appeared as if the member has relocated or ceased to practise and the whereabouts of them is unknown.

A total of 9 (16%) of the firms investigated did not retain proper accounting records. With 3 (5%) firms we could not find any accounting record and is therefore not certain as to whether records were kept by the attorneys concerned.

PROFILE OF FIRMS INVESTIGATED

7 (13%) of the firms investigated reflected a negative profile according to our Disciplinary Department. 3 (5%) firms were previously investigated by the Monitoring Unit.

Application for Striking/Suspension from the Roll of Attorneys

In 9 (16%) matters the Council resolved to apply for the striking/suspension from the Roll of Attorneys arising from investigations conducted by the Monitoring Unit. One (1) application was brought to Court to compel an attorney to make his/her accounting records available. There may still follow further decisions to bring applications for striking\suspension in considering the outcome of investigations held.

Disciplinary Steps Instituted

46 matters (82%) investigated were referred to the Disciplinary Department to consider to institute disciplinary steps against the member concerned. (Inclusive of applications to Court) In 10 matters arising from auditors' reports it was recommended not to proceed with a disciplinary investigation.

Time Spent on Investigations

In considering the time spent to investigate a firm and to compile a report on the findings, it is important to take cognisance of the nature or the scope of our mandate, which has a direct impact on the time spent.

An average of eight (8) hours was spent to investigate an attorney's firm. For travelling, an average of three (3) hours was spent, and an average of seven (7) hours to compile a report. A further two (2) hours on average is spent for preparing and appearing at Disciplinary Committee Hearings.

Ad Hoc Committee of the Monitoring Unit

During the period under review, there was a further meeting held by the Ad Hoc Committee whose members comprises of Mr I Klynsmith (Chairperson) Mr JS Fourie, Mr SA Thobane, Mr AML Phatudi and Mr J van Staden. During this meeting the Committee considered the activities of the Unit and reflected on the results achieved by the Unit.

Auditors' Reports in terms of Rule 70

We experienced a further increase in qualified auditors' reports lodged with the Law Society of the Northern Provinces. The revised auditors' report *inter alia* resulted in the Council identifying forged auditors' reports. We are proceeding to investigate 4 firms where it appears as if the auditors' reports were forged.

JS FOURIE
MEDE-VISIE PRESIDENT
GETROUHEIDSFONFDS VIR PROKUREURS

WHEN DOES A PRESCRIPTION PERIOD COMMENCE ?

The Supreme Court of Appeal in the matter between Truter and another v Deysel dated February 24 2006, Case no 043/2005 discussion in the matter was as follows

Mr MA Deysel instituted action against Drs Truter and Venter in the Cape High Court for damages from a personal injury allegedly sustained by him. This was as a result of various eye operations performed on one of his eyes. It was followed by medication and series of other surgical procedures performed on him by the abovementioned doctors during the period of July to September 1993.

Drs Truter and Venter raised a special plea of prescription with the High Court which was dismissed with costs. The finding of the Court was that the prescription period only begins once the Plaintiff manages to secure a medical opinion.

The main issue before the Court was indeed when the prescription period started to run in respect of Deysel's claim as summons were served on both doctors on 17 April 2000.

Other relevant legal aspects of the matter were:

- In terms of *section 11(d) of the Prescription Act 68 of 1969* the Plaintiff's claim was subject to a three years extinctive period.
- In a delictual claim the requirements of fault and unlawfulness were not factual elements of the cause of action, but were legal conclusions to be drawn from the facts.
- An expert opinion obtained, regarding certain conduct resulting in negligence was not in itself a conclusive but rather evidence.
- In this case the Plaintiff had appreciate that a wrong doing had been done to him.
- On evidence all the facts and information in respect of the operations performed had been known or was readily accessible to the Plaintiff.

Discussion

The Plaintiff appointed an attorney during 1995. Two medical legal opinions were obtained that were inconclusive regarding the merits pertaining to a medical negligence claim.

The Plaintiff appointed a second attorney during 1998 and a further expert opinion was obtained on 7 June 1999, advising the Plaintiff that merits existed for a medical negligence claim.

The question before the Court *a quo* was whether the Plaintiff had actual or deemed knowledge of the fact from which the debt arose as required by *section 12(3) of the Prescription Act*. The "once and for all" rule was applied. A Plaintiff cause of action was completed as soon as he/she sustained some damage.

The Court of Appeal overturned the High Court's *a quo* finding that for purposes of the *Prescription Act* the term "debt due" means a debt including a delictual debt which is owing and payable.

It was found that a debt is when a creditor acquires a complete cause of action for the recovery of the debt, when the entire set of facts where the creditor must prove in order to succeed with his or her claim against the debtor, is in place or when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

The decision in the Court of Appeal will have a significant impact on the prescription of patients' negligence claims and could become a contentious Constitutional issue.

ADELE VAN DER WALT
ADELE VAN DER WALT ING.
SPECIALISING IN PATIENTS MEDICAL NEGLIGENCE CLAIMS

JURISDICTION OF BOPHUTHATSWANA HIGH COURT PUTTING THE RECORDS STRAIGHT

In Society News August 2006 on page 11, I again advised members that the jurisdiction of the High Court of Bophuthatswana has been amended to include Lichtenburg, Coligny, Zeerust, Groot-Marico, Swartruggens, Koster, Rustenburg and Delareyville.

By pure mistake I indicated that this change in jurisdiction took effect on 1 August 2006. It is incorrect as the change in jurisdiction has taken effect on 1 August 2003.

I apologise for this oversight and hope that none of our members have been inconvenienced.

DANIE OLIVIER
LICHTENBURG
1 SEPTEMBER 2006

COMPLAINTS REGARDING MASTERS OFFICES

The LSSA Standing Committee on Deceased Estates and Planning met with the Chief Master on 4 September 2006 and one of the issues discussed was service delivery, or rather the lack thereof, at the various Masters Offices.

The Chief Master has advised us that he now has a dedicated complaints e-mail which is ChiefMaster@justice.gov.za

10 EIENSKAPPE VAN `N GOEIE BOEKHOUER

Die talle telefoonoproepe wat ons op elke dag sedert die begin van Julie in verband met die jaarlikse trustoudit ontvang het, het ook weereens bevestig dat goeie boekhouding afhanklik is van goeie boekhoudsters. Wat is die eienskappe van die goeie boekhoudster?

Hier volg die idees van myself en die mense wat elke dag met boekhoudsters dwarsoor die land werk.

1. **Op datum.**

   Die goeie boekhoudster is daagliks (sommige tot op die minuut) op datum met alle posterings, insluitende opening van nuwe lêers, bankrekonsiliasies en krediteursjoernale (vir balju's, advokate, aktekantoor, opspoorders). 'Op datum' beteken ook dat die bankstaat elke dag deur middel van die Internet gedruk word en dat direkte bank inbetalings en alle ander tipes transaksies gepos is voordat sy die kantoor verlaat. Sy weet dat boekhouding wat op datum is, 'n geweldige groot uitkring effek van voordele het vir die ander lede van die firma.

2. **Noukeurig en presies.**

   'n Goeie boekhoudster is noukeurig in alle verslae, inskrywings, invoere en berekenings wat sy doen. Sy is eintlik **uiters** noukeurig en soms dink ander (verkeerdelik) sy is oormatig puntenerig en presies. Sy sien foute raak wat niemand anders sien nie. Sy sorg dat bedrae presies balanseer met elke sarsie posterings en as daar 'n 1c afwyking is, soek sy totdat die fout gevind word. Sy is trots op haar werk.

3. **Drukstukke / ouditspoor.**

   Sy maak getrou en gedissiplineerd drukstukke van die bankrekonsiliasies, trustoordrag-lyste, proefbalanse, Artikel 78(2A) en 78(2)(a) beleggings en nog meer. Sy liasseer hulle in presiese datum volgorde in 'n rekbinder tesame met bewysstukke. Elke rekbinder is gemerk met die beskrywing van die inhoud en die periode wat dit dek. As die ouditeur vir enige bewysstuk vra, is sy in staat om dit binne sekondes vir hom of haar te gee.

4. **Bankrekonsiliasies.**

   Sy laai elke dag die firma se bankstate, van alle bank rekeninge wat gebruik word, deur die Internet af en maak 'n paar drukstukke daarvan. Sy let op na die direkte inbetalings in die firma se bankrekeninge en gebruik verskeie tegnieke om seker te maak dat sulke betalings op die korrekte rekening gekrediteer word. Sy vermy ten alle koste die sogenaamde "split tjeks" of "split kwitansies" want dit is 'n seker resep om bankrekonsiliasies te bemoeilik. Instede, maak sy gebruik van kontrole rekeninge. ("Split kwitansies" is een enkele bedrag wat ontvang word as betaling vir meerdere rekeninge - in die kasboek verskyn 'n meerdere inskrywings teenoor een inskrywing op die bankstaat. "Split tjeks" is net die omgekeerde - een tjek uitbetaling verteenwoordig meerdere rekeninge).

5. **Trustoordragte en Proefbalanse.**

   Die lewensaar van elke firma bestaan uit 'n ketting van - fooie, kwitansies ter betaling daarvan, en trustoordragte. Sy weet dat trustoordragte nie altyd 'n een rigting verkeer vanaf trust na besigheids rekeninge is nie, want daar is soms ook 'n omgekeerde vloei vanaf besigheid na trust om die foute wat daagliks trust debietsaldo's veroorsaak, reg te stel. Die goeie boekhoudster sien die belangrikheid van hierdie wesentlike taak van 'n oordragfunksie of -prosedure raak.

   Naamlik dat hierdie funksie nie alleen moet sorg vir die vloei van trust na besigheid nie maar ook moet sorg dat die verskil tussen trustkrediteure saldo's en trustkasboek saldo's nooit 'n trusttekort word nie. Die proefbalans wat geen trusttekort toon nie, moet dus 'n wesentlike deel wees van die trustoordrag prosedure en skriftelike ouditspoor. Die goeie boekhoudster gaan elke trustoordraglys met 'n vergrootglas na vir foute en postings op verkeerde rekenings en lig die direkteure/vennote in as daar verdagte transaksies is.

6. **Beleggings.**

   Sy het 'n geordende stelsel van beleggings. Sy het skriftelike bewysstukke van rentes wat verdien is en bedrae wat belê is. Sy pos sodanige rentes tussentyds indien die belegging lank duur. Sy monitor die rente wat ontvang word op beleggings teenoor die rente op die trust tjekrekening en maak aanpassings, in veral artikel 78(2)(a) bedrae, dienooreenkomstig. Sy ken die onderskeid tussen artikel 78(2A) en 78(2)(a) en sorg dat die firma voldoen aan die Wet op Prokureurs wat eersgenoemde betref. Sy verhaal hoogstens een keer per maand die trustrekening se bankkoste van die rente wat verdien word. Sy hou verder die trustkasboek saldo dop om artikel 78(2)(a) beleggings los te maak indien diie saldo te laag raak.

7. **Verslae, rekeninge en inligting: kliënte, personeel en vennote.**

   In die prokureursfirma is daar drie tipes mense wat inligting en verslae moet ontvang op 'n daaglikse, weeklikse of maandelikse basis.

   Hulle is --

   - Kliënte van die firma.
   - Vennote/direkteure van die firma.
   - Personeel van die firma.

   Verbaas dat die personeel van die firma ook inligting behoort te ontvang? Dit is inderdaad belangrik dat elke werknemer inligting moet kry oor sy of haar eie produktiwiteit en die produksie van ander.

   Die boekhoudster moet weet watter inligting elkeen van die groepe moet ontvang en wanneer. Sy dra sorg dat elkeen sy inligting betyds kry. Teenoor die vennote lewer sy kommentaar op verslae, kritiseer sy (ook die vennote) en maak aanbevelings.

8. **Sy is leergierig, kundig en oop vir vernuwing.**

   Vernuwing vind elke dag plaas op die gebied van boekhouding. Meeste veranderings is tegnologies maar sommige het ook betrekking op gewone rekeningkundige

toepassings. Die vernuwingsvereistes word meer en nie minder nie. In baie prokureurskantore neem die maandeinde prosedures steeds tot vyf dae of langer waartydens bedrywighede en produksie in die kantoor benadeel word. Tien jaar gelede sou hierdie vyf dae nog aanvaarbaar gewees het maar in vandag se mededingende omgewing behoort dit nie meer plaas te vind nie. Die boekhoudster moet gewillig wees om aan te pas en nuwe metodes en tegnologieë aan te leer. Die vennote moet gewillig wees om die boekhoudster opleiding te gee of te laat ontvang. Die boekhoudster moet by haarself 'n gesindheid van leergierigheid kweek (al is sy reeds twintig jaar boekhoudster). Haar leergierigheid moet oorloop na die rekeningkundige rekenaarstelsels wat die firma gebruik. Opgradering van sulke stelsels is noodsaaklik en die boekhoudster moet sorg dat sy byhou by veranderinge wat plaasvind.

9. **Soek voortdurend vir bykomende inkomste en kostebesparings**

Ek het al dikwels gesien hoe goeie boekhoudsters deur die kantoor loop voordat sy 'n trustoordragfunksie uitvoer. Tydens so 'n lopie word elke fooieskrywer (dws. elke prokureur, klerk en sekretaresse) gevra om alle fooie wat debiteerbaar is, dadelik aan te teken aangesien die oordragfunksie binnekort sal plaasvind. Die gevolg is 'n voortdurende verhoogde bewussyn by almal om debiteerbare fooie dadelik aan te teken. Die boekhoudster sal ook op die uitkyk wees om bykomende inkomste vir die firma te genereer. Sy sal bv. vra waarom daar nie 'n fooi gedebiteer word vir die arbeid en administrasie verbonde aan 'n belegging ingevolge artikel 78(2A) nie. Sy sal skuldenaars wat onnodiglik vra vir saldo's van hulle skuld, laat betaal daarvoor. Sy sal vra waarom word daar nie fooie gedebiteer is in sake met kredietsaldo's nie. Sy sal altyd uitvind wie voorsien die goedkoopste papier, drukker-ink en penne. Sy sal geen betaling toelaat aan enige leweransier tensy 'n volledige en korrekte BTW belastingfaktuur voorsien is nie. Sy sal dadelik die insetbelasting daarop pos. Sy weet wat die ontsaglike waarde van krediteursjoernale is. Daarmee kontroleer sy die maandeinde rekeninge van balju's, advokate, opspoorders en ander, teen die kredietinskrywings op elke betrokke balju, advokaat en opspoorder se rekening.

10. **Sy onderrig ander en het baie geduld.**

Die boekhoudster is die *"Minister van Finansies"* van die firma. Sy moet voortdurend aan ander inligting gee, help, regmaak, advies gee, en baie keer die onmoontlike regkry. Sy het eindelose geduld nodig met werknemers wat foute maak en laat ons 'n hoed afhaal vir ons boekhoudsters!

Nicolise du Preez is een van die beste boekhoudsters wat ek ken. Sy het my verwys na 'n artikel deur Ellen Freedman in die Philadelphia Bar Association News. Sy is die "Law Practice Management Coordinator" van die betrokke organisasie. Die artikel kan gevind word by www.philadelphiabar.org. In die artikel bespreek Me Freedman die karakter eienskappe van boekhouers in Amerikaanse regsfirmas. Sy sê onder andere:

"What are the characteristics of the top financial manager of a firm? Probably at the top of the list of the varied skills required are stamina, patience, and the ability to withstand stress. There is no doubt that managing the accounting operations of a law firm is a very demanding job."

Die boekhouer is een van die belangrikste werknemers in 'n firma. Dit sal prokureurs loon om baie meer aandag aan die aanstelling, opleiding en vergoeding van hulle boekhouers te gee.

CHRIS DU PLESSIS
DU PLESSIS & KRUYSHAAR.
PRETORIA

HANDVES VIR DIE REGSPROFESSIE ------------------------

IS DIT REGTIG SO DRAKONIES?

Op 14 Augustus 2006 het die Konsep Handves vir die Regsprofessie die lig gesien en, soos verwag kon word, vele opskudding veroorsaak. Op 17 en 18 Augustus 2006 is 'n Indaba gehou waar die konsep handves bekend gestel is.

Ek beoog nie 'n in diepte ontleding van die handves self nie, maar beperk my tot 'n paar gedagtes rondom die proses self en die benadering deur die Departement van Justisie en Konstisionele Ontwikkeling hierin.

Die konsultasieproses:

'n Mens sou verwag dat 'n handves deur onderhandeling van al die rolspelers sou ontstaan, 'n produk na beraadslaging rondom die basiese toepaslike beginsels met inagneming van die spesifieke behoeftes in 'n sektor. Ongelukkig het die Departement van Justisie besluit om self die inisiatief te neem. Vir die doel is 'n Reëlingskomitee aangewys. Op laasgenoemde komitee het die prokureurs, deur die Prokureursorde van Suid-Afrika, (LSSA) twee verteenwoordigers stet. Die Departement het egter die twee lede "in hulle persoonlike hoedanighede" op die komitee aangestel, wat tot die gevolg gehad het dat hulle die reg ontneem is om met hulle lede te konsulteer en 'n mandaat te verkry.

Uit die Reëlingskomitee is toe 'n formuleringskomitee benoem waarop ons lede nie sitting gehad het nie. 'n Lid van Black Lawyers Association (BLA) was wel op die komitee verteenwoordig, maar nog die LSSA nog die Prokureursorde van die Noordelike Provinsie (LSNP) het hieroor enige terugvoering ontvang. Die eindresultaat was eenvoudig dat 'n dokument voorberei is waarin die georganiseerde regsprofessie geen inspraak gelewer het nie.

By die Indaba is ons egter daarop gewys dat die konsep handves bloot 'n "besprekingsdokument" is, en dat dit deur die

Departement van Justisie en Konstitusionele Ontwikkeling op 'n "roadshow" geneem gaan word om op die wyse aan die konsultasiebeginsel reg te laat geskied!. Dit is jammer dat ons nie die geleentheid gebied is om van die begin betrokke te wees nie, aangesien die beginsels wat die handves ten grondslag lê nie gewysig kan word deur bloot persentasies of tydskedules aan te pas nie.

Die Benadering deur die Departement van Justisie en Konstitusionele Ontwikkeling

Tydens die Indaba het die Voorsitster van die formuleringskomitee verduidelik dat die handves *"is based on the Equality Act framework and seeks recognition in terms of Section 12 of the BEE-act"*.

Hierdie is 'n mondvol wat meer aandag verdien. Die Swart Ekonomiese Bemagtigingswet (Wet 53 van 2003) (hierna BEE-wet genoem en die Promofering van Gelykheid en Voorkoming van Onbillike Diskriminasie-wet (Wet 4 van 2000) (hierna die Equality-wet genoem) het verskillende oogmerke en met reg kan gevra word hoekom dan so 'n benadering? Sonder om verder hierop in te gaan wil ek net die opmerking maak dat die benadering mynsinsiens onhoudbaar is en nie ondersteun behoort te word nie. Dit beteken dat die handves van die regsberoep, anders as enige ander handves, aan twee stelle wetgewing met uiteenlopende oogmerke moet voldoen, wat die toepassing van telkaarte wat tot 'n groot mate gestandariseerd is, moeilik bruikbaar maak. 'n Veel swaarder las word op regslui geplaas om aan die telkaartvereistes te voldoen.

DIE GROOTTE VAN FIRMAS

Daar is tans sowat 9 441 prokureurs onder die Jurisdiksie van die LSNP. Hulle is verdeel in sowat 4 571 firmas. Dit verg nie "Einstein" se visie om daaruit te sien dat weinig firmas regtig "groot" of selfs " "middelslag" firmas is.

Trouens, huidige statistiek dui daarop dat:

- 85% van die firmas is 4 vennote of minder;
- 62% van die firmas is enkelpraktisyns.

Die huidige telkaarte wat voorgestel word in terme van die BEE-wet word in kategorieë van verskillende grootte ondernemings verdeel.

Die aanduiding is dat 'n sogenaamde "QSE" (Qualifying Small Enterprise) sal begin op 'n omset van R1 miljoen of meer. Dit sal reeds 'n klompie van die kleiner praktisyns uitskakel. Daar is sprake dat hierdie marge na R5 miljoen verhoog kan word, wat nog 'n aantal enkelpraktisyns en plattelandse praktisyns sal vrystel. As die regulerende bepalings in die huidige Handves na die "Legal Practice Bill" geskuif word (waar dit met respek tuishoort), die "gelykheids"- bepalings onder die toepaslike wetgewing gehou word en die BEE-wet se telkaarte soos bedoel vir QSE's met die nodige aanpassing sonderling aan die regsprofessie toegepas word, behoort die Handves glad nie die drogbeeld te wees wat dit in sy huidige vorm vergestald nie!.

Ten minste sal dit die speelveld gelyk maak en sal banke of ander instansies nie eenvoudig kan voortgaan om enige vereistes wat moontlik op hulle eie sektore toepassing mag vind eenvoudig op prokureurs af te dwing nie.

Die definisie van QSE in die Kode (BEE-wet) is inderdaad 'n hulp aan die regsprofessie in die dat dit:

a klein firmas vrystel van die voldoeningsvereistes; en

b wit QSE firmas die keuse gee om self te besluit of hulle aan die eienaarskap en bestuursvereistes wil voldoen. Voldoening aan die telkaart vereistes kan steeds geskied selfs al word hierdie twee elemente geignoreer.

Trouens, die swye oor 'n onderskeid tussen klein, medium en groot firmas is een van die mees steurende aspekte van die huidige handves.

Die konsep handves is op die Prokureursorde van die Noordelike Provinsie se web-werf (www.northernlaw.co.za) te sien en kollegas word aangemoedig om daarvan kennis te neem. Let veral op Hoofstuk 4 daarvan wat spesifiek die bepalings insluit rondom die voorgestelde riglyne vir eienaarskap en kontrole (Paragraaf 7.1) bestuur (Paragraaf 7.2) vaardigheidsontwikkeling (Paragraaf 7.4) en voorkeur-werktoedeling (Preferential Procurement) (Paragraaf 7.5).

BESPREKING BY GAUTENG JAARVERGADERING:

Nadat ek die artikeltjie geskryf het, het ek die Algemene Jaarvergadering van Gauteng bygewoon op 16 September 2006. Adjunk Minister van Justisie en Konstitusionele Ontwikkeling Mnr Johnny de Lange was 'n spreker by die geleentheid en het onder meer die Handves bespreek. Drie kort opmerkings na aanleiding van sy toespraak:

1. Die Minister is duidelik van mening dat die huidige dokument die resultaat is van breedvoerige konsultasie met alle rolspelers sedert Desember 2004. Ek volstaan daarby dat die georganiseerde prokureursprofessie nie by hierdie konsultasieproses betrek is nie.

2. Die Departement beskou die "transfer of skills" as een van die balangrikste elemente van die handves. Daar moet dus noukeurig gekyk word na al die bepalings wat met hierdie beginsel verband hou aangesien dit groot gewig sal dra in enige telkaart.

3. Die Departement is wesenlik bekommerd oor die betrokkenheid van vroue prokureurs en meer spesifiek dan van swart vrouens op senior vlak in die prokureursberoep. Die persepsie is duidelik (ten regte of ten onregte) dat swart vrouens kwalifiseer as prokureurs maar dan feitlik onmiddellik uit die professie verdwyn. Hierdie kan dan ook die motivering wees waarom die huidige handves so deurspek is met bepalings wat onder die gelykheidswetgewing tuis hoort. Ek wag nog op betroubare statistiek in die verband maar persoonlik is ek van mening dat swart vrouens se toetrede tans 'n groeipunt in die professie is.

WAT NOU?

Die konsultasie proses is nog lank nie afgehandel nie (persoonlik is ek van mening dit het nog nie eens begin nie!) Mynsinsiens moet die volgende aspekte meer aandag geniet en deeglik uitgetrap word voordat 'n finale handves opgestel word:

1. Is die "regsprofessie" groot genoeg om 'n "sektor" daar te stel soos bedoel in die BEE - wet?. Hier kan die moontlikheid van 'n Professioneledienste Handves oorweeg word wat argitekte, ingeneurs en ouditeure kan insluit.

2. Is dit hoegenaamd houdbaar om die Equality-wet by die handves te betrek? Die regte van vrouens, voorheen benadeeldes en gestremde persone geniet in ieder geval beskerming en voorrang onder verskeie ander wetgewing.
3. Is daar hoegenaamd plek in die handves vir aspekte wat die organisasie van die regsprofessie moet reël - val dit nie eerder onder die lang verwagte "Legal Practice Bill" nie?
4. Is dit logieserwyse nie meer gewens om eers die "Legal Practice Bill" in plek te kry sodat die struktuur van die regsprofessie behoorlik georden is voordat 'n Handves opgestel word nie?
5. As 'n handves uiteindelik tot stand kom, is registrasie in terme van Artikel 9 van die BEE-wet nie meer gewens as 'n Artikel 12 handves nie?

In die algemeen kan gesê word dat 'n Artikel 9 Handves meer regskrag het (dit wil sê afdwingbaar is teenoor die Staat en die Privaatsektor) terwyl Artikel 12 handves maar net 'n "show of good intent" daarstel en nie afdwingbaar is nie.

JAN VAN RENSBURG
RAADSLID

SECTION 118 RE-VISITED

In the reported judgment in *BOE Bank Limited v City of Tshwane Metropolitan Municipality 2005 (4) SA 336* the Supreme Court of Appeal already held that *s118 (3) of the Municipal Systems Act* affords a municipality a preference for its claim, older than the 2 year period laid down by *s118 (1)*, over the secured claims of bondholders. The SCA held that the only plausible interpretation of *s118 (3)* is that it is not subject to the time limit in *s118 (1)*.

The Supreme Court of Appeal has again looked at *s118(3)* in the recently reported judgment in the *City of Johannesburg v Kaplan N.O and Another 2006 (5) SA 10*. The important distinction between this case and the BOE case is a consideration of the provisions of the *Insolvency Act* in interpreting *s118 (3)*.

The facts are briefly the following:

Crokipark CC, the owner of fixed property, was liquidated in May 2003. The first respondent as liquidator sold the property in August 2003. The liquidator paid an amount of R386 000,00 to the municipality (appellant) in terms of s118 (1) to obtain a clearance certificate. That represented the amounts that became due to the municipality in connection with the fixed property for municipal services fees, surcharge on fees, property rates and other municipal taxes, levies and duties during the 2 years preceding the date of application for a clearance certificate. The total arrears owing by Crokipark CC to the municipality was R855 000,00. A balance, after payment for the clearance certificate, of R469 000,00 remained due and payable to the municipality.

The SCA had to make a finding whether or not the municipality's preference arising under s118 (3) trumps the preference created by a bond over the property.

The Court *a quo* had found that the time limit of 2 years imposed in s118 (1) also limited the debt to a period of 2 years for purposes of the preference created by
s118 (3). The judgment of the Court *a quo* was before the judgment in the *BOE Bank case*.

However, in defending the judgment of the Court *a quo* the respondent argued that s89 of the Insolvency Act limited the period of preference to 2 years immediately preceding the date of the liquidation and that therefore, s118 (3) must be interpreted in the light of s89 (4) which provides for the payment of any tax as defined in s89 (5) which became due during the period of 2 years immediately preceding the date of the liquidation.

The Court found that both s118 of the *Municipal Systems Act* and s89 of the *Insolvency Act* contain embargo provisions which only differed to the extent that s118 (1) refers to 2 years preceding the date of application for a clearance and that s89 (1) refers to 2 years preceding the date of application for a clearance and that s89 (1) refers to 2 years preceding the date of sequestration. After analysing the embargo provisions the Court held that the period in s 89(1) overrides the period in 118 (1).

The Court concluded that where the owner of fixed property has been sequestrated or liquidated and such property is subsequently sold and transferred:

- a clearance certificate must be obtained from the municipality for the debt that has become due during the period of 2 years before the date of application of the certificate in terms of s 118 (1);
- the municipality's preference, created by s 118 (3) for debts which are "taxes" within the meaning of s89(5) of the *Insolvency Act* is limited to claim which fell 2 years prior to the date of sequestration or liquidation up to the date of transfer in terms of s89 (1) of the *Insolvency Act;*
- subject to prescription, those municipal debts are not "taxes" within the meaning of s 89 (5), give a preference to municipalities in terms of s118 (3) even though such debts are older than 2 years prior to the date of sequestration of liquidation.

The SCA considered, but made no finding on, the nature of the municipality's claim under s 118 in order to determine whether or not the municipality's claim, or portion thereof, fell within the ambit of s89 (5) of the *Insolvency Act*.

GERRY MARITZ
ATTORNEY: TZANEEN
LSNP COUNCILLOR AND MEMBER OF THE PROPERTY LAW COMMITTEE

CROSS BORDER TRADE

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PRACTICAL SEMINAR ON WHAT AND HOW

JOINT SEMINAR FOR THE BENEFIT OF LEGAL PRACTITIONERS IN THE SADC REGION

PRESENTERS:
- **SADCLA**
- **LSSA**
- **DTI**
- **SARS**
- **RESERVE BANK**
- **CROSS BORDER LEGAL TRADE SPECIALISTS**

VENUE:
The Reserve Bank Conference Centre, Pretoria. Secure parking is available.

DATE:
27 November 2006

TIME:
Registration: 08:00 – 09:00
09:00 -17:30 (Lunch included)
Cocktails 18:00 -19:00 (Cash Bar available)

***L.E.A.D** reserves the right to:*
1. *cancel a seminar should the number of delegates not justify the costs involved*
2. *make minor adjustments to the programme should the need arise*

REGISTRATION FEES
- Practising SADCLA members and Practising Attorneys: R650 -00 pp
- Candidate Attorneys and more than 3 persons from a Firm: R500 -00 pp
- All other persons: R950 -00 pp

CLOSING DATE FOR REGISTRATION:
17 November 2006

Payment can be made either by electronic transfer, credit card or direct cash bank deposit on or before 17 November 2006.

Please fax registration form and proof of payment to confirm booking to: 0866707982 or 012 -3413784

Confirmation of attendance will only be sent on receipt of the payment. Please note that payment is non -refundable once registration has taken place.

CONTENT:
- Opening and SADC Vision
- Introduction of speakers and overview of Seminar
- International trade harmonisation
- International trade transaction
- Private international law
- Public international law
- International payment and banking
- Central banking and exchange control
- International transport law
- International sales law
- International commercial arbitration
- Trade and Industry SADC Trade Protocol
- Customs and excise law
- Insurance law

PURPOSE:
- To empower legal practitioners with information regarding State regulations, business strategies and procedures regarding cross border trade transactions

UNITY THROUGH TRADE

'N VRYWARINGSKLOUSULE IS 'N PERD VAN 'N ANDER KLEUR

"*Horses will be horses.*" So sê appelregter Lewis in die ongerapporteerde appélhofsaak van *Walker v Redhouse* (Saakno. 3939/05).

Die pauperiese aksie is gebaseer op strikte aanspreeklikheid gegrond op die eienaarskap van die dier. Die eienaar is aanspreeklik indien die dier in stryd met sy natuur opgetree het en 'n ander persoon daardeur skade ly.

In die praktyk kan dit maar deesdae as 'n gegewe aanvaar word dat van 'n persoon verwag sal word om 'n vrywaring te verleen aan die eienaar van die perd. 'n Vrywaring moet altyd streng geinterpreteer word, en in die geval van dubbelsinnigheid moet dit ingevolge die *contra proferentem* reël beperkend uitgelê word.

Die bewoording van 'n vrywaring is uiters belangrik, soos gesien kan word in die teenoorgestelde resultate in die twee onderhawige sake.

In die gemelde saak van *Walker v Redhouse* gebeur die volgende: 'n Engelse burger wat Suid-Afrika besoek het, het tydens haar verblyf by Walker se gasteplaas perd gery. Voordat Redhouse die perd, bestyg het, is sy versoek om 'n vrywaring te onderteken, wat sy wel gedoen het. Gedurende die perdrit het die perd agteroor gespring, het Redhouse afgeval en is sy op die grond gesleep deur die perd omdat haar een voet in die stiebeuel vasgesit het.

Die vrywaring lees as volg:

"I hereby confirm that neither Walkersons or Critchley Hackle or any member of their staff shall be liable to me, my estate or dependants for any loss or damge sustained as a result of my death or injury to my person or property in the course of my horse riding about the property of Walkersons".

"I acknowledge that I am aware of the risks involved in horse riding and accept such risks".

Die Hoogste Hof van Appél bevind dat hierdie vrywaring ondubbelsinnig is en bedoel is om vrywaring te verleen aan die eienaar van die perd van enige vorm van aanspreeklikheid wat mag ontstaan gedurende die perdry, ook aanspreeklikheid op grond van die pauperiese aksie.

In die saak van *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D), waarna die Hoogste Hof van Appél in die *Walker* saak verwys sonder om dit te kritiseer, is die volgende vrywaring verleen:

"All riders ride at their own risk. If any accident should occur ..." dan sal die verweerder nie verantwoordelik gehou word nie.

Dit word bevind in die *Lawrence*-saak dat aanspreeklikheid op grond van die pauperiese aksie nie deur hierdie vrywaring gedek word nie en die verweerder-hotel word aanspreeklik gehou vir skadevergoeding toe die perd in stryd met sy natuur agteroor gespring het en Lawrence se kind beserings opgedoen het.

Ons moet opnuut kyk na die bewoording van die vrywaringsklousules wat ons opstel en geen ruimte vir dubbelsinnigheid moet gelaat word nie.

ANNA-MARIE VAN ROOYEN
LICHTENBURG
26 SEPTEMBER 2006

STRIKINGS & SUSPENSION

ATTORNEY	STRUCK (DATE)	SUSPENDED (DATE)	INTERDICTED FROM PRACTICE
Delia Mokoena Pretoria		21 August 2006	
Wycliff Mojapelo Dennilton	22 August 2006		
Colleen Joy Ho-Tun Randpark Ridge	4 September 2006		
Lorraine Nolupho Mgudlwa Boksburg	4 September 2006		
Robert Menyatso Morewa Randfontein	4 September 2006		
Dudley Arthur Honey Roodepoort	11 September 2006		
Aubrey Molatlhwa Krugersdorp		11 September 2006	
Malakia Styles Mandiwana Johannesburg	9 October 2006		
Abraham Jacobus Coetzee Johannesburg	9 October 2006		
Andries Johannes Cornelissen Roodepoort	16 October 2006		
Mmbengeni James Munzhedzi Venda		30 October 2006 (for six months)	