

KNOWLEDGE MANAGEMENT

KM ALERT

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IN THIS ISSUE

.....
TRAINING AND LEARNING
.....

.....
MOOT COURT
.....

.....
CASE LAW UPDATE
.....

.....
LEGISLATION UPDATE
.....

.....
NEW LEGISLATION:
EMPLOYMENT
.....

.....
LEGAL DEVELOPMENTS
ACROSS A RANGE OF
PRACTICE AREAS AND
SECTORS
.....

At Cliffe Dekker Hofmeyr, our Knowledge Management initiatives are aimed at putting the law and the combined expertise of the firm at our lawyers' fingertips.

In doing so, we leverage our intellectual capital and ultimately enhance the quality of our service to clients.

This KM Alert offers a high level overview of *selected* recent developments with regard to case law and legislation and reflects the position as at *date of publication*.

Look out for the next KM Alert for more information on recent developments in regard to:

- Employment law ■ Specific sectors and industries ■ Business rescue
- Anti-bribery and corruption

TRAINING AND LEARNING

DLA Piper Africa Group Training Academy a great success

We hosted the DLA Piper Southern African Training Academy at our offices in Sandton during June 2014. The Academy forms part of the overall training strategy of the DLA Piper Africa Group and focused on training and skills development for junior professionals, in addition to networking opportunities.

The DLA Piper Africa Group prioritises training and, as such, invests considerable time and resources in training and skills development. This takes the form of, for example, webinars, informal workshops, client training sessions and formal training academies for professionals.

The Southern African Training Academy involved a series of workshops and training sessions for lawyers from member firms. Associates from, for

example, Mauritius, Botswana, Namibia, Zambia and Ghana attended the event. In addition, a large number of associates and senior associates from our Johannesburg and Cape Town offices attended this training.

The Academy included an update on the DLA Piper Africa Group by the group's Chairman, Chris Ewing. Next, details and advice in relation to the US Foreign Corrupt Practices Act and the UK Bribery Act were explained by representatives from the DLA Piper practice groups in the United States and United Kingdom.



continued

The three-day Academy also included a training session on business communication skills and a business development segment, presented by Chris Ewing and Michael Whitaker, Chief Operating Officer at Cliffe Dekker Hofmeyr. Other topics that were covered included: due diligence investigations, emerging markets and public-private-partnerships, guarantees and indemnities, sector-specific training focusing on hospitality and leisure and a global banking and finance update.

The Academy concluded with a comprehensive training session on commercial drafting, which was presented by one of our senior commercial practitioners, Peter Prinsloo.

A number of directors and senior associates from Cliffe Dekker Hofmeyr were involved as presenters.

Comments from two managing partners in Kenya and Uganda make it clear that the Training Academy is highly valued by member firms in Africa.

James Kamau, the Managing Partner at Iseme, Kamau & Maema Advocates in Nairobi said that working with Cliffe Dekker Hofmeyr directly and within the umbrella of DLA Piper Africa "has enabled us to tap into international systems and

precedents that hitherto we could not imagine. Through training and support from truly experienced lawyers, our clients are guaranteed of tried and tested legal products to support their business endeavours."

Barnabas Tumusingize, the Managing Partner of Sebalu & Lule Advocates in Uganda, said "Cliffe Dekker Hofmeyr has worked hard to improve its partner firms and must be commended for this. It shows that its interest is not just in referrals but in developing the skills of lawyers Africa-wide".

"We value learning, training and skills development as an important part of our corporate culture. Against this background, it is important for us to arrange and facilitate formal training academies. We invest considerable resources in events of this nature, in addition to developing comprehensive training material. The training benefits not only our associates but also colleagues from across the continent. This provides a unique opportunity to share best practice, experience and skill on a regular basis. We look forward to further career academies and training academies, in line with DLA Piper's international training programme." Monique du Preez, Director, Knowledge Management (Cliffe Dekker Hofmeyr)

The Southern African Training Academy in Johannesburg followed the East African Training Academy in Nairobi, which took place earlier this year (March 2014). We also participated in the DLA Piper Africa Group Power/Energy Training Retreat in Kigali, Uganda in July 2014, where three of our directors presented sessions:

- Chris Ewing, the Chairman of the DLA Piper Africa Group presented an update on the Africa Group;
- Kieran Whyte, the head of our Projects and Infrastructure practice presented a session on understanding renewables, technology advances, host government support, connection and transmission and the impact of resource availability;
- Zahra Omar, a director in our Projects and Infrastructure practice presented a session on geothermal development in Kenya: plans for new generation capacity, government incentives and support and the institutional and regulatory framework.



Chris Ewing, Chairman of DLA Piper Africa, providing attendees an update on DLA Piper Africa.



Kieran Whyte, Practice Head of Projects and Infrastructure discussing the lessons learnt from the South African renewable projects.



Zahra Omar, seconded to IKM Advocates (Kenya), providing an overview of geothermal energy in Kenya.



Attendees to the DLA Piper Africa – East Africa Energy Training session held in Kigali, Rwanda.

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MOOT COURT

National Schools Moot Court Competition Training Workshop

The National Schools Moot Court Competition (NSMCC) is a non-profit initiative that aims to foster practical skills in aspirant lawyers. NSMCC achieves this aim by facilitating a nationwide, high school level moot court competition on an annual basis.

Participating learners are provided with a hypothetical set of facts that concern a constitutional and human rights law issue, with this year's problem relating to the right to freedom of expression. The learners must subsequently formulate a legal argument based on these facts and orally advocate this argument through various elimination rounds. The final round of the competition is hosted at the Constitutional Court, where the matter is heard before a panel of five judges, three of whom are justices of the Constitutional Court.

Our Pro Bono and Human Rights Practice recently hosted participating learners and their educators from 17 high schools for a training workshop at the firm's Sandton offices. The workshop aimed to provide participants with the practical skills required to succeed in a moot court environment as well as offer a glimpse into the culture

and feel of a large law firm.

The workshop was also supported by various departments within firm. Representatives from the knowledge management, competition, corporate and commercial, employment and dispute resolution practices played key roles in ensuring learners were provided with holistic and practical training.

Some of the issues that were canvassed included: an introduction to the South African legal system, the legal profession, a panel discussion on the right to freedom of expression, a panel discussion on the art of moot court, legal research, referencing and an introduction to the firm's recruitment processes.

The day was deeply rewarding for all involved and stood testament to the firm's commitment to training and skills development, legal education, pro bono services and human rights law.

We will be presenting a similar training workshop for learners at our offices in Cape Town in August 2014.



Learners and educators paying attention to the presentations.



Tricia Erasmus, a senior associate in our Pro Bono and Human Rights practice, with the learners during their comfort break.

Our associates and candidate attorneys opened the floor to a debate on the right to, and limitations of, freedom of expression.



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CASE LAW UPDATE

A selection of recent cases

Investec Bank Limited t/a Investec Private Bank v Mavungu David Ramurunzi (445/13) [2014] ZASCA 67 (19 May 2014)

It is accepted that section 129(1) of the National Credit Act, No 34 of 2005 (NCA) requires a credit provider to draw to a consumer's attention – by notice – the consumer's default, and furthermore to set out the options available to the consumer to remedy or resolve the default. Section 130(3) of the NCA provides that a credit provider may only take steps to enforce the credit agreement where there has been compliance with section 129. On failure by the credit provider to comply, the court is required, in terms of section 130(4)(b) of the NCA, to adjourn the matter and make an order as to the steps to be taken by the credit provider to comply.

The question in this case was whether a debt owed to the credit provider may prescribe in circumstances where:

- (i) summons had been issued and served prior to the lapse of the three year period allowed in terms of the Prescription Act, No 68 of 1969 (Prescription Act); but
- (ii) the matter was adjourned in terms of section 130(4)(b) of the NCA, in order to allow the credit provider to comply with section 129, and the notice in terms of section 129, pursuant to the adjournment and order in terms of section 130(4), was only delivered after the three year prescription period had passed.

In short the Supreme Court of Appeal (SCA) had to answer the question – "does a summons served before the requisite notice in terms of section 129 of the NCA has been delivered to the consumer interrupt the running of prescription?" The court *a quo* (High Court) held that it did not. It is against this decision that Investec (Bank) appealed.

In this particular case, the section 130(4)(b) order was pursuant to a pre-trial meeting that the parties conducted, at which they agreed to adjourn the matter. This was subsequently made an order of court. In terms of the order the Bank was ordered to send a section 129 notice to the consumer by email as agreed. This order was made approximately three and eight months after initial service of the summons (which was served within the three years allowed in terms of the Prescription Act).

At the hearing of the action the consumer raised the argument that, because the relevant section 129 notice had only been sent to him after a three year period from the date on which the debt became due, the debt had prescribed.

The SCA had to consider whether sections 129(1) and 130(4)

of the NCA impose conditions "on the institution of an action for the recovery of a debt" which "affect the way in which an action will interrupt the running of prescription."

In the High Court it was held that the relevant sections in the NCA did constitute provisions which impose conditions on the institution of an action, such that failure to deliver the section 129(1) notice would render service of a summons for recovery of a debt ineffective in interrupting prescription.

In the SCA it was the Bank's argument that found favour. The Bank relied on the decision in *Sebola & another v Standard Bank of South Africa Ltd & another* [2012] (5) SA 142 (CC) where Justice Cameron indicated that:

"...while s129(1)(b) appears to prohibit the commencement of legal proceedings altogether ('may not commence'), s130 makes it clear that where action is instituted without prior notice, *the action is not void*. [SCA's emphasis] *Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity.*"

The SCA held that section 130(4) pauses (adjourns) the proceedings to give the consumer the benefit of the processes in the section 129(1) notice. In fact, the use of the word 'adjourn' (rather than 'refuse to hear' for example) indeed suggests that the proceedings have 'life' and are not a nullity. This position (that the summons served prior to the section 129(1) notice was not a nullity) was, the SCA suggested, in line with the principles of common law which allow a summons and particulars of claim which are somehow defective to be cured of the defect after prescription has run – naturally provided same was delivered prior to the prescription period running out.

Consequently, the SCA held that the summons interrupted prescription, despite the fact that the section 129(1) notice was only delivered subsequently and in terms of the order contemplated in section 130(4)(b)(ii).

Land and Agricultural Development Bank of South Africa v Panamo Properties 103 (Pty) Ltd [2014] (2) SA 545 (GJ)

This decision concerned the question whether a continuous covering mortgage bond would still be valid and enforceable despite the fact that the loan agreement – to which the mortgage bond was accessory – was *void ab initio*. The court held, on the facts of this particular matter, that despite the accessory nature of a mortgage bond, a continuous covering mortgage bond may be utilised to secure, and ultimately obtain, payment of another liquid obligation/debt owed by the mortgagor to the mortgagee. This is provided that the other obligation/debt arose while the mortgage bond was still in

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force. In this case the obligation secured was therefore not the void loan agreement, but a valid enrichment claim available to the Land and Agricultural Development Bank of South Africa because it advanced money to Panamo Properties without any valid cause. The continuous covering mortgage bond was thus valid and enforceable.

Paulsen v Slip Knot Investments (434/13) [2014] ZASCA 16 (25 March 2014)

The ability of a creditor to levy interest on a debt is limited by what is termed the common law *in duplum* rule.*

The rule states that when a debt is owed and it bears interest, arrear interest may not exceed the equivalent of the amount of the capital debt. Thus, if a debtor owes R1000.00 at 10% interest per month (for example) and is in default of these monthly re-payments, interest will only run until it reaches the equivalent of the capital sum i.e. R1000.00, leaving the debtor owing R2000.00.

**The principles identified in this judgment and which relate to the common law in duplum rule, do not apply to the statutory rule created in terms section 103(5) of the NCA, which is applicable to credit agreements falling within the ambit of the NCA and the relevant section.*

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Other interesting decisions

WORKPLACE EQUALITY IN THE SPOTLIGHT

In a recent contribution to this publication, we pointed out that the right to equal pay has been expressly included in the amendments to the Employment Equity Act, and that the legislature has already published draft regulations giving flesh to this concept of the right to equal pay, notwithstanding that the amendments have not even taken effect yet.

This, together with the, bitter and violent strike in the platinum sector, which touched on sensitivities about the wage gap in South Africa, and the spate of litigation about the fair implementation of affirmative action policies, make it apparent that workplace equality will continue to be at the top of many large organisations' list of concerns. While we will have to wait a while for cases interpreting the expanded equal pay obligations, the extent to which employers may place reliance on their employment equity plans, and the need to ensure that these plans are rational and fairly applied, have come under the spotlight in recent judgments involving the South African Police Service (SAPS).

We highlight a few of the notable cases below:

■ In **Solidarity obo Barnard v SAPS [2014] (2) SA 1 (SCA)** a white female police captain was not promoted to the position of Superintendent, despite being evaluated as the best candidate, on the basis that her appointment would adversely affect representivity within the relevant occupational

category. In this case, no candidate was appointed to the vacant position. There was clearly discrimination involved, as the reason for the decision was based on Captain Barnard's race. It was then open to the employer to defend against a finding of unfair discrimination, by proving that it was acting in reliance on an employment equity plan. The Supreme Court of Appeal (SCA) however found that the SAPS's contention that the position was not "critical", and the failure to appoint any other candidate, as well as the application of its transformation objectives did not offer a sufficient defence. The idea that the position was not critical, was, in the SCA's opinion, "contrived". The SAPS had further rigidly applied its employment equity plan, effectively offering an absolute barrier to Captain Barnard's promotion. As such, the SAPS was found to have unfairly discriminated against Captain Barnard.

However, should the debtor again begin to pay his debt, such payment will reduce the total amount owing and interest will again begin to run on the outstanding amount. This case re-affirmed this principle.

Furthermore, the case affirmed that the *in duplum* rule applies prior to litigation, and to the judgment debt i.e. that is the rule is suspended between service of process and judgment. In our scenario then, interest would stop running once the combined amount of the outstanding capital and the arrear interest reached R2000.00. When the creditor issued summons, interest would again begin to run on the amount owing by the debtor. When judgment is eventually granted, the capital debt and the arrear interest that accrued prior to service of the summons, and thereafter (while the *in duplum* rule is suspended), would be consolidated to form a singular judgment debt. Interest would run on this judgment debt afresh until the interest on the judgment debt reached the equivalent of the judgment debt.

■ The SAPS have been on the receiving end of a number of claims under the Employment Equity Act. Its fixed application of employment equity goals, effectively elevating it to the level of absolute barriers to advancement of persons it has identified as "over-represented", was again struck down in **Munsamy v Minister of Safety and Security [2013] 7 BLLR 695 (LC)**. In this case, an Indian male (and therefore one of the designated groups under the

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Employment Equity Act) was rejected for promotion in favour of a member of another designated group (African male) on the basis that Indian males were over-represented in the particular category. This despite the Indian male being considered the best candidate. Whilst it is theoretically possible for an employer to act in this manner, the Labour Court has emphasised (in the course of finding for Mr Munsamy) that employers can only prefer one category of designated employees over another if it has a "rational coherent equity plan" permitting this. This would at least require that regional demographics be considered when crafting the plan, and absolute barriers to advancement may not be implemented.

- In the unreported judgment of **Minister of Police v Sewlall Ranoo, case number D640/12**, delivered on 9 May 2014, the SAPS's haphazard

application of its affirmative action goals again resulted in a promotional decision being struck down by the Labour Court. The affirmative action figures relied on, were viewed as "irreconcilable, contradictory and haphazard". In this case, it was again an Indian male who was rejected for promotion on the basis of over-subscription of Indian males in the job category (presumably, since the Provincial Commissioner declined to provide reasons for rejecting Mr Ranoo's promotion other than to state that the promotions panel had to reconsider representivity). This notwithstanding that Mr Ranoo was rated as the best candidate, and further that the SAPS's affirmative action plan actually still allowed for appointment of Indian males. The Labour Court upheld the decision of an arbitration commissioner who ruled that Mr Ranoo be appointed to the rank of captain and be given back-pay and benefits.

LEGISLATION UPDATE

Employment Law – Employment Equity

On 1 August 2014 the Minister of Labour published regulations in terms of the Employment Equity Act (EEA) 55 of 1998 (the new regulations), at the same time repealing the previous regulations. Unlike the draft regulations published for comment earlier this year, the Minister this time made the new regulations of immediate effect.

Employers should take cognisance of two material aspects of the new regulations:

- The first relates to the manner in which employers must approach the obligation to ensure that employees who perform work of equal value do not receive unequal pay, where the inequality is based on any of the prohibited grounds listed in the EEA. The legislature placed particular importance on the need to avoid different pay for work of equal value based on race, gender and disability.
- The second material aspect of the new regulations concern employers' obligations when drafting employment equity plans (i.e. targets to achieve transformation), and reporting thereon.

The equal pay regulations explain the meaning of "work of equal value", and provide guidelines to employers on how to go about determining whether they are complying with its equal pay obligations under the EEA read with the new regulations. In considering whether work is of equal value, employers must objectively assess the "value" of the work, based on an open list of criteria, which includes the responsibility demanded of the job, the skills and related criteria required to perform the job, the effort (physical, mental and emotional) required to do the job, conditions under

which the job is performed, and any other relevant factor.

Once the value of a position is determined, the employer must establish whether there is a difference in terms and conditions of employment, including remuneration, between positions that qualify as equal value positions. If the answer to this last question is yes, it must then be established whether the reasons for the differentiation are based, directly or indirectly, on one of the prohibited grounds. If so, discrimination has been established. The employer will then have to show that one of the defences against a finding of unfair discrimination is available to it. The regulations flesh out the general defences available in a discrimination context, by providing a list of factors that may justify a differentiation in terms and conditions of service. Once again this is not a closed list, and it includes factors such as the individual's respective seniority or length of service, qualifications, performance, scarce skills, market forces etc.

Where the employment equity plan and annual reporting on progress made with affirmative action is concerned, employers should be careful not to underestimate the impact that the new regulations will have on their current situation. While the attempt under the repealed draft regulations, to largely limit employers to the use of national demographics (the national economically active population) when establishing whether it is sufficiently representative of African, Indian and Coloured people, women or people living with disabilities, has not been repeated in the new regulations, these new regulations nonetheless contain some fairly material new obligations for employers. Employment equity plans will in future have to be prepared with reference to a new template document, and must include goals relating to each element contained in the template, in each instance measurable against very clear deadlines, and with provision being made for monitoring and evaluation methods to establish progress. It would for instance not be sufficient to assert that progress will be monitored on an "ongoing" basis.

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Unlike the repealed regulations, the new regulations provide that all employers, irrespective of size, must report in the same format, with the same regularity, and must retain the necessary records for a period of five years, no longer for two or three years as was previously the case.

A further potentially far-reaching deviation from the repealed regulations, relates to the removal of the right to craft individual

employment equity plans if an employer operates multiple workplaces or is based in multiple geographical areas. The regulations that previously authorised such "split" plans and reporting were repealed, and in its stead employers who are holding companies (of more than one registered entity) are given the right to submit a consolidated report. This apparently signifies a move away from workplace specific affirmative action measures, in favour of consolidated approaches.

OTHER LEGISLATION

ACTS

ACTS PUBLISHED

■ **Electronic Communications Amendment Act, No 1 of 2014**

Commencement date: 21 May 2014 (GN 406; GG 37670; 21 May 2014)

This aims "to amend the Electronic Communications Act, 2005, so as to insert, amend or delete certain definitions; to align the Act with broad-based black economic empowerment legislation; to refine provisions relating to licensing; to make further provision towards ensuring effective competition amongst persons licensed under the Act; to remove regulatory bottlenecks; to require the Minister of Communications to establish a council to advise the Minister on broadband policy and implementation; to make further provision for the discounted rate at which Internet services must be provided to schools, educational institutions and public health establishments; to authorise the Minister to require that certain information be submitted to the Minister; to make provision for the fiduciary duties of members of the Board of the Universal Service and Access Agency of South Africa; to provide afresh for the appointment and conditions of appointment of the chief executive officer of the Board; to make further provision for the utilisation of money in the Universal Service and Access Fund and to provide for matters connected therewith".

■ **Independent Communications Authority of South Africa Amendment Act, No 2 of 2014**

Commencement date: 16 May 2014 (R 31; GG 37650; 16 May 2014)

This aims "to amend the Independent Communications Authority of South Africa Act, 2000, so as to insert new, amend existing and repeal obsolete, definitions; to provide for further clarity on the powers and duties of the Authority; to introduce mechanisms to ensure the accountability of the Authority, including that of councillors and committees; and to confirm the use of

electronic communications networks and services for the purpose of electronic transactions and to provide for matters connected therewith".

■ **Tourism Act, No 3 of 2014**

Commencement date: 16 June 2014 (R37; GG 37719; 6 June 2014)

This aims "to provide for the development and promotion of sustainable tourism for the benefit of the Republic, its residents and its visitors; to provide for the continued existence of the South African Tourism Board; to provide for the establishment of the Tourism Grading Council; to regulate the tourist guide profession; to repeal certain laws and to provide for matters connected therewith".

■ **Employment Services Act, No 4 of 2014**

Commencement date: to be proclaimed (GG 37539; 7 April 2014)

This aims "to provide for public employment services; to provide for the establishment of schemes to promote the employment of young work seekers and other vulnerable persons; to provide for schemes to assist employees in distressed companies to retain employment; to facilitate the employment of foreign nationals in a manner that is consistent with the objects of this Act and the Immigration Act, 2002; to provide for the registration and regulation of private employment agencies; to provide for the establishment of the Employment Services Board; to provide for the establishment of Productivity South Africa; to provide for the establishment of Supported Employment Enterprises; to provide for transitional provisions and to provide for matters connected therewith".

■ **Marine Living Resources Amendment Act, No 5 of 2014**

Commencement date: to be proclaimed (GG 37659; 19 May 2014)

This aims "to amend the Marine Living Resources Act, 1998, so as to insert, amend or delete certain definitions; to amplify the objectives and principles provided for in that Act; to make provision for

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measures relating to small-scale fishing and for the powers and duties of the Minister in this regard; to effect technical amendments and to provide for matters connected therewith".

■ **Science and Technology Laws Amendment Act 7 of 2014**

Commencement date: 26 April 2014 (GG 37594; 26 April 2014)

This aims "to amend the Scientific Research Council Act, 1988, the National Research Foundation Act, 1998, the Academy of Science of South Africa Act, 2001, the Natural Scientific Professions Act, 2003, the Human Sciences Research Council Act, 2008, the Technology Innovation Agency Act, 2008, and the South African National Space Agency Act, 2008, so as to harmonise the processes for the appointment of the chairpersons of the Boards of the entities reporting to the Minister; to streamline the processes for the appointment of members of the Boards and of the chief executive officers of the entities; to provide for the filling of vacancies of members of the Boards; to provide for the qualification requirements for membership of the Boards and the disqualification of members of the Boards; to provide for the extension of the term of office of members of the Boards; and to provide for the dissolution and reconstitution of the Boards and to provide for matters connected therewith".

■ **Legal Metrology Act, No 9 of 2014**

Commencement date: 1 August 2014 (GG 37887; 1 August 2014)

This aims "to provide for the administration and maintenance of legal metrology technical regulations in order to promote fair trade and to protect public health and safety and the environment and to provide for matters connected therewith".

■ **State Attorney Amendment Act, No 13 of 2014**

Commencement date: to be proclaimed (GG 37662; 19 May 2014)

This aims "to amend the State Attorney Act, 1957, so as to provide for the establishment of offices of State Attorney; to provide for the appointment of a Solicitor-General and State Attorneys; to provide for the powers of the Minister relating to the functions of the offices of State Attorney; to provide for the powers and functions of the Solicitor-General and to provide for matters connected therewith".

■ **Judicial Matters Amendment Act, No 14 of 2014**

Commencement date: this take effect on the date of publication (20 May 2014), except for sections 2, 3 and 6 which come into operation on a date to be proclaimed by the President in the Government Gazette (GG 37663; 19 May 2014).

This aims "to amend the Attorneys Act, 1979, so as to further regulate the powers of the board of control of the Attorneys Fidelity Fund; the Child Justice Act, 2008, so as to further regulate the evaluation of the criminal capacity of a child; to provide for the delegation of certain powers and assignment of certain duties by the Cabinet member responsible for social development in respect of the accreditation of diversion programmes and diversion service providers; to repeal provisions that make the Criminal Law Amendment Act, 1997, applicable to persons under the age of 18 years; and to provide for matters connected therewith".

■ **Restitution of Land Rights Amendment Act, No 15 of 2014**

Commencement date: 1 July 2014 (GG 37791; 1 July 2014)

This aims "to amend the Restitution of Land Rights Act, 1994, so as to amend the cut-off date for lodging a claim for restitution; to further regulate the appointment, tenure of office, remuneration and the terms and conditions of service of judges of the Land Claims Court; to make further provision for the advertisement of claims; to create certain offences; to extend the Minister's powers of delegation and to provide for matters connected therewith".

■ **Special Economic Zones Act, No 16 of 2014**

Commencement date: to be proclaimed (GG 37664; 19 May 2014)

This aims "to provide for the designation, promotion, development, operation and management of Special Economic Zones; to provide for the establishment, appointment of members and functioning of the Special Economic Zones Advisory Board; to provide for the establishment of the Special Economic Zones Fund; to regulate the application, issuing, suspension, withdrawal and transfer of Special Economic Zones operator permits; to provide for functions of the Special Economic Zones operator; to provide for transitional arrangements and to provide for matters connected therewith".

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■ **Property Valuation Act, No 17 of 2014**

Commencement date: to be proclaimed (GG 37792; 1 July 2014)

This aims "to provide for the establishment, functions and powers of the Office of the Valuer-General; to provide for the appointment and responsibilities of the Valuer-General; to provide for the regulation of the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by a department and to provide for matters connected therewith".

■ **National Credit Amendment Act, No 19 of 2014**

Commencement date: to be proclaimed (GG 37665; 19 May 2014)

This aims "to amend the National Credit Act, 2005, so as to amend certain definitions; to provide for the alteration of the governance structure of the National Credit Regulator; to empower the Chief Executive Officer to delegate certain functions to other officials of the National Credit Regulator; to provide for the registration of payment distribution agents; to tighten measures relating to debt counsellors and the conduct of their practices as debt counsellors; to allow registrants to voluntarily cancel their registration; to empower the Minister to issue a notice for the removal of adverse consumer credit information; to provide for automatic removal of adverse consumer credit information; to empower the National Consumer Tribunal to declare a credit agreement reckless; to provide for the registration and accreditation of alternative dispute resolution agents and to provide for matters connected therewith".

■ **National Environmental Management: Air Quality Amendment Act, No 20 of 2014**

Commencement date: this takes effect on "the date of publication in the Gazette as contemplated in section 81 of the Constitution of the Republic of South Africa, 1996 (GG 37666; 19 May 2014).

This aims "to amend the National Environmental Management: Air Quality Act, 2004, so as to substitute certain sections; to provide for the establishment of the National Air Quality Advisory Committee; to provide for the consequences of unlawful commencement of a listed activity; to provide for monitoring, evaluation and reporting on the implementation of an approved pollution prevention plan; to empower the MEC or Minister to take a decision in the place of the licensing authority under certain circumstances; to provide for the Minister as licensing authorities in situations where the province, as a delegated licensing authority by the municipality,

is the applicant for an atmospheric emission licence, where the applications are trans-boundary, where the air activity forms part of national priority project, where the activity is also related to the environmental impact and waste management activities authorised by the Minister, where the air activity relates to a prospecting, mining, exploration or production activity; to delete cross references to the Environmental Conservation Act, 1989; to clarify that applications must be brought to the attention of interested and affected parties soon after the submission to the licensing authority; to provide for a validity period of provisional atmospheric emission licence; to create an offence for non-compliance with controlled fuels standards; to provide for the development of regulations on climate change matters and the procedure and criteria for administrative fines; to delete certain obsolete provisions and to provide for matters connected therewith".

■ **National Environmental Management: Protected Areas Amendment Act, No 21 of 2014**

Commencement date: this takes effect on the date of publication in the Gazette as contemplated in section 81 of the Constitution of the Republic of South Africa, 1996, or such earlier date as determined by Proclamation by the President in the Gazette.

This aims "to amend the National Environmental Management: Protected Areas Act, 2003, so as to amend or insert certain definitions; to authorise the declaration of marine protected areas; to provide for the management of marine protected areas; to provide for transitional measures; and to effect certain textual alterations and to provide for matters connected therewith".

■ **Infrastructure Development Act, No 23 of 2014**

Commencement date: this takes effect on a date determined by the President by proclamation in the *gazette*.

This aims "to provide for the facilitation and co-ordination of public infrastructure development which is of significant economic or social importance to the Republic; to ensure that infrastructure development in the Republic is given priority in planning, approval and implementation; to ensure that the development goals of the state are promoted through infrastructure development; to improve the management of such infrastructure during all life-cycle phases, including planning, approval, implementation and operations and to provide for matters incidental thereto".

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■ **National Environmental Management Laws Amendment Act, No 25 of 2014**

Commencement date: this takes effect three months from the date of publication of this Act by the President in the *Gazette* in terms of section 81 of the Constitution.

This aims "to amend the:

- **National Environmental Management Act, No 107 of 1998**, so as to amend certain definitions and to define certain words and expressions; to provide for the review of environmental management instruments; to provide for minimum information requirements to be included under environmental management instruments; to provide for the Minister responsible for mineral resources to be the competent authority for environmental matters in so far as they relate to prospecting, exploration, mining or production of mineral and petroleum resources; to empower the Minister to take an environmental decision in so far as it relates to prospecting, exploration, mining or production instead of the Minister responsible for mineral resources under certain circumstances; to clarify the provisions relating to integrated environmental authorisations; to strengthen the financial provisions in the Act; to provide for consultation with State Departments; to provide for the management of residue stockpiles and residue deposits; to empower the Director-General of the Department responsible for mineral resources to issue section 28 directives in so far as they relate to prospecting, exploration, mining or production; to empower the Minister responsible for mineral resources to designate environmental mineral resource inspectors within the Department responsible for mineral resources for compliance monitoring and enforcement of provisions in so far as they relate to prospecting, exploration, mining or production; to provide the Minister with the power to direct environmental management inspectors to perform compliance monitoring and enforcement duties instead of mineral resource inspectors under certain circumstances; to empower the provincial head of department to delegate a function entrusted to him or her under this Act; to provide for the suspension of a decision on receipt of an appeal; to provide for appeals

against directives; to further provide for the power of the Minister to make regulations; to provide for consultation in the event that an Act of Parliament or regulations are amended that impact on the Agreement; to provide for the criteria for condonation applications in the case of appeals that relates to prospecting, exploration, mining or production; and

- **National Environmental Management: Waste Act, No 59 of 2008**, so as to insert certain definitions; to empower the Minister to prohibit or restrict waste management activities in specified geographical areas; to empower the Minister responsible for mineral resources to be the licensing authority to issue waste management".

■ **National Environmental Management: Waste Amendment Act, No 26 of 2014**

Commencement date: this takes effect on the date of publication of this Act by the President in the *Gazette* in terms of section 81 of the Constitution of the Republic of South Africa, 1996.

This aims "to amend the National Environmental Management: Waste Act, 2008, so as to substitute and delete certain definitions; to exclude the department from the spheres of government that are required to compile integrated waste management plans; to require the MEC responsible for waste management to act in concurrence with the Minister when requesting certain persons to compile and submit industry waste management plans; to provide for the exclusion of the provincial department responsible for waste management from the requirement to compile an industry waste management plan; to establish a pricing strategy; to provide for the content and application of the pricing strategy; to establish the Waste Management Bureau; to provide for the determination of policy and the Minister's oversight in relation to the Waste Management Bureau; to provide for the determination of policy and the Minister's oversight in relation to the Waste Management Bureau; to provide for the objects, functions, funding, financial management, reporting and auditing, immovable property of the Waste Management Bureau; to provide for the employees of the Waste Management Bureau; to provide for the appointment and the functions of the Chief Executive Officer of the Waste Management Bureau; to prescribe certain matters in relation to the Waste Management Bureau; to provide for transitional provisions in respect of existing industry waste management plans and to provide for matters connected therewith".

continued

■ **National Water Amendment Act, No 27 of 2014**

Commencement date: this takes effect on the same date as the National Environmental Laws Amendment Act, 2014.

This aims "to amend the National Water Act, 1998, so as to make provision for the correct designation of the Department and Minister; to correct outdated references; to provide for an alignment and integration of the process for consideration of water use licences, relating to prospecting, exploration, mining or production activities; to provide for the

appointment of the Minister as the responsible authority for appeals relating to prospecting, exploration, mining or production activities; to amend the authority of the Water Tribunal as appeal authority relating to prospecting, exploration, mining or production activities; to provide for the concurrence between the Minister, the Minister responsible for mineral resources and the Minister responsible for environmental affairs when amending provisions of the Agreement related to prospecting, exploration, mining or production activities and to provide for matters connected therewith".

BILLS

Bills approved awaiting the President’s signature

- Labour Relations Amendment Bill [B16D of 2012]
- Legal Practice Bill [B20D of 2012]
- Local Government: Municipal Property Rates [B33B of 2013]
- Mineral and Petroleum Resources Development Amendment [B15B of 2013]
- Private Security Industry Regulation Bill [B27D of 2012]
- Public Administration Management Bill [B55B of 2013]

Bills tabled in 1st Session of the 5th Parliament

- Development Bank of Southern Africa [B 2-14]
- Medicines & Related Substances [B 6-14]
- Legal Aid Bill [B 8-14]
- Attorneys Amendment Bill [B 9-14]
- Defence Amendment Bill [PMB 8-13]
- Medical Innovation Bill [Private Member Bill]

Draft Bills published for comment

- Performing Animals Protection Amendment Bill [2014]
- Protected Disclosures Amendment Bill [2014]

This aims "to amend the Protected Disclosures Act, 2000, so as to extend the application of the Act to any person who works or worked for the State or another person or who in any manner assists or assisted in carrying on or conducting the business of an employer or client as an independent contractor, consultant, agent or person rendering services to a client while being employed by a temporary employment service; to regulate joint liability of employers and their clients; to introduce a duty to investigate disclosures of information regarding unlawful or irregular conduct; to provide for immunity against civil and criminal liability flowing from a disclosure of information which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed and to provide for matters connected therewith".

- Rates and Monetary Amounts and Amendment of Revenue Laws Bill [2014]
- Remote Gambling Bill [2014]
- Road Accident Fund Benefit Scheme Bill [2014]

This aims "to provide for a social security scheme for the victims of road accidents; to establish the Road Accident Benefit Scheme Administrator to administer and implement the scheme; to provide a set of defined benefits on a no-fault basis to persons for bodily injury or death caused by or arising from road accidents; and to exclude liability of certain persons otherwise liable for damages in terms of the common law and to provide for matters connected therewith".

continued

■ **Small Claims Courts Amendment Bill [2014]**

This aims "to amend the Small Claims Courts Act, 1984, so as to insert a definition; to further regulate the jurisdiction of a small claims court and to provide for matters connected therewith".

■ **Superior Courts Amendment Bill [2014]**

Amendments to the Superior Courts Act are in the pipeline to provide for the rescission of default judgments by consent in the High Court.

■ **Taxation Laws Amendment Bill [2014]**

The 2014 draft TLAB gives effect to the following key proposals announced in the 2014 Budget Review:

- the introduction of tax free saving accounts;
- amendments to the taxation of contributions to defined benefit funds;
- changes to the taxation of Small Business Corporations;
- adjustments to the tax treatment of the risk business of long term insurers;
- refinements to the employment tax incentive; and
- the repeal of the VAT zero rating in respect of goods for agricultural, pastoral or other farming purposes.

OTHER IMPORTANT LEGISLATIVE DEVELOPMENTS

■ **Employment**

Employment Equity Amendment Act No 47 of 2013
Commencement date: 1 August 2014 R50; GG 37871; 25 July 2014

&

Repeal of Employment Equity Regulations & publication of new regulations GN 595; GG 37873; 1 August 2014

■ **Immigration**

Immigration Amendment Act No 3 of 2007
Commencement date: 26 May 2014 R32; GG 37679; 22 May 2014

&

Immigration Amendment Act No 13 of 2011
Commencement date: 26 May 2014 R33; GG 37679; 22 May 2014

■ **Immigration Regulations**

Commencement date: 26 May 2014 R413; GG 37679; 22 May 2014

The regulations contain specific requirements with regard to travelling with children.

Cliffe Dekker Hofmeyr recently hosted a conference on behalf of the Dutch and Belgian Chambers of Commerce where the new immigration legislation and regulations were discussed. Representatives from the Departments of Labour and Trade of Industry attended this event. Michael Yeates, a director from our Employment Practice and expert in immigration law, initiated and facilitated this event. The speakers included:

- **Immigration Amendments**

Advocate T. Sebelemetja Director Drafting (Legal Services) – Department of Home Affairs

- **Involvement of the Department of Labour**

Mr I Nongi (Director) – Department of Labour

- **Involvement of the Department of Trade and Industry – Corporate Visas**

Ms W. Barnard (Deputy Director Investment Promotion) – Department of Trade and Industry

■ **Interest rate**

New prescribed rate of interest of 9.0 per cent per annum as from 1 August 2014 for purposes of section 1(1) of the Prescribed Rate of Interest Act, No 55 of 1975

Commencement date: 1 August 2014 R554; GG 37831; 18 July 2014

RECENT DEVELOPMENTS

Competition

Recent publications covered:

- Dunlop gets fined for prior implementation of merger
- Competition Commission raids auto body firms
- Sixteenth construction firm settles with the Competition Commission
- Exception application by Cape Gate (Proprietary) Limited
- Exemption application sought for professional
- Squid exporters receive Competition law exemption
- Sasol found guilty of excessive pricing
- Healthcare inquiry: Statement of issues and draft guidelines for participation issued for public comment
- Awarding costs is an exercise of judicial discretion
- Property merger – Pareto Limited and Fountainhead Property Trust Collective Investment Scheme
- The Competition Tribunal saws through application
- Competition Commission gives notice of market enquiry into LPG sector
- Annual Competition seminar
- Minister of Economic Development appoints Competition Commissioner
- Tribunal dismisses case against SAB
- Competition Commission appeals Tribunal decision dismissing charges against SAB
- Exclusivity clauses in lease agreements still subject to scrutiny
- The Competition Tribunal issues its reasons for approving Aspen's acquisition of Pfizer's infant nutrition business
- First address by the panel of the private healthcare inquiry
- Resin merger does not resonate with Commission
- Commission concludes consent order with Martinair Cargo in respect of fuel surcharges price fixing complaint
- Africa Insights Competition Alert
 - Africa rules, ok!
 - COMESA Competition Commission provides update on merger regime at 10th IBA conference in Cape Town
 - Kenya's competition authority invites comments on proposed merger filing fees

- Failure to notify in Kenya may result in criminal sanctions
- COMESA approves merger between courier companies

For more information, please refer to the following Alerts on our website: <http://www.cliffedekkerhofmeyr.com/en/news/?type=en/news/publications/&practice-area=Competition>

Construction and Engineering

Recent publications covered:

- Occupational Health and Safety Act, No. 85 of 1993: Construction Regulations, 2014

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/projects/construction-and-engineering-alert-4-june.html>

Corporate and Commercial

Recent publications covered:

- DE facto directors
- TRP ruling highlights pyramid companies and issues around "control"
- Board's power to refuse a transfer of shares: Citrus Visser case

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/?type=en/news/publications/&practice-area=Corporate and Commercial>

Data Protection and Privacy

- A recent publication: Just Google it? Forget it! The right to be forgotten case

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/technology/data-protection-alert-30-july.html>

continued

Dispute Resolution

Recent publications covered:

- The Protection of Investment Bill – A possible death knell for foreign investment
- Business Rescue and its effect on suretyships
- Repudiation: A "thing writ in water"?
- I know I signed the contract, but it's not fair!
- Guarantees – Guaranteed certainty ... at last!

For more information, please refer to the following Alerts on our website: [http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Dispute Resolution](http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Dispute%20Resolution)

Employment

Recent publications covered:

- The employer's statutory duty to report criminal conduct under the Prevention and Combating of Corrupt Activities Act, No 12 of 2004
- What about a minimum national wage for South Africa?
- The 'undesirable person' provisions of the new immigration legislation *Wehncke v Surf4cars (Pty) Ltd*: Riding the wave into the amendments to s187(1)(c) of the LRA
- *Segakweng v Ogilvy (Johannesburg) (Pty) Ltd*: Prescription: Certainty before equity
- The common good of the enterprise is not a relevant factor in determining whether a demand constitutes a matter of mutual interest
- Employers should safeguard themselves against the difficulties of defamation claims brought by employees
- Redundancy in Zambian Labour Law
- Draft Protected Disclosures Amendment Bill has wider ambit than before
- Can employees interdict their intended dismissals – a question of alternatives?
- Clear strike notices and a reminder of the interim right to strike under S64(4) of the LRA
- Affirmative action – The "BBBEE" all and end-all?
- Polygraphs: Are inferences from Pinocchio's nose worth the procedure?
- Minister of home affairs announces financial or capital contribution for business
- Employer's duty to report on vacancies
- Recent judgments dealing with sexual harassment in the workplace

- *Beurain V Martin N.O and Others*: The unreasonable whistle-blower
- Putting the lawfulness of a trade union's demand under the microscope
- Severance tax benefits – Threshold increase
- Dismissing 'without prejudice' and not to be reminded again
- Employment Services Act
- Skyping at an arbitration proceeding – A clever way to allow a witness to testify or an infringement of the right to a fair trial?
- Territorial application of the LRA: *South African Tourism Vs Tebogo Brian Monare*
- Warning from the Labour Court regarding adherence to time frames contained in the new Labour Court Practice Manual

For more information, please refer to the following Alerts on our website: <http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Employment>

Energy

The race to secure energy to the national grid, and through alternative energy sources, has intensified if the Policy Budget Speech delivered by Ms Tina Joemat-Peterson (Minister) on 21 July 2014 is anything to go by.

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/projects/energy-alert-28-july.html>

Environmental

Recent publications covered:

- New responsible authorities identified to regulate water use
- Amendments to National Environmental Management: Air Quality Act, No 39 of 2004

For more information, please refer to the following Alerts on our website: <http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Environmental>

continued

Finance and Banking

Recent publications covered:

- Foreign Account Tax Compliance Act (FATCA) – practical implications for South African entities
- When is a company an operating company for tax purposes?
- Demystifying adequate delivery of a Section 129 Notice

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/finance/finance-and-banking-alert.html>

Immigration

The long-awaited commencement date for the amendments to South Africa's immigration law has been announced.

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/immigration/Immigration-Alert-30-June-2014.html>

Insurance

It is self-evident that any contract should clearly and accurately reflect the intentions of both parties, and an insurance contract is no different. This is especially important when recording any limitation on the obligation of the insurer to indemnify the insured for a loss.

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/dispute/insurance-alert-2-june.html>

Projects and Infrastructure

Recent publications covered:

- Gauteng MEC tables the 2014/15 budget vote for the Gauteng Provincial Treasury
- Infrastructure Development Act comes into effect
- *Allpay v CEO of SASSA*: Dealing with alleged irregularities in awarding tenders
- *Allpay v CEO of SASSA*: Greater scrutiny of economic empowerment in government tenders?
- *Allpay v CEO of SASSA*: The use of structural interdicts to remedy unlawful tender awards

For more information, please refer to the following Alerts on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/projects/Projects-and-Infrastructure-Alert.html>

Real Estate

In *Africast (Pty) Ltd v Pangbourne Properties Ltd*, the Supreme Court of Appeal had occasion to consider the law of contract, specifically the legal consequences emanating from a contract containing a suspensive condition.

For more information, please refer to the following Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/real-estate/real-estate-alert-4-june.html>

Tax

Recent publications covered:

- Ruling on leasehold improvements
- Securities Transfer Tax and "earnout"
- Disposals by share incentive trusts
- Sars must give proper reasons and have proper grounds
- Contributed tax capital in a company context
- Tax free savings accounts
- Public benefit organisations - lowering of the distribution requirement
- Value-added Tax and the disposal of a partnership interest to the remaining partner
- New tax dispute resolution rules – the wait is finally over!
- Ruling on amalgamation transaction
- VAT considerations between developers and owners of land
- Capitalisation of shareholder loans
- Deductibility of costs in respect of plant used in the production of renewable energy
- Reportable arrangements and retrospectivity
- Donations made between spouses
- Supreme Court of Appeal addresses administrative fairness in raising assessments and disputes before the Tax Court
- Tax exemption on foreign employment income
- The taxation of risk policies – throw away existing principles
- The fine line between a restricted and unrestricted equity instrument
- Reasonable care in completing tax returns
- International tax transparency: the need for automatic exchange of information
- Taxation of hedge funds

continued

- New regulations for the zero rating of indirect exports
- Implications of the carbon offsets paper
- An update on the streamlining of the VAT registration process

For more information, please refer to the following Alerts on our website: <http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Tax>

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We value training and skills development as an important part of our corporate culture. We offer various training sessions, presentations, updates and workshops on a range of topics. Please visit our website for more information about upcoming events.

We recently hosted seminars on developments in the areas of:

- Anti-bribery and corruption
- Competition law
- Dispute resolution – business rescue proceedings
- Employment law
- Immigration law
- Tax law

Our anti-bribery and corruption seminar was attended by a number of senior executives of South African corporations. There are a number of South African entities which are already the subject of investigations by the US Department of Justice and the Securities and Exchange Commission. Clients who have any dealings of any sort with US or UK citizens as shareholders, suppliers or customers, need to understand the threats, dangers and risks posed by the US and UK bribery and corruption legislation. The seminar was aimed at assisting clients to understand their obligations in terms of global anti-bribery and anti-corruption legislation and to develop their own compliance programmes.

The next training initiative will focus on:

Term Sheets

For more information, please contact us: www.valueadd4clients@dlacdh.com

The KM Team

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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