IMPORTANT NEWS & CIRCULAR

LAST BULLETIN FOR 2015 & OFFICES CLOSED FOR THE HOLIDAYS

This is the final Bulletin for 2015. The Bulletin service will recommence on 8 January 2015.

Please note that the offices of Phatshoane Henney Attorneys will be closed from 13:00 on 24 December 2015 and will re-open at 08:00 on 4 January 2016.

From the Knowledge Centre we wish everyone a happy and peaceful holiday season and everything of the best for 2016.

FINAL DEADLINE OF PAIA LOOMS!

PAIA (the Promotion of Access to Information Act) requires you to prepare, lodge and publish (including on any website you have) an information manual in the prescribed format.

Who must lodge

Every business operation, no matter how small (the definition includes any person or partnership carrying on "any trade, business or profession", together with any "juristic person") must comply.

If you are one of the many smaller businesses (see below to check) who benefitted from a last-minute extension of your deadline from 31 August 2005 to 31 December 2011, and then another to 31 December 2015, this is for you:

- Although there could be another last-minute extension (or even perhaps an outright exemption for some businesses), don't count on it.
- If your business is a small and simply-structured one it really isn't difficult to get your PAIA manual together, so do it now and avoid the stress of trying to comply at the last minute. It's important to do it correctly and accurately, so take advice in doubt.

Does this deadline apply to you?

The 31 December 2015 extension applies to most smaller businesses - specifically to any "private body", including any private company, but not to any non-private company, nor to any private company in any of the business sectors listed below with either:

- 50 or more employees, or
- An annual turnover of or above specific thresholds - see the table below for details.


TAKE NOTE: PAIA MANUAL DEADLINE MIGHT BE EXTENDED AGAIN!

Information pertaining to another extension have appeared on non-official forums, but no notice has yet been published in the Government Gazette confirming such further extension and to whom it will apply. We are monitoring the situation and will keep the Group Firms updated as soon as we receive confirmation of a more official nature.
PAIA MANUAL DEADLINE EXTENDED AGAIN!

According to Michalsons' website the PAIA manual deadline has been extended, again. The Minister of Justice and Correctional Services has “decided to further exempt private bodies from compiling the Manual contemplated in section 51(1) of PAIA…” The deadline has been extended for another routine 5-year period, and it comes into effect from 1 January 2016. The notice has not been gazetted but as soon as the notice is available, we can tell you when the exemption ends and who is exempted.

What does this mean?

This means that you should not rush into making a shabby PAIA manual just to meet the deadline. Those who were previously exempt, will probably remain exempt and do not need a PAIA manual by law. Some businesses have never been exempt and they have always needed a PAIA manual.

Do you still need a PAIA manual?

If you are a small business, you don’t. If you are a large business, you still do. If you are in between, you need to see if you meet the threshold.

Source: http://www.michalsons.co.za/blog/paia-manual-deadline-extended/18033

RETIREMENT FUND REFORM IMPLEMENTATION CLARIFIED

National Treasury has confirmed that the de minimus threshold below which a retirement fund member may take the entire benefit available to him/her in a lump sum has been raised to R247,500. According to a media statement, the new threshold will become effective on 1 March 2016 – along with other tax harmonisation reforms in the 2013 Act, the implementation of which was postponed by 12 months early this year. The threshold will apparently be reviewed two years after the effective date.

Clarifying the implications of the new threshold, the one-third restriction on lump sum cash pay-outs from retirement savings – already applicable to all pension fund and retirement annuity fund members – will be extended to include the members of provident funds from 1 March next year. As a result, all new contributions into provident funds after that date by members below the age of 55 ‘will be subject to the two-thirds annuitisation requirement’. However, this will only apply once the benefit at retirement exceeds the de minimus threshold.

‘It will take several years before many provident fund members under the age of 55 years reach this higher limit’, the statement notes – presumably in an attempt to allay unfounded fears about restrictions on access to retirement savings on resignation, dismissal or retrenchment. It also reaffirms government’s commitment to ‘releasing the social security paper despite its complexity’, nevertheless alluding to further improvements to retirement fund regulation with the aim of ensuring a ‘better’ outcome for members.

Source: Legalbrief 7 December 2015

CYBER SECURITY FRAMEWORK GAZETTED

Government’s National Cyber Security Policy Framework was gazetted – nearly four years after it was approved by Cabinet in March 2012. Since then there has been no official communication on why its publication was being delayed, despite burgeoning cybercrime and the need for ‘strategic direction’ in dealing with the issue.

In his May budget vote speech, State Security Minister David Mahlobo nevertheless undertook to ‘move with speed’ in ‘finalising’ the policy, appearing to suggest that more work still needed to be done. A draft Cybercrimes and Cybersecurity Bill released in August for comment has since been met with widespread criticism.

Replete with ideals and platitudes – but astonishingly short on substance – the policy framework will be ‘supported’ by an implementation plan yet to be developed. Hopefully, notes Pam Saxby, this will provide much-needed clarity on government’s intentions regarding several key imperatives identified in the document: the introduction of a verification system for information security products; the protection of SA’s national critical information infrastructure; and the regulation of cryptography. Underpinning the entire policy framework is a commitment to ensuring that growing threats to cybersecurity do not undermine ‘the crucial role’ played by information and communications technology in stimulating economic growth and human development.
1. Resolutions taken at a Registrars’ Conference will be effective from 2 January of the year following the year of such Conference.
2. Registrars of Deeds must ensure that all examiners are in possession of a copy of the Registrars’ Conference Resolutions.
3. The Office of the Chief Registrar of Deeds will ensure that a copy of the Registrars’ Conference Resolutions is forwarded to the Law Society of South Africa, as well as Butterworths Publications.
4. This Circular will only apply to aspects that relate to practice and procedure to be followed in the deeds registry and not to aspects that relate to the correct application of the provisions of legislation.
5. Chief Registrar’s Circular No. 16 of 2005 is hereby withdrawn and substituted with this Circular

Contact the Knowledge Centre for a copy of above circular

**RECOMMENDED READING**


- **Adolescent girls’ access to contraceptive information and services in South Africa: What is going wrong? (2)**, by OA Savage-Oyekunle & A Nienaber, THRHR, Band 78 No 4 November 2015

- **Evaluating the United Kingdom’s employee shareholder status provisions in context of the South African position**, by MM Botha, THRHR, Band 78 No 4 November 2015

- **Wrongful suffering: A life that should never have been**, by TG Brits & M Slabbert, THRHR, Band 78 No 4 November 2015


- **The requirements and test to assess testamentary capacity**, by MC Schoeman-Malan, THRHR, Band 78 No 4 November 2015

- **Die vervreemding van grond kan mondelings geskied: Feit of fiksie?**, deur DJ Lötz, THRHR, Band 78 No 4 November 2015
RECENT SUPREME COURT OF APPEAL JUDGMENTS


Criminal Law – unlawful multiplication scheme conducted in contravention of various statutory provisions and the common law – whether such activities constituted a pattern of racketeering activity in contravention of sections 2(1)(b), 2(1)(e), 2(1)(f) and 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA) – elements to be proved by the State to secure convictions under relevant provisions of POCA – whether dolus or culpa required – proper approach. Sentence – whether interference by court of appeal is justified.

NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT (20781/2014) [2015] ZASCA 206 (4 DECEMBER 2015)

Constitutional law - constitutional challenge to Act s 7(1)(a) of the Criminal Procedure Act 51 of 1977 - whether the section is unconstitutional insofar as it allows only private persons to institute private prosecutions and not juristic persons - whether the differentiation is rationally connected to a legitimate governmental purpose.

WESTINGHOUSE v ESKOM HOLDINGS (476/2015) [2015] ZASCA 208 (9 DECEMBER 2015)

Review of tender award: where an administrative body takes into account considerations that are extraneous to the tender evaluation criteria, as set out in the invitation to bid, its decision to make the award is unlawful and procedurally unfair. Award set aside and matter remitted to administrative body for reconsideration.

AURECON SOUTH AFRICA (PTY) LTD v CITY OF CAPE (20384/2014) [2015] ZASCA 209 (9 DECEMBER 2015)

Administrative review – respondent seeking review and setting aside of its own decision to award tender for the decommissioning of Athlone Power Station to appellant – 180 day time limit envisaged in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 not met – no fraud or corruption involved in procurement process and irregularities, if any, not material – no case made out for the extension of time limit under s 9(1) of the Act.


RECENT HIGH COURT JUDGMENTS

MOTHER WINS VISA BATTLE FOR CHILDREN

A University of KZN professor has won a court battle against the Department of Home Affairs to travel with her children without permission from their father. She has secured a court order allowing her children to travel in and out of the country without the written consent of their father, as required by the new visa regulations. But the second part of her ‘public interest’ KZN High Court (Durban) application – to scrap in its entirety the new, controversial regulation which requires the consent of any non-travelling parent for any child wishing to travel overseas – is being challenged by the Minister of Home Affairs and, unless there is a change of heart, could take months to resolve. In terms of an order taken by consent before Judge Dhaya Pillay yesterday, the Minister has until March next year to file a full answering affidavit in the matter which is likely to go to the Constitutional Court. The professor said in her court application that she and they were virtual prisoners in SA because she could not get the necessary written consent from their father, who was named on their birth certificates, but who had little to do with their lives. She said there were many other single parents in the same situation, in which the other parent, while not having any parental rights or responsibilities, now had the power to decide whether or not their children could or could not leave the country. She said her ex-husband lived in a home for unrehabilitated alcoholics in England and used every opportunity – such as being asked to consent to the children’s travelling – as a means to extort money from her.

Source: Legalbrief 11 December 2015

COURT ORDERS REMOVAL OF FACEBOOK POST

The KZN High Court (Durban) has issued an interim order for a policeman to remove a Facebook post in which he falsely accused a well-known driving school of offering lessons to his wife in exchange for oral sex. However, a week after the post was removed and an apology issued on the social network, the driving school’s owner and his son are still being verbally abused by motorists and shunned by the community. The owner said his client base had dropped from 10 a day to two. In court papers he explained that a friend contacted his son to refer a client and then handed over her
cellphone to a policeman who asked about lessons for his wife. The son suggested to the client that he contact other driving schools in the area as they did not offer the package deal he sought. A few days later the driving school owner was alerted to a post on a Facebook group called ‘GATVOL’, on which the policeman posted a phone number and the name of the driving school, and claimed that the man who answered suggested that his wife would only pass her driving test if she performed oral sex. ‘He dialled the wrong number and thought whoever it was was us. He could have approached me and we would have straightened it out, but instead he went to Facebook and now we are in this very bad situation,’ said the driving school owner. The policeman's attorney, Viren Singh, reportedly confirmed that his client had removed the post and issued an apology online, but was opposing the interim order.

Source: Legalbrief 11 December 2015

EX-WIFE WINS 50% OF ASSETS

Bukelwa Holomisa – the estranged wife of ANC MP Patekile Holomisa – has persuaded the court that she is entitled to half of his assets. The pair married in December 1995 under the Marriage Act 25 of 1961. Things turned sour when her husband married another woman and they lived together as man and wife. Bukelwa had initially intended to ask Home Affairs to expunge her husband’s new marriage from its records. She had earlier argued that although polygamy is acceptable in African culture, because of her civil union he could not marry again while still married to her. But she decided not to pursue that route and to focus instead on the divorce proceedings. The divorce was granted by the Mthatha Regional Court but her husband appealed to the Eastern Cape High Court (Mthatha). He argued that they were married out of community of property under the Transkei Act while she insisted that was not the case. Now Eastern Cape High Court (Mthatha) Judge John Smith has ruled that the MP failed to prove they were married under the Transkei Act and therefore cannot claim it is applicable.

Source: Legalbrief 11 December 2015

SUICIDE IN FACT A MURDER

The Northern Cape High Court ruled that what had been thought to be the suicide of a prominent game farmer in the province was not suicide, but in fact a murder carried out by his wife. Koekie Botha (65) was yesterday convicted of murdering her husband, Nico (60), in July 2010. He was found dead in their bedroom with two gunshot wounds to his head. Judge Violet Phatsoane found that Botha drugged her husband before shooting him. The state had applied to reopen the case, exhume Nico’s remains and recall witnesses after a new prosecutions team took over. Botha was released on bail of R5 000. Sentencing proceedings start in February.

Source: Legalbrief 11 December 2015

ALL SOUTH AFRICAN LAW REPORTS 2015 VOLUME 4 NOVEMBER 1 & 2

MEC: DEPARTMENT OF POLICE, ROADS AND TRANSPORT, FREE STATE PROVINCIAL GOVERNMENT v TERRA GRAPHICS (PTY) LTD T/A TERRA WORKS AND ANOTHER [2015] 4 ALL SA 255 (SCA)

Contract – Claim by sub-contractor for payment by provincial government that benefited from sub-contractor’s services – Work done and services rendered both by principal contractor and by subcontractor – Defence of lack of contractual privity – Where sub-contractor performed work for the benefit of province, and the province approved appointment of such sub-contractor, defence relating to privity of contract rejected.

NDV v S [2015] 4 ALL SA 268 (SCA)

Criminal law – Sentence – Fraud on employer when in position of trust – Principles to be applied where a person convicted of an offence is the primary caregiver of children – Failure to consider the best interests of an offender’s young children, when imposing a sentence, constitutes a grave misdirection – Court held that a custodial sentence is appropriate even though appellant was primary caregiver because of the seriousness of the crime.

BR AND ANOTHER v TM; IN RE: LR [2015] 4 ALL SA 280 (GJ)

Civil procedure – Divorce action – Paternity dispute – Motion proceedings – Motion proceedings are not permissible in matrimonial causes since it is undesirable for a court to grant a divorce without hearing oral evidence of the parties, first because not only is the status of the parties themselves involved, but also those of children, and second because of the interests of the State in the preservation of the binding nature of marriage – Question of paternity of the child in casu,
and the rights and responsibilities of the parties were raised in the divorce action and were as such integral to the matrimonial cause between the second applicant and the respondent.

**BUSINESS PARTNERS LIMITED v WORLD FOCUS 754 CC (REGISTRATION NO: CK 2005/023544/23) [2015] 4 ALL SA 294 (KZD)**

Civil procedure – Application – Pleadings – Founding and replying affidavit – New facts impermissible – General rule is that the court will not permit an applicant to assert new facts in his replying affidavit which should have been set out in his founding affidavit – Court’s discretion to allow new matter to remain in a replying affidavit – Court held that no prejudice had been shown to have been suffered by the applicant in consequence of the respondent’s subsequent reliance on section 347(1A) of the Companies Act 61 of 1973 as the statutory basis for the relief that it sought.

**GENESIS MEDICAL SCHEME v MINISTER OF HEALTH (MEDE-CLINIC SOUTHERN AFRICA (PTY) LTD AND OTHERS AS APPLICANTS TO INTERVENE; TREATMENT ACTION CAMPAIGN NPC AND OTHERS AS AMICI CURIAE) [2015] 4 ALL SA 302 (WCC)**

Civil procedure – Leave to intervene – Standing – Right of access to courts – Section 34 of the Constitution of the Republic of South Africa, 1996 – Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum – Court held that it would not be rational or equitable to limit the right of access to the courts in a case of competing litigants to the party who is the first to institute the proceedings in question.

**GREAT FORCE INVESTMENTS 124 (PTY) LTD v SURVEYOR-GENERAL, CAPE TOWN AND OTHERS [2015] 4 ALL SA 322 (WCC)**

Administrative law – Property title deed – Incorrect recording of servitude – Review – Owner of small holding’s knowledge was that the use of the servitude was infrequent and not particularly onerous on the dominant tenement – Recordal of servitude was clearly incorrect – In casu, Court held that remittal was the prudent relief.

**LAW SOCIETY OF THE NORTHERN PROVINCES AND OTHERS v RONALD BOBROFF & PARTNERS INC AND OTHERS [2015] 4 ALL SA 347 (GP)**

Civil procedure – Counter-application – Applicants requesting necessary and ancillary relief aimed at giving proper effect to order already granted – Court found no bar to the remedies sought by the applicants – Relief was permissible in terms of rule 6(7) of the Uniform Rules of Court which imposed no limitation on a litigant, preventing him from seeking more extensive relief than that sought in the main application.

**MBENA AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES [2015] 4 ALL SA 361 (ECP)**

Delict – Claim for damages – Alleged assault on prison inmates – Onus of proof – Matter to be determined on facts presented – Issue whether a party has discharged the onus is invariably dependent upon whether such party’s version is more probable than the other’s – Question of whether the plaintiffs had discharged the onus resting upon them on a balance of probabilities, was, ultimately, dependent on whether their testimony was truthful and reliable.

**PATEL v S [2015] 4 ALL SA 382 (GJ)**

Criminal law – Extradition – Appeal against extradition order – Extradition Act 67 of 1962 – Whether the offences in respect of which the appellant was sought were “extraditable offences” – Whether the certificate furnished by the Prosecuting Authority of USA in support of the appellant’s extradition complied with section 10(2) of the Extradition Act – Court confirmed that even though the offences for which extradition was sought were not offences in South Africa, because of the date on which the relevant provisions of the relevant statutory regime came into operation, at the time of their commission in the USA, they were extraditable because they were offences in South Africa at the time of the request for extradition.

**CHETTY T/A NATIONWIDE ELECTRICAL v HART NO AND ANOTHER [2015] 4 ALL SA 401 (SCA)**

Company law – Business rescue proceedings – Proceedings instituted or continued without business practitioner’s consent are a nullity, but the provisions in that regard are for the exclusive benefit of the company in business rescue and not a creditor. Whether arbitration proceedings fall within the general moratorium on legal proceedings against a company under business rescue in section 133(1) of the Companies Act 71 of 2008 – Court held that it would be incongruous not to construe proceedings in which legal disputes are resolved privately through arbitration as legal
proceedings simply because they take place outside of the formalities of the court system.

Words and phrases – “legal proceeding” – Dictionary meaning – Any proceeding authorised by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.

**NOVARTIS SOUTH AFRICA (PTY) LTD v MAPHIL TRADING (PTY) LTD [2015] 4 ALL SA 417 (SCA)**

Contract – Existence of agreement – Effect of written agreement being followed and supplemented by oral agreement and emails – Critical factor was the intention of the parties – Evidence demonstrating intention to conclude contract in this way, as well as actual authority of representatives to bind the appellant, rendering the contract valid.

**GRIESSEL AND ANOTHER v LIZEMORE AND OTHERS [2015] 4 ALL SA 433 (GJ)**

Company law – Business rescue – Resolution by director of company passed without the knowledge of the other shareholders – Setting aside of resolution – Requirements for business rescue – Proof that the company is financially distressed as required under section 129(1)(a) of the Companies Act 71 of 2008 – Not reasonably likely (or perhaps possible) for the company to be rehabilitated and continue in existence on a solvent basis as contemplated in section 128(1)(b)(iii) of the Companies Act – Development and implementation of a plan to rescue the company would result in a better return for creditors or shareholders than would occur from its immediate liquidation.

**JUSTICE ALLIANCE OF SOUTH AFRICA AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT, WESTERN CAPE AND OTHERS [2015] 4 ALL SA 467 (WCC)**

Children – Youth centres – “Re-purposing” of former schools of industries and reform schools – Children’s Act 38 of 2005 – Section 196(3) – Interpretation of – Whether the youth centres in casu fell within the purview of section 196 of the Children’s Act – Centres had to be regarded from 1 April 2010 as having been established and/or maintained in terms of section 195 of the Children’s Act as secure care child and youth care centres, the responsibility for which remained with the Department of Education until 1 April 2012, thereafter the responsibility was transferred to, and remains with, the Department of Social Development – Obligation rested on the Education Department to provide education to children at the facilities.

**MOTO HEALTH CARE MEDICAL SCHEME v MULLER NO AND OTHERS [2015] 4 ALL SA 485 (GP)**

Civil procedure – Prescription – Service of summons after liquidation – Companies Act 61 of 1973 – Section 359(2)(a) and (b) – Locus standi – Whether the third and fourth respondents had any legal interest in the fact that the liquidator had waived non-compliance with the statutory provision, condoned the non-compliance or whether the court should condone the applicant’s non-compliance in failing to give notice – Liquidator was the person to which section 359(2) of the 1973 Act applies and who was affected by non-compliance – Court held that prescription was interrupted by the action being instituted and the action had not yet been concluded and therefore the claim had not prescribed.

Civil procedure – Prescription – Service of summons after liquidation – Validity of summons – Applicant had served the summons on the chosen domicilium citandi et executandi and not on the liquidators – Test was whether the liquidators were prejudiced thereby – Court could not find that the proceedings were void ab initio due to the applicant’s non-compliance.

**S v MILLER AND OTHERS [2015] 4 ALL SA 503 (WCC)**

Criminal procedure – Evidence – Police captain’s evidence – Analysis of cellular phone communications between the accused – Admissibility – Argument that certain cell phone records procured by the State under section 205 of the Criminal Procedure Act 51 of 1977 had been obtained unlawfully since the subpoenas presented to the issuing magistrate in terms of section 205 were allegedly fatally defective – Objection that the primary data which was loaded onto the police computer was unlawfully obtained in breach of section 205 – Court was not persuaded that the defence had established that the subpoena was wrongly issued or that it fell to be declared invalid. Argument that the rights of the accused to privacy protected under section 14 of the Constitution of the Republic of South Africa, 1996 had been unlawfully breached when the police captain accessed the data on the cell phones lawfully seized by the police without prior authorisation – Court balanced the right to privacy against the interests of the administration of justice, and found that this defence failed.
WERKSMANS INCORPORATED v PRAXLEY CORPORATE SOLUTIONS (PTY) LTD [2015] 4 ALL SA 525 (GJ)

Civil procedure – Claim for legal fees – Whether a party is entitled to demand that fees and disbursements that had already been paid by it to its attorneys be subjected to taxation by the Taxing Master – Court upheld the applicant’s argument that it should not be compelled to tax bills that had already been paid. Whether there is justification to proceed with liquidation proceedings against a client who withholds payment because of a dispute in respect of the fees and disbursements of Counsel – Whether an untaxed bill can be used to sue thereon or not – Court found that the dispute raised by the respondent regarding the amount claimed was not genuine and was not persuaded that in launching the liquidation proceedings, the applicant acted maliciously or vexatiously.

Source: Advance Notification – Buttenworths All SA Law Reports www.legalbrief.co.za

BUTTERWORTHS CONSTITUTIONAL LAW REPORTS – NOVEMBER 2015, NO. 11

CITY OF TSHWANE METROPOLITAN MUNICIPALITY v LINK AFRICA (PTY) LTD AND OTHERS (DARK FIBRE AFRICA (RF) (PTY) LTD AND OTHERS AS INTERVENING PARTIES) 2015 (11) BCLR 1265 (CC)


EKE v PARSONS 2015 (11) BCLR 1319 (CC)

Court – proper function of – rules of civil procedure – purpose of – Rules of Court – inherent power of court to regulate and adapt procedure, including Rules of Court – where the interests of justice dictate, courts may depart from a strict observance of the rules, even where one of the litigants is insistent that there be adherence to the rules – rules existing for the courts, and not the courts for the rules – where the parties themselves, through a settlement agreement reached with legal representatives present on each side, prefer to dispense with the strictures of a rule and request that the court recognise that preference by means of a consent order, not open to a party thereafter to demand strict adherence with the rule in question.

Practice – order of court — incorporating settlement agreement — effect of settlement order — changes the status of the rights and obligations between the parties — save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties and the lis becomes res judicata. Practice of incorporation of settlement agreements into court orders — such practice salutary and in accordance with the need to conserve a court’s limited judicial resources — earlier decisions holding the practice of making settlement agreements orders of court to be undesirable and holding that the terms of a settlement agreement incorporated into an order of court must be capable of ready enforcement by execution without recourse to further litigation criticised and overruled.

LEGAL AID SOUTH AFRICA v MAGIDIWANA AND OTHERS 2015 (11) BCLR 1346 (CC)

Access to court – right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum – section 34 of the Constitution – scope and ambit of the right – whether section 34 extends to tribunals that are not empowered to finally determine legal rights – commissions of inquiry – whether section 34 embraces the right to State-funded legal representation for parties appearing before a commission of inquiry.

Legal aid – refusal of legal aid by Legal Aid SA – applicants seeking legal aid for purposes of representation before Commission of Inquiry – High Court having ordered Legal Aid SA to take steps to provide funding to applicants – Legal Aid SA appealing to Supreme Court of Appeal – funding provided by Legal Aid SA to applicants by time of hearing before Supreme Court of Appeal – Supreme Court of Appeal having dismissed appeal on basis that any order granted by it would have no practical effect – Legal Aid SA seeking leave to appeal to Constitutional Court, contending that
Constitutional Court should decide the appeal in order to clarify the correct position regarding Legal Aid SA’s duties – Constitutional Court dismissing application for leave to appeal on basis that matter moot between the parties and no exceptional circumstances requiring it to exercise its discretion to hear matter.

Practice – constitutional issues – mootness of question – no longer any live issue between the parties – mootness of issue not necessarily a bar to an appeal being entertained – Constitutional Court having a discretion whether or not to consider a case which is moot – discretion to be exercised according to what the interests of justice require – where a matter is moot between the parties there must be compelling public interest considerations before the Constitutional Court will entertain it. Refusal of legal aid by Legal Aid SA – applicants seeking legal aid for purposes of representation before Commission of Inquiry – High Court having ordered Legal Aid SA to take steps to provide funding to applicants – Legal Aid SA appealing to Supreme Court of Appeal – funding provided by Legal Aid SA to applicants by time of hearing before Supreme Court of Appeal – Supreme Court of Appeal having dismissed appeal on basis that any order granted by it would have no practical effect – Legal Aid SA seeking leave to appeal to Constitutional Court, contending that Constitutional Court should decide the appeal in order to clarify the correct position regarding Legal Aid SA’s duties – Constitutional Court dismissing application for leave to appeal on basis that matter moot between the parties and no exceptional circumstances requiring it to exercise its discretion to hear matter.

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES v NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS 2015 (11) BCLR 1387 (CC)

Animals – performing animals – restriction on exhibition and training of performing animals – licence for exhibiting and training of performing animals – sections 2 and 3 of the Performing Animals Protection Act 24 of 1935 – provisions declared to be constitutionally invalid in so far as they relate to the requirement that a magistrate decide applications for, and, issue, the licences referred to therein – declaration of the order of invalidity suspended – period of suspension extended to 27 August 2016.

Constitutional Court – powers – order suspending a declaration of invalidity – further suspension – application to extend the period of suspension brought prior to the expiry of the suspension – circumstances in which the Court will grant an extension – in general an extension will be granted if it is just and equitable to grant it – factors to be considered include the explanation for why the period was not sufficient, whether the applicant had acted diligently in taking steps aimed at ensuring that the defect was cured within the original period fixed by the Court, and what the consequences to the public, Government or Parliament will be if the application for an extension is dismissed.

MTYHOPO v SOUTH AFRICAN MUNICIPAL WORKERS UNION NATIONAL PROVIDENT FUND 2015 (11) BCLR 1393 (CC)

Defamation – what is and what is not actionable – whether a statement is defamatory – test – a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it has been published.

Source: https://jutalaw.co.za

BUTTERWORTHS LABOUR LAW REPORTS – NOVEMBER 2015

ARB ELECTRICAL WHOLESALE (PTY) LTD v HIBBERT [2015] 11 BLLR 1081 (LAC)

Discrimination – Relief – Employee seeking compensation under LRA for automatically unfair dismissal and damages for discrimination under EEA – Court must avoid penalising employer twice for same wrong – Compensation equal to 12 months’ salary deemed fair for poorly performing employee forced to retire a year before retirement date.

Dismissal – Automatically unfair – Age – Senior employee told to retire a year before retirement date, but true reason for dismissal was employee’s poor performance – Dismissal automatically unfair. Relief – Compensation – Compensation for unfair dismissal not aimed at restoring patrimonial loss, but form of solutum for injured feelings – Compensation of 12 months’ remuneration for employee forced to retire a year before retirement date appropriate. For automatically unfair dismissal – Where employee claims compensation for automatically unfair dismissal under LRA and damages for unfair discrimination under EEA, court must ensure that amount granted is just and equitable – Compensation of 12 months’ remuneration for employee forced to retire a year before retirement date appropriate.
FIRST GARMENT RENTAL (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS [2015] 11 BLLR 1094 (LAC)

Commission for Conciliation, Mediation and Arbitration – Arbitration award – Review – Commissioner properly assessing mutually destructive versions and finding that employee had failed to discharge onus of proving employees guilty of assault – Review application properly dismissed.

Dismissal – Misconduct – Assault – Employer dismissing employees for assault during strike on basis of video recordings which failed to capture particular incident – Misconduct not proved and dismissal unfair.

GEMALTO SOUTH AFRICA (PTY) LTD v CEPPWAWU OBO LOUW AND OTHERS [2015] 11 BLLR 1100 (LAC)

Dismissal – Misconduct – Employees selected for dismissal from large number of those who declined to undergo polygraph tests simply because they had signed contracts containing obligation to undergo tests on request – Dismissal unfair.


Collective agreement – Interpretation and application – Employees and employer agreeing that Labour Court should arbitrate dispute concerning interpretation and application of collective agreement under section 158(2)(b) of LRA – Court lacking jurisdiction to interpret and apply collective agreement under LRA or BCEA even with parties’ consent.

Labour Court – Jurisdiction – Court lacking jurisdiction to entertain claim under BCEA where dispute in truth concerns interpretation and application of collective agreement. Court lacking jurisdiction to entertain dispute “sitting as arbitrator” under section 158(2)(b) of LRA where pleadings indicated that from outset dispute concerned interpretation and application of collective agreement.

MINISTER OF SAFETY AND SECURITY AND OTHERS v NAIDOO [2015] 11 BLLR 1129 (LAC)

Affirmative action – Plans – Court interrogating validity of plan in case based on claim that plan had been improperly applied – Ruling that plan was unconstitutional a misdirection. Plan setting targets based on racial and gender demographics not creating absolute barriers for Indian female police officer. Test for validity – Test for validity of equity plan is whether plan aimed at advancing previously disadvantaged and whether it advances equality – If plan satisfies this test it accords with objectives of Employment Equity Act 1998 and is constitutional.

Discrimination – Race – Indian female police officer recommended for post but recommendation overruled because her appointment would neither advance progress towards equity targets nor promote effective service delivery – Ruling that candidate with second highest score be appointed rational and in accordance with equity plan.

TRANSNET RAIL ENGINEERING v MIENIES AND OTHERS [2015] 11 BLLR 1144 (LAC)

Bargaining council – Arbitration awards – Review – Commissioner upholding dismissal of employee for poor work performance without taking into account employee’s mental state or personal history – Award set aside.

Dismissal – Poor work performance – Employee dismissed for shoddy work while suffering from clinical depression – Dismissal unfair.

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA (TAWUSA) AND OTHERS v UNITRANS FUEL AND CHEMICAL (PTY) LTD [2015] 11 BLLR 1151 (LAC)

Practice and procedure – Appeal – Late filing of record – Union filing appeal record a year late and failing to explain delay – Late filing not condoned.

Strike – Dismissal – Workers engaging in strike over demand which Labour Appeal Court had previously ruled was reserved for centralised bargaining – Dismissal of strikers upheld.

ASSIGN SERVICES (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS [2015] 11 BLLR 1160 (LC)

Temporary employment services – Effect of “deeming provision” created by amendment to LRA – Client of TES not
becoming sole employer of client after three months in terms of 189A(3), but contract between TES and employees continuing.

**MUNICIPAL AND ALLIED TRADE UNION OF SOUTH AFRICA (MATUSA) v CROUSE NO (THE REGISTRAR OF LABOUR RELATIONS) AND ANOTHER [2015] 11 BLLR 1172 (LC)**

Trade union – Registration – Name of union – IMATU objecting to registration of MATUSA on ground that names so similar that confusion could be created – Given history of unions in local government sector no risk that employees would confuse acronyms, full names or emblems – Objection overruled. Refusal by registrar – Registrar of Labour refusing to register trade union by purporting to limit proliferation of trade unions and without considering numerous factors which made applicant trade union “genuine” – Registrar directed to register applicant union.

*Source: [http://legalbrief.co.za](http://legalbrief.co.za)*

**BILLS**

**ADMINISTRATIVE ADJUDICATION OF ROAD TRAFFIC OFFENCES AMENDMENT BILL, 2015**

**BROADCASTING AMENDMENT BILL, 2015**

**PROTECTED DISCLOSURES AMENDMENT BILL, 2015**

Notice of intention to introduce and explanatory summary published for comment

*Source: [http://legalbrief.co.za](http://legalbrief.co.za)*

**PROCLAMATIONS AND NOTICES**

State Security Agency

National Cybersecurity Policy Framework (NCPF) for South Africa published

CUSTOMS AND EXCISE ACT 91 OF 1964

Schedule 1 amended

PETROLEUM PRODUCTS ACT 120 OF 1977

Regulations in respect of the single maximum national retail price for illuminating paraffin published with effect from 2 December 2015

Amendment of regulations in respect of petroleum products published with effect from 2 December 2015

Regulations in respect of the maximum retail price of Liquefied Petroleum Gas supplied to residential customers published with effect from 2 December 2015

LABOUR RELATIONS ACT 66 OF 1995


MARKETING OF AGRICULTURAL PRODUCTS ACT 47 OF 1996

Request for the continuation of statutory measures in the South African Wool Industry (registration and records & returns) published for comment

COMPETITION ACT 89 OF 1998

Competition Tribunal: Notifications of decisions to approve mergers published

*Source: [http://legalbrief.co.za](http://legalbrief.co.za)*
<table>
<thead>
<tr>
<th>Act/Bill</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000</td>
<td>Notification of complaint referral published</td>
</tr>
<tr>
<td>ARCHITECTURAL PROFESSION ACT 44 OF 2000</td>
<td>Description submitted in terms of s. 15 (1) by the Gauteng Province: Department of Agriculture and Rural Development</td>
</tr>
<tr>
<td>SOUTH AFRICAN COUNCIL FOR THE ARCHITECTURAL PROFESSION (SACAP): INTERIM POLICY ON THE IDENTIFICATION OF WORK FOR THE ARCHITECTURAL PROFESSION</td>
<td></td>
</tr>
<tr>
<td>PROJECT AND CONSTRUCTION MANAGEMENT PROFESSIONS ACT 48 OF 2000</td>
<td>Council for the Project and Construction Management Professions: Rules relating to the payment of annual fees for registered persons published with effect from 1 January 2016</td>
</tr>
<tr>
<td>COUNCIL FOR MEDICAL SCHEMES LEVIES ACT 58 OF 2000</td>
<td>Proposed levies on medical schemes issued in terms of s. 3 (a) published for comment</td>
</tr>
<tr>
<td>NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 10 OF 2004</td>
<td>Biodiversity Management Plan for the African Lion (Panthera leo) published</td>
</tr>
<tr>
<td></td>
<td>Biodiversity Management Plan for the White Rhinoceros (Ceratotherium simum) published</td>
</tr>
<tr>
<td>SOCIAL ASSISTANCE ACT 13 OF 2004</td>
<td>Designation of pay points for the payment of social grants published</td>
</tr>
<tr>
<td>NATIONAL PORTS ACT 12 OF 2005</td>
<td>Memorandum of Agreement entered into by and between the Ports Regulator of South Africa (PRSA) and the Competition Commission published</td>
</tr>
<tr>
<td>AUDITING PROFESSION ACT 26 OF 2005</td>
<td>Mandatory disclosure of audit tenure published with application to audit reports issued on the annual financial statements of all public interest entities for periods ending on or after 31 December 2015</td>
</tr>
<tr>
<td>USE OF OFFICIAL LANGUAGES ACT 12 OF 2012</td>
<td>Department of Tourism Official Language Policy published</td>
</tr>
</tbody>
</table>

**PROVINCIAL LEGISLATION**

**Eastern Cape**

<table>
<thead>
<tr>
<th>Act/Bill</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>DISASTER MANAGEMENT ACT 57 OF 2002</td>
<td>Joe Gqabi District Municipality: Declaration of a Local State of Drought Disaster: Local Municipalities: Elundini; Gariep; Maletswati; and Senqu published</td>
</tr>
<tr>
<td>DISASTER MANAGEMENT</td>
<td>Joe Gqabi District Municipality: Declaration of Ugie</td>
</tr>
</tbody>
</table>
ACT 57 OF 2002

Town in the Elundini Local Municipality as a Local State of Organic Pollution Disaster area published

Free State

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT 41 OF 2003

Guidelines for the determination of the number of members of a Traditional Council as published under PG 18 of 31 May 2013 replaced

LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT 117 OF 1998

Municipal Demarcation Board: Confirmation of delimitation of municipal wards: Mangaung Local Municipality (MAN) published

PG 129 (04.12.15)

PG 131 (04.12.15)

PG 533 (01.12.15)

PG 1558 (01.12.15)

PG 1560 (03.12.15)

PG 1560 (03.12.15)

PG 1561 (04.12.15)

PG 1562 (04.12.15)

PG 1563 (04.12.15)

PG 2619 (04.12.15)

Gauteng

LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT 117 OF 1998

Municipal Demarcation Board: Delimitation of municipal wards: Correction notice to Midvaal Local Municipality (GT422) as published under PN 522 of 25 November 2015 published

KWAZULU NATAL

LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT 117 OF 1998

Uthungulu District Municipality: Standing Rules and Orders, 2015 published

PG 1560 (03.12.15)

PG 1561 (04.12.15)

PG 1562 (04.12.15)

PG 1563 (04.12.15)

PG 2616 (01.12.15)

Mpumalanga

Nkomazi Municipality

By-law on Spatial Planning and Land Use Management published with effect from a date to be proclaimed

PG 2616 (01.12.15)

PG 2619 (04.12.15)
### North West

**NATIONAL ROAD TRAFFIC ACT 93 OF 1996**

Proposed Licence Mark System published for comment

PG 7582 (30.11.15)

### Northern Cape

**SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013**

Tsantsabane Municipality: Approval of a Land Use Management System (LUMS) published

PG 1973 (30.11.15)

**SOUTH AFRICAN SCHOOLS ACT 84 OF 1996**

Notice for the establishment, election and functioning of representative councils of learners in public schools published for comment

PG 1975 (04.12.15)

### Western Cape

**WESTERN CAPE LAND USE PLANNING ACT 3 OF 2014**

Date of commencement for Bitou, Breede Valley, Laingsburg, Matzikama, Mossel Bay, Stellenbosch and Theewaterskloof Municipalities: 1 December 2015

PG 7539 (01.12.15)

**DISASTER MANAGEMENT ACT 57 OF 2002**

Endorsement by the Premier of the classification of a provincial state of drought disaster: Local Municipalities: Oudtshoorn; Prince Albert; Witzenberg; Eden; Cape Winelands; Central Karoo; and West Coast published

PG 7542 (04.12.15)