The law reports

June 2015 (3) South African Law Reports (pp 313 – 649); [2015] 2 All South African Law Reports May no 1 (pp 251 – 386) and no 2 (pp 387 – 515); 2015 (5) Butterworths Constitutional Law Reports – May (pp 509 – 652); 2014 (2) Competition Law Reports (pp 339 – 543)

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

Abbreviations

CAC: Competition Appeal Court
CC: Constitutional Court
ECP: Eastern Cape Local Division, Port Elizabeth
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Adultery

Whether oral sex constitutes adultery: In *PV v AM* 2015 (3) SA 376 (ECP) the plaintiff, PV, and his wife, IV, were married to each other in 2000 and divorced in 2009. After the divorce, PV instituted a claim for damages against the defendant, AM, seeking compensation under the following heads –

- loss of love and consortium;
- *iniuria*;

- patrimonial loss;
- medical expenses; and
- legal expenses.

The action against the defendant, who was the plaintiff's uncle, was instituted after failure of the marriage between the plaintiff and his wife as a result of the defendant having oral sex with her. The defendant contended that as oral sex was not sexual intercourse, it did not constitute adultery and was, therefore, not sufficient to support a claim for damages for loss of consortium and *iniuria*.

After separation of the issue of merits from the quantum, the court upheld with costs the plaintiff's claim on the merits and postponed the issue of the quantum of damages for determination at a later date.

Revelas J held that a technical and narrow approach to the definition of adultery, which confined it to the usual consensual sexual intercourse between man and woman, could only lead to absurdity and unfairness. Doing so would offend the equality prescripts of s 9 of the Constitution in that parties to a same-sex marriage would not have the same rights with regard to adultery as parties to a heterosexual marriage. The limitations presented by the strict definition of adultery, which was confined to sexual intercourse had been recognised and corrected in the criminal law of rape and sexual-assault cases where s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 outlawed oral sex (penetration of genital organs into or beyond the mouth of another person). Therefore, the conduct under consideration (oral sex) constituted adultery. Adultery was an injury to the reputation, dignity and emotional welfare of the innocent person. In the instant case, the plaintiff had established that as a result of the defendant's conduct he suffered a loss of consortium and *iniuria* and was accordingly entitled to damages as he would be able to prove to have suffered.

Note: The case should be read in the light of *RH v DE* 2014 (6) SA 436 (SCA) (discussed 2015 (Jan/Feb) *DR* 53) where the SCA held that the High Court should have dismissed the claim for loss of consortium because the marriage had already broken down when adultery first took place and, therefore, did not have to decide what the position would have been had the marriage not already broken down. However, in relation to the claim for *contumelia* the court held that while the award of damages under that heading was perhaps correctly granted by the High Court, the SCA would in the exercise of its right to develop the common law entirely abolish the innocent spouse's action for adultery based on the *actio injuriarum*. Accordingly, in the light of the changing *mores* of the society the delictual action based on adultery had become outdated, could no longer be sustained and was, therefore, abolished. However, the SCA expressly refrained from commenting on *actio injuriarum* based claims relating to abduction, enticement and harbouring someone's spouse or a claim against a third party for patrimonial loss suffered by the innocent spouse.

An appeal against the decision of the SCA was dismissed, with no order as to costs, in *DE v RH* (CC) (unreported case no 182/44, 19-6-2015) (Madlanga J) where the CC held per Madlanga J (Mogoeng CJ, Cameron J concurring, filing a separate concurring judgment) that the delictual claim for loss of consortium and *contumelia* was particularly invasive of and violated the right to privacy as it often involved abusive, embarrassing and demeaning questioning of the adulterous spouse who suffered the indignity of having personal and private life placed under a microscope, as well as being interrogated in an insulting and embarrassing manner. Likewise, in order to defend a delictual claim based on adultery, the third party was placed in the invidious position of having to expose details of intimate interaction, including sexual relations, with the adulterous spouse. As a result the rights of the adulterous spouse and third party to privacy, freedom of association, freedom and security of the person were compromised. Public policy dictated that the act of adultery by a third party be found lacking of wrongfulness for purposes of a delictual claim of *contumelia* and loss of consortium. It was, therefore, not reasonable to attach delictual liability to it.

Attorneys

Prescription period of claim for refund of fees charged in terms of invalid contingency fee agreement: The facts in the case of *Levenson v Fluxmans Inc* 2015 (3) SA 361 (GJ) were that in February 2006, the applicant, Levenson, instructed a law practice, the respondent, Fluxmans Inc, to institute a claim for damages against the Road Accident Fund (RAF). The parties concluded a contingency fee agreement in terms of which the respondent would charge a fixed fee of 22,5% and value-added tax (VAT) on the amount recovered from the RAF. The action was settled in May 2008 in the amount of some R 4,8 million. The respondent sent a statement of account showing that their fees were in the amount of some R 1,1 million, inclusive of VAT. The applicant complained about the fee as being excessive but the respondent insisted that it was reasonable. In April 2014 and after media coverage of the case of *Ronald Bobroff & Partners Inc v De la Guerre and Another* 2014 (3) SA 134 (CC), which held that contingency fee agreements, which did not comply with the Contingency Fees Act 66 of 1997 were invalid, the applicant wrote a letter to the respondent asking for a review of the fees charged. As that was not done the applicant approached the High Court for an order declaring the contingency fee agreement invalid and a return of overcharged fees. In the alternative, he sought a new itemised bill of costs showing the fees due to the respondent. The respondent contended that as their bill of costs was given to the applicant in 2008, his claim prescribed after three years, which was in August 2011.

Windell J granted a separation of the issue of merits from the quantum and held that the claim had not prescribed. The question of the quantum of the claim was postponed *sine die*. The respondent was ordered to provide an itemised bill of costs within 20 days of the making of the court order. The court held that until he became aware of the decision of the CC in the *De la Guerre* matter in April 2014, the applicant did not have knowledge of the facts from which the debt arose. Until then he merely suspected that the fees were not correct. Suspicion could not be equated with knowledge and was insufficient for the running of prescription to commence. For there to be knowledge, the belief had to be justified. The respondent acted as the applicant's attorney and were duty-bound to properly represent and advise him. They failed to advise him that the contingency fee agreement was illegal, invalid and unenforceable. The date of acquiring the requisite knowledge was April 2014 when the minimum facts necessary to launch the application came to his knowledge.

- See 2014 (July) *DR* 37 and 2014 (July) *DR* 40 for the *Bobroff* judgment.

Companies

Relief from oppressive and unfairly prejudicial conduct: Section 163(1) of the Companies Act 71 of 2008 (the Act) provides among others that: 'A shareholder or director of a company may apply to court for relief if –

(*a*) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant.'
In terms of subs 2 a 'court may make any interim or final order it considers fit, including –
…
appointing directors in place of or in addition to all or any of the directors then in office'.

In *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA); [2013] 3 All SA 111 (SCA) the appellant, Grancy Property, a minority shareholder in Seena Marena Investments (SMI), sought the appointment of two objective and independent directors to determine if it was necessary to investigate the affairs of SMI and in that event, conduct the investigation themselves. That was after the appellant alleged that the majority shareholders and directors of SMI, being the respondents Manala and Gihwala, had misappropriated large sums of money out of the coffers of the company in the form of directors' remuneration and fees, and had also made other unauthorised payments to themselves, to the exclusion of the appellant. The WCC per Henney J dismissed the application.

An appeal against that order was upheld with costs by the SCA. Petse JA (Mthiyane DP, Nugent, Lewis and Tshiqi JJA concurring) held that in line with the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 ([1958] 3 All ER 66 (HL) at 342) the concept 'oppressive' denoted conduct that was 'burdensome, harsh and wrongful', which would include lack of probity or good faith and fair dealing in the affairs of a company, to the prejudice of some portion of its members. The extensive nature of the remedy for which the section provided was underscored by the inclusion of the element of unfair disregard of the applicant's interests. Accordingly there was much to be said for the proposition that the section had to be construed in a manner, which would advance the remedy that it provided for rather than limit it. In determining whether the conduct complained of was oppressive, unfairly prejudicial or unfairly disregarded the interests of the applicant, it was not the motive for the conduct complained of that the court had to look at but the conduct itself and

the effect it had on the other members of the company. The provisions of the section were of wide import and constituted a flexible mechanism for the protection of a minority shareholder from oppressive or prejudicial conduct. The list of orders that a court could make was non-exhaustive and open-ended.

Constitutional law

Right to open justice: In the *City of Cape Town v South African National Roads Authority and Others* 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA) the respondent, South African National Roads Authority (Sanral), was an organ of state tasked with the duty, among others, to design, construct, manage and maintain national roads country-wide. In the performance of its mandate Sanral sought to introduce electronic tolling on roads in Cape Town and accordingly awarded a tender to Protea Parkways Consortium (PPC) to do the tolling. The appellant, City of Cape Town (the City), which opposed the tolling, instituted proceedings in the WCC to have the tender reviewed and set aside. As negotiations relating to finalisation of the contract between Sanral and PPC were still in progress and also because there was another tender relating to financing of the tolling system, Sanral applied for an interlocutory order preventing disclosure of certain documents to members of the public until it (Sanral) had filed its answering affidavit. The purpose was to prohibit members of the public, who were largely taking side with the appellant, from having access to the specified documents until Sanral's version, as contained in its answering affidavit, was also available. The basis of the sought prohibition was confidentiality and secrecy. The interlocutory application was dismissed with costs by Binns-Ward J. While the decision of the High Court was correct up to that stage, the court went further, erring in the process, and granted an order that Sanral was not interested in and did not ask for. The court held that r 53(1)(b) and r 62(7) the Uniform Rules of Court were subject to the English law 'implied undertaking rule', which had been accepted as part of South African law.

Applying the 'implied undertaking rule' the High Court held that no person would be permitted, unless authorised by Sanral or the court on application, to disseminate, publish or distribute any part of the administrative record (the alleged confidential part of the court file) before the hearing of the main review application. It was against that part of the judgment that the appeal was made and granted by the SCA with costs.

Ponnan JA (Saldulker, Zondi JJA, Van der Merwe and Gorven AJJA concurring) held that the 'implied undertaking rule' was not part of South African law. Moreover, it was inconsistent with the Constitution in a number of ways. The foundational constitutional values of accountability, responsiveness and openness applied to the functioning of the judiciary as much as to other branches of government. As a general rule litigants were prejudiced when their proceedings were not held in public. It would be a dangerous thing for all litigants in both civil and criminal matters, for court documents, as a general rule, to be inaccessible and unpublishable. The right to public courts did not belong only to the litigants in any given matter but also to the public at large. Open justice was required by s 32 of the Superior Courts Act 10 of 2013. Without openness the judiciary lost legitimacy and independence it required to perform its function. Accordingly, court proceedings should be open unless a court ordered otherwise. The right to open justice included the right to have access to papers and written arguments, which were an integral part of court proceedings. It was vital that the public be able to have access to court records prior to the hearing so that they could follow the proceedings in open court. Without prior access to the papers the proceedings would have less meaning for them.

Costs

Costs *de bonis propriis*: In the matter of *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) the plaintiff (Lushaba) sued the defendant MEC for Health, Gauteng for damages suffered as a result of medical negligence on the part of staff of a provincial hospital. As a result of delayed caesarean section performed on her, her baby suffered severe brain damage. The court found in her favour and in the course of that judgment issued a rule *nisi* calling on certain persons to show cause why an adverse costs order (costs *de bonis propriis*) should not be made against them personally as a result of the way in which they conducted the case. While there were a number of ways in which the persons concerned were found not to have conducted litigation satisfactorily, by and large it was the decision to defend the action in the first case while there was no defence at all, which attitude the court found unacceptable.

Robinson AJ held that the defendant's attorney in the employ of the state attorney' office, one EM, a senior legal administrative officer in the legal services section of the Department of Health, Gauteng, a certain JM and Dr C, a medical practitioner employed as a medico-legal adviser by the same department, had to pay 50% of the costs incurred on attorney and client scale *de bonis propriis*. The court further ordered that were the defendant to pay the costs, she

was directed to recover 50% thereof from the named three persons.

It was held that costs *de bonis propriis* were not easily awarded but that would be done when there was negligence in a serious degree. They were awarded for conduct, which substantially and materially deviated from the standard expected of the legal practitioner, such that his clients could not be expected to bear the costs or because the court felt compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples of such conduct were dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, gross incompetence and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care. The authorities cautioned that costs orders *de bonis propriis* should only be awarded in exceptional circumstances. A legal adviser or legal representative was not to be punished with a costs order for every mistake or error of interpretation. However, there was a limit, which was crossed when one encountered the degree of indifference and incompetence, which was evident in the instant case where litigation was continued in circumstances where –

- there was no defence exhibited in the defendant's expert report;
- no defence was pleaded;
- no defence was advanced at the trial;
- the three persons concerned were unaware of any defence; and
- the three persons concerned were reckless as to the facts of the case.

Divorce – assets in a family trust

Whether assets in a discretionary family trust form part of joint estate (alter ego): In *WT and Others v KT* 2015 (3) SA 574 (SCA) before his marriage to the respondent, KT, the appellant, WT, created a trust which bought property and registered it in its name. A few years later WT and KT married each other in community of property. When the marriage failed and the parties divorced in 2010, KT claimed that the property belonging to the trust was part of the joint estate as a result of which she was entitled to a 50% share thereof. The GJ per Lamont J held that the property of that discretionary family trust formed part of the joint estate. An appeal against that decision was upheld with costs by the SCA.

Mayat AJA (Lewis, Bosielo, Pillay and Mbha JJA concurring) held that WT and KT never owned the property of the trust in equal shares prior to the marriage, nor was it established on the probabilities that they ever concluded any agreement relating to the purchase of the property. Moreover, notwithstanding suggestions to the contrary, it was common cause that WT had procured the establishment of the trust as well as the purchase of the property prior to the marriage to KT, without the participation of KT and without any significant financial contribution from her. A court concerned with a marriage in community of property had no comparable discretion as envisaged in s 7(3) of the Divorce Act 70 of 1979 to order redistribution of property in the case of a marriage out of community of property, to include the assets of a third party (a trust in the instant case) in the joint estate. In any event s 12 of the Trust Property Control Act 57 of 1988 specifically recognised, as a matter of law, in this context that trust assets held by a trustee did not form part of the personal property of such trustee.

Income tax

Preservation order: Section 163(1) of the Tax Administration Act 28 of 2011 provides among others that the South African Revenue Service (Sars) may make an *ex parte* application to the High Court for a preservation order prohibiting any person from 'alienating, encumbering, dissipating [or] dealing in any manner whatsoever that will cause a decrease in the value of all their assets, whether specified in the order or not.' Such order was granted at an interim stage in *Commissioner, South African Revenue Service v Tradex (Pty) and Others* 2015 (3) SA 596 (WCC) against the second respondent, Mrs Wiggett, and two companies, the first respondent, Tradex, and the third respondent, BWA, which companies were owned and controlled by her. That was after the financial affairs of the three respondents remained in disarray for a number of years during which no tax returns were filed or tax paid. It was the position of the applicant Sars that all three respondents owed large sums of money in unpaid income tax and value-added tax (VAT). The application for confirmation of the interim preservation order was dismissed with costs, subject to continuation of *caveats* that had been registered against some of the properties owned by the respondents in favour of the applicant.

Rogers J held that a preservation order could be made if it was required to secure the collection of tax, even if such tax was not currently due and payable. It was sufficient if it appeared that tax in a currently unquantified amount was likely to be due and payable. Preservation of assets was required to secure the collection of tax if it would confer a substantial advantage in the collection

of the tax. It was only authorised in order to prevent any realisable assets from being disposed of or removed if the disposal or removal would frustrate the collection of tax.

The applicant was required to show that there was a material risk that such assets, which would otherwise be available in satisfaction of tax would, in the absence of a preservation order, no longer be available. The question whether a preservation order was required and whether the court should exercise its discretion to grant one called for a consideration of the specific terms of the order sought by the applicant and could not be decided in the abstract. In the instant case a preservation order was not required to secure the collection of tax as it had not been shown that the respondents would deal with their assets in a manner adverse to the applicant such as by distributing dividends, paying unreasonable salaries or engaging in other suspicious transactions.

Interest

In duplum rule: In the case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) in 2006 a certain company, Winskor, received a loan in the amount of R 12 million from the respondent, Slip Knot Investments. As trustees of a trust, which held shares in Winskor the appellants, Mr and Mrs Paulsen (the Paulsens), stood surety for the loan whose terms were that interest would run at the rate of 3% per month, which translated into 43% per annum. A year later the company defaulted on repayments. When legal proceedings were instituted against the appellant in 2010 the total amount sought was R 72 million, being the capital amount of R 12 million and R 60 million in interest. The WCC granted judgment against the appellants. An appeal to the full Bench achieved limited success in that interest was limited to R 12 million in terms of the *in duplum* rule. A further appeal to the SCA was dismissed with costs. The majority of the court held per Wallis JA that whereas the *in duplum* rule limited accumulation of interest to the extent of the capital amount, the R 12 million in the instant case, on the authority of *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA); [1998] 1 All SA 413 (SCA) (the *Oneanate* case) once legal proceedings were instituted to recover a debt the *in duplum* rule was suspended with the result that interest started accumulating without limit. For that reason the SCA upheld the respondent's cross appeal, granting judgment in its favour in the amount of R 72 million, just as the High Court did. As a result the appellants applied for leave to appeal to the CC against the decision of the SCA.

The main judgment was read by Madlanga J (Jafta and Nkabinde JJ concurring) while the majority judgment, which was the concurring judgment, was read by Moseneke DCJ while Cameron J delivered a dissenting judgment. Madlanga J granted leave to appeal and ordered the appellants to pay the respondent –

- the capital amount of R 12 million;
- interest on the capital amount at the rate of 3% permonth, up to a maximum of R 12 million (the *in duplum* rule); and
- interest on the judgment debt (consisting on R 12 million capital amount and R 12 million maximum accumulated interest) limited to a maximum on R 24 million.

The court held that the *in duplum* rule was a long-standing and well-established part of South African law, which provided that interest ceased to accrue once the total of unpaid interest equalled the amount of the outstanding capital. The overarching purpose of the rule was to protect debtors from being crushed by the never ending accumulation of interest on the outstanding debt. By suspending the application of the *in duplum* rule *pendente lite* the *Oneanate* case indiscriminately targeted all debtors regardless of whether they were defending the claim in good faith or not. To hit all debtors in that manner would definitely have an undesirable chilling effect. Some debtors, despite a genuinely held belief that they had a valid defence, could sooner opt to settle a claim than face the potentially financially ruinous interest that would again commence to pile up once a court process was served. Therefore, the *Oneanate* case principle inhibited rather than promoted the right of access to courts as provided for in s 34 of the Constitution. To many consumers astronomical interest would mean the difference between economic survival and complete financial ruin. To allow for uncapped, and possibly exorbitant, interest to run *pendente lite* granted a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage. Allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by suspending the *in duplum* rule *pendente lite*, created a risk of rendering the debtor's right of access to courts tenuous, if not illusory.

- See feature article 'Interested about the interest in debt? The *in duplum* rule revisited', as well as 2014 (Sept) *DR* 40.

Local government – compliance with court order

Mandamus obliging responsible functionaries to ensure that municipality comply with court orders: In the *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others* [2015] 2 All SA 251 (SCA) at the time of taking transfer of ownership of property in the centre of Johannesburg by the 183rd respondent, Changing Tides (CT), the property was unlawfully occupied by poor and homeless people. CT wanted to renovate and upgrade the property and accordingly sought eviction of the unlawful occupiers. The eviction order was granted by the GJ per Claassen J. As part of the eviction order, the court ordered the appellant City of Johannesburg (the city) to provide suitable temporary accommodation to the occupiers. About a year later the city had still not provided the accommodation, citing lack of resources to do so. With the eviction date looming the occupiers approached the High Court for a *mandamus* requiring the city and its functionaries namely the executive mayor, municipal manager and the director of housing, to comply with the order and provide the required temporary accommodation. By agreement between the parties Lamont J granted an order requiring the city to provide that sought accommodation and report on progress made regarding the nature and location of that accommodation, as well as a list of occupiers who qualified for it. That order was also not complied with. Finally the matter came before Satchwell J who ordered the city and its functionaries to comply with the order regarding provision of temporary accommodation and also answer a very long list of questions relating to past, present and future arrangements of the city to deal with the provision of temporary accommodation in general to all persons who had been evicted and how that had been dealt with and was financed. An appeal against the order of Satchwell J was upheld by the SCA in relation to the duty to report on the long list of questions posed but dismissed with costs regarding the *mandamus* against the city and its functionaries to provide temporary accommodation.

Van der Merwe AJA (Brand, Maya, Willis JJA and Schoeman AJA concurring) held that while it was true that the functionaries were not cited in the intitial application for the city to provide temporary accommodation, a party that initiated legal proceedings against a municipality could not be expected to act on the assumption that if the litigation was successful the municipality would not comply with the order against it. CT was under no obligation to cite the functionaries in the eviction application. Only when the city failed to comply with the order of Claassen J did the need arise to look to the functionaries, which was the purpose of the enforcement application before Lamont J. The decisive consideration was the principle of public

accountability, a founding value of the Constitution, which was central to the constitutional culture. Constitutional accountability could be appropriately secured through a variety of orders that the courts were capable of making, including a *mandamus*. Accordingly, the appeal against the *mandamus* had to fail.

Rescission of judgment

A non-party that is prejudicially affected by judgment may apply for its rescission: The facts in *Mabuza v Nedbank Ltd and Another* 2015 (3) SA 369 (GP) were that the applicant, Mabuza, was the registered owner of immovable property. She received a loan from the second respondent, Brusson Finance (BF), the property serving as security. However, BF acted fraudulently by causing the applicant to sell and transfer the property to it instead of serving as security for the loan provided. Thereafter BF sold the property to Steyn in respect of which the financing bank, the first respondent Nedbank, registered a mortgage bond. When Steyn failed to repay the bond, the first respondent obtained default judgment against him and had the property declared executable. As a result the applicant approached the High Court for an order rescinding the default judgment, which order was granted with costs.

Mavundla J held that although the applicant was not a party to the default judgment she nevertheless had a direct and substantial interest in the matter by virtue of the fact that the immovable property concerned was initially registered in her name but was fraudulently transferred out of her name into the name of the second respondent. She nevertheless continued to occupy the property. If the default judgment were not rescinded, her right and title to the property, as well as occupancy, would be prejudicially affected. Like any contract or order of court a transaction could be set aside on the ground that it was fraudulently obtained or obtained by mistake where the error was *justus*. In the instant case, the second respondent obtained ownership of the property from the applicant by fraudulent means, which justified rescission of default judgment granted to the first respondent.

Unlawful competition

Restrictive horizontal practice of dividing the market, substantial lessening of competition and retail price maintenance: In the case of *Competition Commission v South African Breweries Ltd and Others* 2015 (3) SA 329 (CAC); [2014] 2 CPLR 339 (CAC) the first respondent, the South African Breweries (SAB), was the dominant firm in the clear-beer and other alcoholic beverages production market in the country, controlling some 80% – 90% share of the market. It distributed its products through wholly–owned depots, which accounted for some 90% of the market share while the remaining 10% was done through appointed distributors (ADs). The first respondent had 'exclusive distribution agreements' with ADs, each of which confined the activities of an AD to a specified area (territory). The appellant, Competition Commission, challenged the validity of the 'exclusive distribution agreements' on a number of grounds, alleging that they infringed the provisions of the Competition Act 89 of 1998 (the Act). The present discussion will be confined to the challenges that the agreements –

- constituted restrictive horizontal practices;
- were a substantial lessening or prevention of competition; and
- amounted to the practice of retail price maintenance.

The Competition Tribunal found against the appellant on all complaints. As a result the appellant appealed to the Competition Appeal Court (CAC), which dismissed the appeal with costs. Davis JP and Rogers AJA (Molemela AJA concurring) held that the characterisation approach that was required in terms of the Act to determine if there was a prohibited restrictive horizontal practice related to the enquiry whether –

- the parties were in a horizontal relationship; and if so
- there was direct or indirect fixing of a purchase or selling price, division of markets or collusive tendering within the meaning of s 4(1)(*b*) of the Act.

The key characterisation question was whether an arrangement or agreement which possessed both vertical and horizontal elements stood to be examined under one or other or both of s 4(1)(*b*) or s 5 of the Act. The agreements in this case were entered into between the first respondent and the ADs. The core relationship between the ADs and the first respondent remained to be described as of a vertical nature that was between a producer of a product and distributors thereof, which was also its true economic nature. Therefore, once the characterisation principle was applied, there could not have been a restrictive horizontal

practice.

Section 5(1) expressly referred to the effect of substantially lessening or preventing competition in a market. Therefore, some likely effect on price, output and/or quality of product, which diminished consumer welfare had to be shown to exist in order to trigger the application of the section. In the instant case the evidence did not support the case of a significant lessening or prevention of competition as a result of an exclusive territorial system of distribution.

The essence of the practice of retail price maintenance was the imposition by the supplier on its distributors of a price at which goods were to be resold with the minimum price on pain of a sanction for non-compliance. The elements of imposition and inducement entailed some conduct by the supplier directed at ensuring compliance with the minimum price. In the instant case the contracts between the first respondent and the ADs were quite explicit in allowing the latter to charge prices below the listed prices. Moreover, there was no enforcement of compliance therewith by way of sanction.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with admissibility of pointing out, business rescue, commencement of extinctive prescription, enforcement of consumer credit agreement, enforcement of order of lower court, expert opinion evidence, lawfulness of levying of electrical service charge by landlord, liability for omission, liability of auditor, meeting of creditors of a university which is in liquidation, prescription of a claim against attorney, reinstatement of a consumer credit agreement, reinstatement of registration of a company, review of executive action, termination of consumer credit agreement, validity of Islamic marriage and validity of procurement agreement concluded without ministerial approval.