

# NATURE

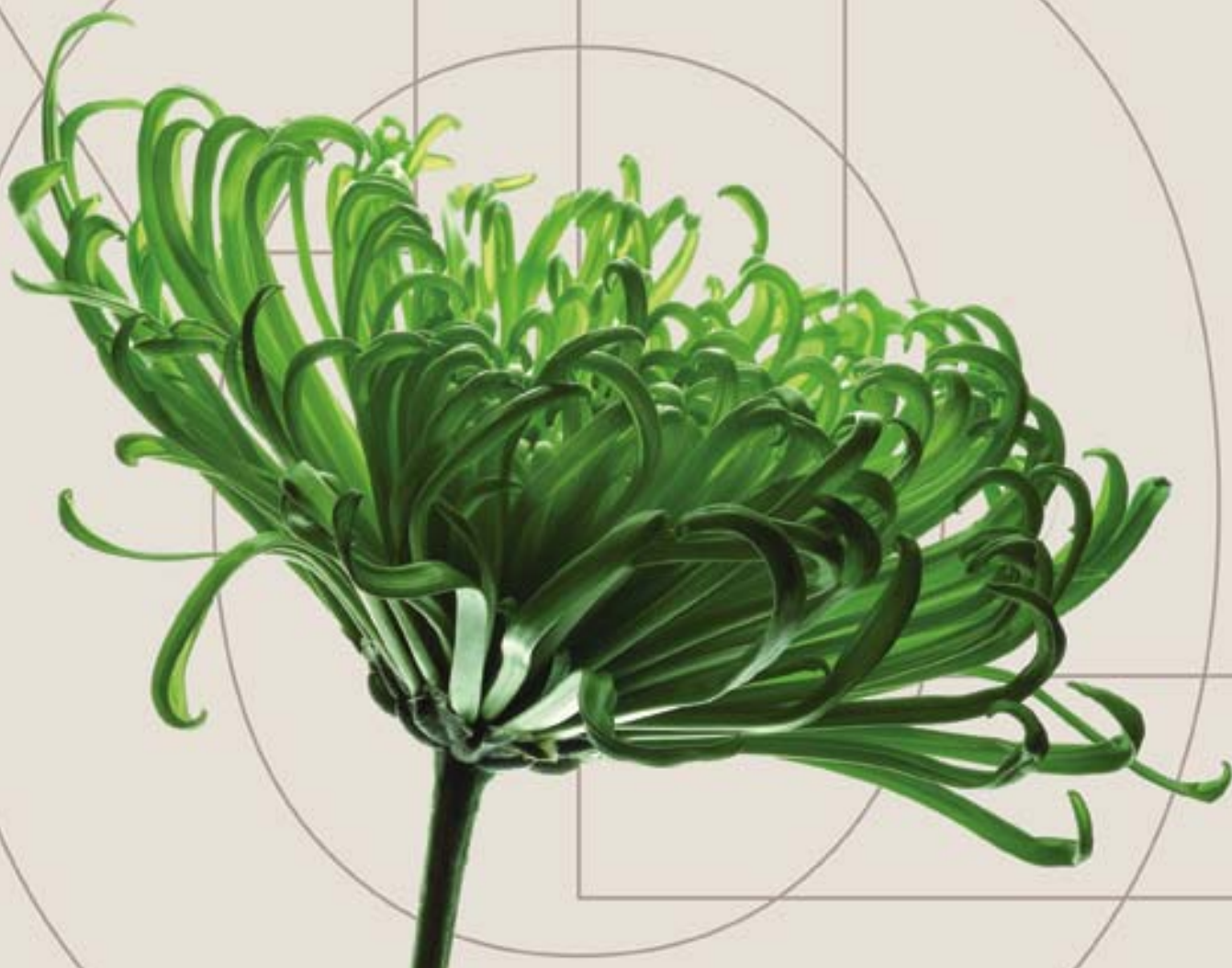
# OF LAW

**BG** *Bowman Gilfillan*  
Attorneys

6th Edition  
**2006**

New white collar  
crime practice –  
p.8

**Hedge funds in  
South Africa –  
p.36**



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Jon Schlosberg,  
chairman

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# chairman's letter

It is, once again, my pleasure to present to you the next edition of our “Nature of Law” publication. I hope that it will be met with the same enthusiastic response as has been the case for previous editions.

While each edition covers a range of topics so as to be interesting and informative to as many of our readers as possible, each edition focuses on a particular department or practice area. The focus of this edition is our competition (anti-trust) and international trade practice area.

Once again, we also highlight some of our recent achievements and successes. We publicise these in our external document in addition to doing so internally within our firm because it is an important part of our culture and values to acknowledge, celebrate and applaud the achievements of our people – and highlighting this information publicly gives us an opportunity to invite our clients, associates and alumni to join us in doing this.

You will see from the article elsewhere in this edition that we have established a white collar crime practice area. This increasingly important aspect of corporate and commercial life will involve four partners, three senior associates and support staff.

As part of our ongoing efforts to improve the quality of our service to and relationships with our clients, we recently embarked on a client survey to establish what our clients think of us. As a start, we have met with a representative group of approximately 20 clients – in Johannesburg, Cape Town and London. I thank all of you who participated in the project – and, in advance, I thank all of you who will still be asked to participate – for taking the time and trouble to meet with us and to provide us with your feedback. While, of course, we are very grateful for the congratulations and plaudits which were offered, it is just as important to us (probably more important) to receive constructive suggestions so that we can improve the service which we provide to our clients and enhance our client relationships. Amongst the useful issues which have been highlighted by the survey is the reinforcement of the importance of regular, constructive communication between us and our clients at various levels. We will increase our efforts in this regard.

Along these lines, I invite our clients to feel free to contact me (or any other lawyer in the firm) at any time with any suggestions or comments – whether positive or critical. We love to celebrate our successes but it is also very important for us to be made aware of our shortcomings so that we can correct them.

## JON SCHLOSBERG



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Department focus: Competition (anti-trust), international trade and lobbying



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The move to facilitated mutual gain negotiation in South Africa



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Access to information in private hands

## Tribute to Tim McIntosh

& Tait (which is now the firm's Cape Town office) in March 1995. After the merger with Bowman Gilfillan, Tim became senior partner of our Cape Town office.

Tim was a versatile lawyer from the so called “old school”. Unlike the current situation where lawyers specialise quite early, Tim practised in a number of areas with significant success - corporate law, construction law, international contract law, insolvency law and commercial litigation.

Tim McIntosh retired as a partner on 28 February 2006, just short of his 40th anniversary with the firm. Tim joined the firm in April 1966 and became an equity partner in 1969. On the retirement of Noel Tunbridge, he became the Chairman of Findlay

Tim has been involved in many significant transactions, including

the hostile management buyout of Garlicks, the listing on the JSE of Grey Security, the takeover of GSS by Securicor plc, the hostile acquisition of Fancourt and the acquisition of Safmarine by Capital Alliance. His last job was drafting the contracts for the Nelson Mandela 46664 Concert at Fancourt last year.

In the 1980's, Tim represented the Cape Times newspaper – including through several states of emergencies when there were severe restrictions on the press.

Tim did more than his fair share of professional service. He was President

of the Cape Town Attorneys' Association on two occasions in the 1970's, a member of the Cape Town Law Society from 1987 to 1995 and Vice President in 1994-1995. He was a Council member of the Association of Law Societies in 1994-1995 and a member of various committees of the Association.

Tim is a man of strength, dedication and integrity. He is held in great esteem by his colleagues in the firm and the profession generally.

We wish Tim and his wife Alice, a happy retirement.

## 2006 Empowerdex rating: "A"

"It is my pleasure to advise you that Bowman Gilfillan has been awarded an A rating through Empowerdex, and is classified as 'good Broad-based BEE contributors'.

With a level 4 status, as defined in the Codes of Good Practice issued by the Department of Trade and Industry, Bowman Gilfillan's BEE procurement recognition level is 100%. Practically this means that when using the generic BEE scorecard, any preferential procurement spend with BG carries a weighting of 100%.

We are particularly delighted with this rating and are committed to continuing to play our part in bringing about sustainable Broad Based Black Economic Empowerment."

Leon Kruger, CEO

## people movements

**CHRIS TODD** moved into the corporate department joining Ezra David's team.

**JOHN BRAND** is the new head of the employment department.

**FRANK JOFFE** is the new head of the IP department, replacing Rowan Joseph.

## recent deals

**Credit Suisse and ABN AMRO:** Anglo American's disposal of its shareholding in Highveld Steel (value R4.9 billion). We acted for Credit Suisse and ABN AMRO as financial advisors.

**Team:** Charles Valkin (partner), Derek Lotter (partner), Paul Schroder (partner) and Nyasha Samariwa (candidate attorney).

**Tshwarisano: Sasol Limited's disposal of 26% of the issued share capital of Sasol Oil to Tshwarisano (a BEE entity led by Dr Penuell Maduna) (value R1.8 billion). We were acting for Tshwarisano.**

**Team:** Jon Schlosberg (partner), Ezra Davids (partner), Rob Cohen (partner), Lance Fleiser (partner), Tammy Beira (partner), Fatima Laher (senior associate), Lele Modise (senior associate), Moipone Khojane (senior associate), Charles Smith (candidate attorney) and Lili Nupen (candidate attorney).

**Credit Suisse: The formation of Credit Suisse Standard Securities (value undisclosed). We acted for Credit Suisse.**

**Team:** Ezra Davids (lead partner), Rob Cohen (partner), Paul Schroder (partner), Derek Lotter (competition partner), Lulama Mtanga (senior associate – competition) and Justine Huddle (candidate attorney).

**Mvela Group: Advised Mvela Group on the disposal of 22.9% interest in Mvelaphanda Resources Limited to Mvela Holdings (value R1.5 billion).**

**Team:** Carl Stein (lead partner) and Lance Fleiser (partner).

**UCWP Partnership: We represented the UCWP Partnership in relation to the delivery to Spoornet of 110 new locomotives for use on the Richards Bay/ Ermelo line. UCWP is a partnership between Union Carriage and Wagon Company (Pty) Ltd and its black empowerment partner, Duduza Rail Engineering (Pty) Ltd. Union Carriage is a subsidiary of Murray & Roberts Ltd.**

**Team:** Dennis Jooste (partner), Craig Kennedy (senior associate) and Fani Dingiswayo (senior associate).

**Steinhoff International: Advising Barclays Capital as Lead Manager and Bookrunner in the issuance by Steinhoff International of a convertible bond (value ZAR 1.5 billion).**

**Team:** Ezra Davids (partner) assisted by Alan Keep (partner), Paul Schroder (partner) and Carla Cloete (candidate attorney).

**Associated British Foods: Associated British Foods ("ABF") acquisition of a majority shareholding in Illovo Sugar through a partial offer (value R3.8 billion). We were acting for ABF.**

**Team:** Jon Schlosberg (partner), Rob Legh (partner), Rob Cohen (partner), David Yuill (senior associate), Rehana Cassim (senior associate), Charles Smith (candidate attorney) and Sebastian Rosholt (candidate attorney).

**Goldman Sachs: Bowman Gilfillan acted on behalf of Goldman Sachs in the equity capital markets transaction relating to the disposal by Norilsk of its shareholding in Gold Fields to Goldman Sachs. This was the largest equity sale for a company in South African corporate history, with the approximate value of the trade, according to the Financial Times, being \$2 billion (R12.3 billion).**

**Team:** Ezra Davids (lead partner), Paul Schroder (partner) and Carla Cloete (candidate attorney).

**EDS: Acted for US outsourcing giant EDS in the sale of a 20% stake in EDS South Africa to the Koketso Gravitas Consortium, and a 10% stake to a trust for black executive employees. The value of the deal is undisclosed.**

**Team:** Alan Keep (partner), Craig Kennedy (senior associate), Georg Kahle (associate).

**Goldman Sachs and UBS: Anglo American and AngloGold Ashanti have completed the sale of AngloGold stock. Anglo American had cut its stake in AngloGold to 41.8% from 51% by selling 19.69-million shares, the group said yesterday. Shares sold for \$51.25 each for a total of \$1.6 billion. Bowman Gilfillan advised the Joint Global Co-ordination, Goldman Sachs and UBS.**

**Team:** Davids (lead partner), Paul Schroder (partner) and Carla Cloete (candidate attorney)

**Witsgold: Bowman Gilfillan advised Witsgold on its IPO (initial public offering). The Witsgold shares will be listed on the JSE with effect from 24 April 2006.**

**Team:** Ezra Davids (lead partner) assisted by Hamish Jooste (senior associate), Afia Fening (associate) and Lili Nupen (candidate attorney).

**Credit Suisse: Advised Credit Suisse in a Standard Bank and Credit Suisse iro a brokerage business joint venture. Value undisclosed.**

**The team:** Ezra Davids (lead partner), Rob Cohen (partner), Paul Schroder (partner), Justine Huddle (candidate attorney), Derek Lotter (partner, competition), Lulama Mtanga (senior associate, competition), Kelebogile Modise (senior associate, regulatory).

**M1 Limited and Investcom: MTN's acquisition of Investcom from M1 (value R33.5 billion). We were acting for M1.**

**Team:** Ezra Davids (lead partner), Paul Schroder (partner), Carla

Cloete (candidate attorney), Rob Legh (partner, competition) and Daniel Pretorius (partner, regulatory and telecommunication)

**Department of Transport: We have been awarded a contract by the Department of Transport to draft regulations for the operation of ports, the establishment of the Independent Ports Regulator and the creation of the Ports Authority Limited as a separate company from the existing National Ports Authority Division within Transnet.**

**Team:** Craig Cunningham (partner, maritime), Claire Tucker (partner, project coordinator, environmental), Jeremy Prain (associate), Amanda Stobart (senior associate), Livia Dyer (associate), James Linscott (associate), Lindiwe Matiwane (candidate attorney).

**ARM: Advised ARM in the establishment of ARM Coal and the acquisition by ARM Coal of 20% interest in the coal assets of Xstrata South Africa and the establishment of the Goedgevonden joint venture. Value R2.4 billion.**

**Team:** Charles Valkin (lead partner), Rudolph du Plessis (partner, transaction advice), Derek Lotter (partner, competition), Lulama Mtanga (senior associate, competition), Guillermo Erasmus (associate, competition).



▼ **WIM ALBERTS** has been appointed as a Research Associate in the Department of Mercantile Law at the University of the Free State.



▼ **DIANA RILEY** has won this year's OSALL/AMS sponsorship and attended the BIALL conference in the UK.



▼ **JERRY KAAPU** was voted on to the Saslaw committee again.



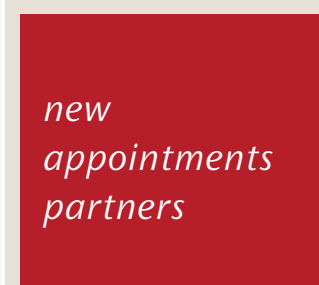
▼ **ROSALIND JACKSON** was voted on to the Saslaw committee again.



▼ **PAUL HART-DAVIES** has been elected as a Council Member to the Franchising Association of South Africa (FASA).



▼ **JOHN BRAND** presented a paper at the Harvard Law School in Cambridge, Massachusetts in May 2006 on joint gains negotiation in the Road Freight Industry in South Africa at a workshop on "New Developments in Workplace Dispute Resolution in Australia, South Africa, United States and other Nations" at the Project on Negotiation.



▼ **CARL STEIN** – Corporate



▼ **LANCE FLEISER** – Corporate



▼ **TALITAL LAUBSCHER** – Employment



▼ **Iona Dhladhla** – Corporate, Sandton



▼ **Alayne Meinesz** – Corporate, Sandton



▼ **Clifford Sandler** – Corporate, Sandton



▼ **Rabalao Moalosi** – Corporate, Sandton



▼ **Kgadi Kekana** – Corporate, Sandton



▼ **Rachel Underwood** – Corporate, Sandton



▼ **Mogola Makola** – Corporate, Sandton returned from secondment at Sullivan & Cromwell LLP, New York.



▼ **Lischa Gerstle** – Corporate, Cape Town



▼ **Shahid Sulaiman** – Corporate, Cape Town



▼ **Carol Dulin** – Litigation, Sandton



▼ **Saskia-Ann Price** – Litigation, Sandton



▼ **Mandisi Rusa** – Litigation, Sandton



▼ **Grant Wiid** – Family Law, Cape Town



▼ **Jeremy Prain** – Maritime and Transport, Cape Town



▼ **Marcia Mondl** – Real Estate and Conveyancing, Sandton



▼ **Vicky Plumpton** – Intellectual Property, Sandton



## MARITIME

THE MARITIME AND TRANSPORT DEPARTMENT RECENTLY PARTICIPATED IN THE COLLOQUIUM OF THE COMITÉ MARITIME INTERNATIONAL (CMI). THE CMI IS ONE OF THE MOST DISTINGUISHED AND ILLUSTRIOUS INTERNATIONAL MARITIME ORGANIZATIONS AND IS IN ITS SECOND CENTURY OF PROMOTING THE DEVELOPMENT AND HARMONIZATION OF MARITIME LAWS. DELEGATES FROM ALL AROUND THE WORLD ATTENDED INCLUDING LEADING FIGURES IN PRACTICE, ACADEMIA AND JUDGES FROM COUNTRIES SUCH AS CHINA, FRANCE, GERMANY, BELGIUM, THE UNITED KINGDOM, CANADA, USA AND AUSTRALIA.

BOWMAN GILFILLAN WERE PLATINUM SPONSORS OF THIS MAJOR EVENT AND WERE ONE OF SEVEN EXHIBITORS. THE CONFERENCE BAGS AND STATIONERY BORE THE BOWMAN GILFILLAN LOGO.

THE M&T DEPARTMENT ALSO HOSTED A SIT DOWN DINNER FOR 30 PEOPLE AT THE VICTORIA AND ALFRED HOTEL. GUESTS INCLUDED MEMBERS OF THE UNITED KINGDOM, SPANISH, FRENCH, AMERICAN, GREEK AND CROATIAN DELEGATIONS AND INCLUDED THE PRESIDENT OF THE SPANISH MARITIME LAW ASSOCIATION AND THE SECRETARY OF THE BRITISH MARITIME LAW ASSOCIATION.

BOWMAN GILFILLAN RECEIVED A VOTE OF THANKS FROM THE PRESIDENT OF THE CMI, MR JEAN-SERGE ROHART, AND WERE MENTIONED AT VARIOUS FUNCTIONS DURING PROCEEDINGS WHICH MARKED THIS HISTORICAL EVENT, BEING THE FIRST TIME THE CMI HELD AN OFFICIAL FUNCTION IN AFRICA. FURTHERMORE, THE NAMES OF CRAIG CUNNINGHAM AND GRAHAM CHARNOCK WERE MENTIONED BY NAME IN A SPEECH AT A COCKTAIL PARTY HOSTED BY HOLMAN FENWICK & WILLAN, ONE OF THE LEADING INTERNATIONAL MARITIME AND INTERNATIONAL TRADE LAW FIRMS.

THE COLLOQUIUM WAS HELD AT THE CAPE TOWN INTERNATIONAL CONVENTION CENTRE AND WAS ATTENDED BY SOME 250 DELEGATES.

# DIRECTORS LIABILITY AND INSURANCE COVER

By Lezel Crook

The Companies Act ("the Act"), specifically section 247 of the Act, renders void any provision in the articles of a company or stipulation in a contract with the company, purporting to exempt or indemnify a director, who is guilty of any liability in respect of negligence, default, breach of duty or breach of trust, in relation to the company. The Act provides further in section 424 that when the business of the company is carried on recklessly or with an intent to defraud creditors, a court of law may (following a prescribed application process) declare that any person who knowingly partook in such activity be held personally responsible, without limitation, for all or any of the debts or other liabilities of the company.

Besides the duties placed on directors by the Act, there are also prescribed fiduciary duties owed to the company which arise in terms of the common law, as the director stands in a fiduciary relationship with the company. These include, amongst other things, a duty to not act arbitrarily, capriciously or for an improper purpose.

Due to the onerous duties imposed on directors by the Act and the common law it would be desirable for a director to obtain insurance cover in the event that such director incurs liability. It is not however possible to contract out of or indemnify a director from reckless and/or fraudulent conduct. Nevertheless, it is possible for a director

to obtain insurance cover arising from liability in respect of negligence, default, breach of duty or breach of trust. The insurance policy concurrently serves as an indemnity to the director (and consequently the company in question) because such insurance contract is not void as it does not attempt to avoid liability on the director's part; instead it merely covers the company's loss in a situation where the director has incurred the liability and the director is unable to pay the damages.

Further, a company may protect itself by taking out insurance against liability of a director towards the company in respect of

negligence, default, breach of duty or breach of trust, which would serve to protect its directors at its own expense. The company would then be able to recover its losses in a situation when a director is unable to compensate the company for incurring liabilities. However, only the director can be indemnified against the liability against the company and in truth the company will be taking out insurance cover on behalf of the director.

There are companies specializing in risk and financial services that will provide directors and companies advice and offer insurance cover of this nature. ■





# NEW WHITE COLLAR CRIME PRACTICE

By Dave Loxton

Bowman Gilfillan is delighted to announce the establishment of a dedicated white collar crime unit as a separate practice area within our litigation department. The practice area will respond to client needs for a complete white collar crime service, offering a comprehensive range of services including forensic accounting and fraud investigation, loss recovery, fraud prevention and training, forensic work within the employment law field, corporate intelligence and compliance and contract and procurement services.

Globalisation, technological development and rapid economic progress along with corporate failures, a myriad of new legislation and endemic fraudulent and corrupt practice has seen the forensic investigating market continue unprecedented growth. Various restrictions on the auditing industry have already impacted on the international auditing firms' ability to provide forensic auditing services to their audit clients. In the USA for example, the forensic investigating market is amongst the fastest growing of all industries.

South Africa has not been unaffected by this and is showing similar trends to what is happening globally. The demand for prevention and detection, in particular within the public service, is enormous due to the high levels of procurement fraud. National government has also embarked on a drive to hold public entities to account for their conduct as required by, inter alia, the Public Finance Management Act, and the Municipal Finance Management Act, and accordingly the Public Sectors' need for forensic investigation services has also shown significant growth.

In recent times there has been a growing trend towards forensic outsourcing. In the USA for example, a large number of the major insurers have turned their special investigation unit activities over to outside service providers. A recent survey done by one of the major accounting firms concludes that outsourcing of forensics services is the recommended route due to the fact that it delivers impressive results along with considerable cost saving and other bottom line benefits.

Our own research has established that all the magic circle law firms in the United Kingdom as well as the major law firms in the United States of America have established white collar crime units. More and more organisations, both in the public and private sectors, see attorneys as being better placed than accountants to conduct an overall forensic investigation. In line with international trends, it is recommended that attorneys head up the investigation team with accountants forming part of the team.

The liquidation or sequestration of the perpetrators of economic crime is often the most appropriate and indeed sometimes the only avenue open to an aggrieved victim of fraud. Bowman Gilfillan already has a well established liquidation practice.

The practice area will be headed up by Dave Loxton, who has built up extensive specialised knowledge in this area. The rest of the team will be Mandy Munro, who joins us on 1 August 2006, having previously worked at Ramathe Fivaz and the forensics department of KPMG, Mendel Sass, Priyesh Modi, Claire van Zuylen, Tembeka Ngcukaitobi and Gordon Rushton (Cape Town). The combined experience of the team includes the following:

- » Prosecuting experience in Regional, Magistrate and High Courts;
- » Investigation of:
  - » procurement fraud;
  - » payroll and employee benefit fraud;
  - » insurance fraud;
  - » misappropriation of donor funding in housing subsidies;
  - » an internal theft ring, involving corruption and collusion with police, attorneys and magistrates.
- » Asset tracing and verification;
- » Drafting of criminal and disciplinary charge sheets;
- » Litigation support;
- » Development of state of the art fraud prevention and detection strategies;
- » Training and fraud prevention programmes.

The team will be supplemented as needed, both by internal Bowman Gilfillan resources, and external resources, depending on the nature of the work involved and the needs of the particular client. This will be done in consultation with the client. The team will continue to offer our clients the same uncompromising standards of excellence we continuously strive to maintain, and we hope that our clients will utilise this resource in their efforts to stamp out workplace crime and corruption. ■

*In 2004 Bowman Gilfillan adopted its own internal Transformation Charter to ensure that the firm as soon as possible reflected the demographics of the South African populace and met the challenges of a changing South Africa. At that time there were no codes of good practice, nor were there any other models, either inside or outside the profession, for us to use as a reference with which to benchmark the firm. We therefore opted for an inclusive process in which we engaged clients and a cross section of staff, as well experts, on the subject of transformation and Black Economic Empowerment (BEE).*

*This process of educating ourselves, understanding the challenges ahead and setting goals and objectives to meet these challenges, lasted a few months and culminated in the adoption of the Transformation Charter. This Charter has a broad focus and considers all aspects of the business to ensure the transformation of the firm is broad based and sustainable.*

*The firm is making good progress in its efforts to achieve its objectives but we also recognise there is still a lot to be done. In order for us to measure our progress we rely on statistics, awards and the feedback we receive from independent sources. Some of the recognition we have received with regards to our transformation objectives are:*

**In 2006 we received an A rating from independent empowerment adjudicator - Empowerdex.** We are very proud of this rating and it is extremely gratifying to be the first law firm to receive an A rating. As a level four contributor, all clients are able to claim 100% of their spend with the firm for their own scorecard purposes.


It is generally acknowledged that it will take a few years to change the equity ownership profile of the firm to a position where we are considered a black empowered firm with a 25.1% equity ownership. Therefore to receive an A rating at this time reflects the good progress we have made in many of the other areas of the generic scorecard and reinforces the firm's commitment to Broad Based Black Economic Empowerment.

**\* In the Transformation Charter we set ourselves ownership targets of 17% black and 30% female ownership by 2009.** The table above reflects our current ownership status and also gives a clear indication of how our junior levels are made up, from where the majority of future directors will emerge. Judging from this data we are confident that we will make and hopefully exceed our targets.

**LEGAL 500 – 2005 Annual Publication**

In this most respectable publication the following was said of Bowman Gilfillan:

*“One firm at the forefront of BEE is Bowman Gilfillan, probably the most credible advocate of genuine BEE within its own walls”.*

	BLACK	FEMALE	TOTAL
DIRECTORS	9.5%	26.2%	84
SENIOR ASSOCIATES	38.8%	46.3%	54
ASSOCIATES	51.7%	66.1%	56
CANDIDATE ATTORNEYS	51.8%	50%	54
SUPPORT STAFF	40%	79.3%	293
<b>TOTAL</b>	<b>39.9%</b>	<b>63.2%</b>	<b>541</b>

**National Business Awards 2005 – Top Company of the Year in the support services category:**

*“Outstanding contribution towards job creation, sustainable development and economic growth and overall performance in its industry”.*

**3rd Annual Top Women in Business and Government 2006**

*“Nominated as one of South Africa’s top gender empowered organisations for 2006”.*

**Magnet Graduate Survey – The Ideal Employer**

Gold Medal 2004  
Bronze Medal 2005

Honest feedback from all our staff and clients is crucial as we undertake this journey of transformation. We get this feedback through the following sources:

- » The annual Deloitte ‘Best Company to Work for’ survey. Incidentally we finished 57th in 2005 as a first time entrant and were commended for this ranking as a first time entrant;
- » Staff culture and climate surveys – these are conducted every two years;
- » Diversity management – we have secured the assistance of Professor Linda Human to provide expert guidance in this ongoing initiative;
- » Client Surveys – we conduct a formal client survey every two years and have recently completed the second of these; and
- » A Transformation Steering committee which is representative of all Directors and staff meet regularly to review progress in meeting the goals and objectives of the Transformation Charter.

Some clients take an active interest in reviewing our transformation progress and insist on regular feedback and formal review sessions. Many of our clients have a genuine desire and interest in bringing about real transformation on the legal profession, and we welcome this. Practically we have worked together with clients to achieve this goal in many different ways some of which include:

- » Attendance by client lawyers and staff at various training and development sessions and seminars run by the firm;
- » Secondment of lawyers to and from clients;
- » Twinning arrangements with black law firms; and
- » Briefing of black counsel;

Bringing about sustainable transformation remains a key strategic objective of the firm. We believe that with decisive and insightful leadership and a commitment from all Directors and staff that we will continue to build momentum and succeed in all the goals which we have set ourselves.

There are initiatives currently under way within the profession to establish a Legal Services Charter. We intend to be an active participant in this process and to play a meaningful leadership role in the negotiations of a Legal Services Charter. ■



**COMPETITION (ANTI-TRUST),**  
*International trade and* **LOBBYING**

**THIS PAGE**

- 1. Iona Dhladhla
- 2. Simla Ramdayal
- 3. Welsh Gwaza

**OPPOSITE PAGE**

- 4. Lulama Mtanga
- 5. Michelle Morrison
- 6. Femida Cassim
- 7. Guillermo Erasmus
- 8. Rudolph Labuschagne

**ABSENT**

- 9. Rob Legh
- 10. Derek Lotter
- 11. Sebastian Rosholt
- David Yuill
- Tamara Dini
- Keith Hendry

**DEPARTMENT FOCUS**

# The limits of the use of anti-dumping measures

By Guillermo Erasmus and Keith Hendry

## South African industry was historically protected from import competition through various types of trade barriers.

During the 1990's South Africa again became part of the international community and started opening up its economy. This introduced the domestic industry to vast international competition by way of imports. One of the measures available to the local industry to protect itself against imports are anti-dumping measures.

Given the historical lack of competition and the protection enjoyed, some local producers have become, not only dominant, but also uncompetitive. As these protections fell away, some local producers have battled to adjust and to compete with import competition. As was stated by the Minister of Trade and Industry in his forward to the International Trade Administration Commission's (ITAC) 2004/2005 Annual Report, "our current competitiveness problems can be traced to the poor economic policy choices that were taken decades ago. These policies of erecting protective barriers led to our manufacturing industry becoming uncompetitive."

The Minister also cautioned that "ITAC indeed needs to be wary of neo-protectionist tendencies in the form of anti-competitive, unfounded, or factitious (sic) anti-dumping and other trade remedy petitions from industry, the injudicious imposition of which would stifle our progress and precipitate non-competitiveness."

Anti-dumping measures are legitimate measures permitted under Article VI of the General Agreement on Tariffs and Trade (GATT) and the Agreement on Implementation of Article VI of GATT (the Anti-Dumping Agreement) under the World Trade Organisation (WTO). This allows an industry to protect itself against "unfairly" low priced imports. South Africa promulgated anti-dumping regulations which are largely based upon the WTO rules and, in particular, GATT.

In order to justify anti-dumping measures it has to be established that (1) dumping, which (2) caused (3) injury has taken place. An application needs to be supported by

25% of the local producers by domestic production volume. Those producers expressing a view on the application must also constitute at least 50% of all producers expressing either support or opposition to the application. However, it is only required that a prima facie case of dumping, injury and a causal link between the two is made out, for an investigation to be initiated.

The notion of dumping is superficially simple. Dumping exists where an exporter's domestic price is greater than its export price for the like product. The difference is the dumped amount. However, actually determining the extent of dumping by reference to normal value and export price is extremely complicated.

Injury is determined in a less complex fashion. Material injury is determined by considering whether there has been a significant depression and/or suppression of the local industry's prices. In addition, it must be considered whether there have been

significant changes in the domestic performance of the local industry, in respect of various potential injury factors, which include sales volume, profit and loss, output, market share, productivity, return on investments, capacity utilisation, cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and any other relevant factors.

A causal link between the dumped imports and injury also needs to be established. This is ordinarily done by reference to trends in quantities and prices of the dumped imports and price undercutting or price suppression and depression. All relevant factors other than dumping that may have caused the injury must be considered.

In some instances it has been found that imports, although cheaper than those produced locally, do not satisfy all the requirements for anti-dumping measures to be imposed. It is often easy for local industries to show that they have suffered injury. However, when ITAC conducts its investigation it sometimes finds that the cheaper imports are not being dumped, i.e. the domestic price of the exporter is not greater than its export price, and the investigation is terminated.

Increasingly dumping investigations are also being terminated because of a lack of a causal link between imports and the injury being suffered by the local industry. In most of these instances it is found that factors other than imports are causing the injury, therefore detracting from the causal link between the dumping and the material injury. As stated above, all relevant factors other than dumping that may have caused the injury must be considered. Such factors may include the volume and prices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, trade restrictive trade practices of and competition between

the foreign and local producers, developments in technology, other factors affecting the local prices, the industry's export performance, and the productivity of the local industry.

ITAC, who investigates complaints of dumping, is increasingly aware of complaints being brought by especially dominant market players as a means of protecting its market position. As a result of this, a lot of investigations have been terminated and no anti-dumping measures imposed. It was stated by The Chief Commissioner of ITAC in her forward to ITAC's 2004/2005 Annual Report:

"In the sphere of trade remedy investigations, we have displayed vigilance not to revert to past inward-looking strategies, encouraging anti-competitive behaviour. The trade remedy instruments will be viewed as a means to provide necessary protection against proven injurious unfair trade.

We consider it critical that the approach to trade remedy investigations, in particular the methodology for considering the injury effects and establishing causality between injury and dumping, does not compromise principles of competitiveness and of economic growth and development in the guise of providing remedial assistance."

Local industry should therefore be aware that ITAC will thoroughly investigate applications for trade remedy protection (including for anti-dumping measures) and will not allow any form of trade protection to be abused as a mere means of protecting uncompetitiveness. If however, there is a legitimate case to be made; this should not deter local producers from successfully bringing such an application. ■



## DEPARTMENT FOCUS

*competition (anti-trust), international trade and lobbying: the limits of the use of anti-dumping measures*

By Guillermo Erasmus and Keith Hendry

# ARE NON-COMPETE OBLIGATIONS IN SALE OF BUSINESS TRANSACTIONS PER SE VIOLATIONS OF THE COMPETITION ACT?

By Lulama Mtanga



*The Nedschroef/Teamcor and Others Case No. 95/IR/Oct05), a Competition Tribunal (the “Tribunal”) decision that has stirred confusion with regard to the safety of non-compete obligations in sale of business transactions.*

Teamcor Limited (“Teamcor”) one of the respondents in the matter owned two divisions. The divisions were National Bolts which produced standard fasteners and lock fasteners and National Bolts automotive which sold fasteners to the automotive industry. Teamcor sold the former to CBC Fasteners (Pty) Ltd (“CBC”). The sale agreement between Teamcor and

CBC contained a non-compete clause to the effect that Teamcor would not sell the remaining assets to a competitor of CBC in return for a premium payment by CBC on the assets sold. At a later stage Teamcor sold the National Bolts automotive division to Nedschroef Johannesburg (Pty) Ltd (“Nedschroef”). The sale agreement between Teamcor and Nedschroef also contained a non-compete clause in terms of which Nedschroef agreed to only manufacture fasteners specified in their agreement (effectively excluding all the fasteners manufactured by CBC) for a period of 10 years in return for a discount on the price of the assets sold. Nedschroef also extended the benefit of the restraint against itself to CBC. The assets bought by Nedschroef related to machinery and equipment for manufacturing fasteners which could also manufacture fasteners that CBC manufactured. Hence the restraint was in protection of CBC’s market.

Due to poor performance of Nedschroef’s business, its parent company exerted pressure on it to diversify into more lucrative markets, including the market for short bolts which were covered by the non-compete clause or face closing down. To escape the non-compete clause, Nedschroef

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made an application to the Tribunal seeking an order declaring that the non-compete clause constitutes a market allocation between itself and CBC as competitors and, as such contravened section 4(1)(b)(ii) of the Competition Act No.89, as amended (the “Act”). The Tribunal (delivering its judgement on 1 February 2006) ruled that the non-compete clause indeed constituted market division as contemplated by section 4(1)(b)(ii).

ensure that the purchaser is protected against competition from the seller in order to gain loyalty of customers and to assimilate and exploit know-how), maintain continuity of supply after the break-up of a former economic entity or enable the start-up of a new entity and, I would add, to protect expertise, know-how and intellectual property typically transferred in joint venture arrangements. The EU Law does not only offer guidelines on non-

geographical field of application to ensure that it does not exceed what is reasonably required to achieve the objectives of the merger. In the EU Law non-compete clauses are justified for a period of up to 3 years when the transfer includes transfer of customer loyalty in the form of goodwill and know-how. When only goodwill is transferred then a period of two years is sufficient. Further, non-compete clauses are considered unnecessary in transfer of

non-compete provisions contained in the parties' sale agreements undergo scrutiny by the competition authorities.

Perhaps the only hope for these transactions is the ANSAC/Commission decision (Supreme Court of Appeal in American Natural Soda Ash Corporation CHC Global (Pty) Ltd/Commission et al Case No.: 2005 (6) SA 158 (SCA) which ruled that for an agreement to fall within the ambit of section 4(1)(b) of the Act it must first be characterised as that conduct which the Act prohibits under this section. In other words, not every market dividing agreement will constitute market division as contemplated by the Act. The confusion may be resolved by adopting the concept of characterisation established in the Ansac case and thus ask whether a non-compete clause protecting the value transferred, maintaining continuity of supply after the break-up of a former economic entity or

enabling the start-up of a new entity and protecting expertise, know-how and intellectual property typically transferred in joint venture arrangements and after having had regard to its nature, duration, subject matter and geographical field of application constitutes a section 4(1)(b) violation.

Applying this to the Nedschroef decision, the difficulty in that case is that the non-compete obligations that Nedschroef complained of sought to protect CBC, a third party (as it was not a party to the sale agreement of agreement between Teamcor and Nedschroef, instead the agreement was extended to cover CBC). Even the EU Law clearly states that non-compete obligations may be to the benefit of the purchaser or the seller. The protection of a third party and combined with the duration of the non-compete obligation amounted to Teamcor as a seller

not only protecting CBC's investment, but also protecting it against competition in general. CBC only required protection against competition from Teamcor as a purchaser. Any protection beyond this was indeed unreasonable and hence caught by section 4(1)(b) of the Act.

The difficulty with the approach in the Nedschroef decision is that characterisation analysis adopted failed to consider the general use of non-compete obligations in sale of business transactions. As a result of this failure, it has created confusion with regard how far does the illegality extend. Are all sale of business contracts caught by the ruling in that decision? This is unlikely. It remains possible to utilise the concept of characterisation to distinguish non-compete obligations that protect a purchaser as is reasonably necessary for the parties to achieve their objectives from those that go beyond this. ■

*Non-compete obligations are a common feature in sale of business contracts. Their purpose as discussed in the European Union competition law (the “EU Law”) is to protect the value transferred, maintain continuity of supply after the break-up of a former economic entity or enable the start-up of a new entity and, to protect expertise, know-how and intellectual property typically transferred in joint venture arrangements.*

Section 4(1)(b) provisions relate to per se violations. In the Commission/Patensie Sitrus Beherend Beperk Case No. 37/CR/ Jun01, the Tribunal held that, “section 4(1)(b) [offences] are arguably the most egregious offences under competition law and, hence, are prohibited outright - harm to competition is presumed and no pro-competitive defence is permitted. This is why the legislature has confined the application of this section to agreements whose content is clearly specified in the Act”. Worst, the firm found guilty can have an administrative penalty of up to 10% of its gross annual turnover imposed on it by the Tribunal.

Non-compete obligations are a common feature in sale of business contracts. Their purpose as discussed in the European Union competition law (the “EU Law”) (See Commission's Notice on restrictions directly related and necessary to concentrations) is to protect the value transferred (to

compete obligations that are likely to be anti-competitive, but also recognises the necessity of these obligations in the sale of business transactions. The EC Merger Regulation (the primary legislation regulating mergers in the EU) requires that a merger analysis must establish whether non-compete clauses contained in the underlying agreements establishing the merger are “restrictions directly related and necessary to the implementation” of that merger. In the EU Law, restrictions directly related and necessary to the implementation of a merger are those restrictions that in their absence, a merger cannot be implemented or would only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerable difficulty. In the EU law, whether a non-compete obligation is “necessary” and justifiable must be determined by having regard to its nature, duration, subject matter and

physical assets such as land, buildings or machinery or to exclusive industrial rights and commercial property rights of the holders. (The latter are considered to have recourse to legal action in the event of breach by the seller).

In the absence of any case law in South African law as that found in the EU Law or similar guidelines with regard to the approach to non-compete obligations, the Nedschroef decision has created confusion and apprehension particularly on its implications for sale of business transactions. This concern is particularly greater for sale of business transactions that are not notifiable which contain these clauses which could very well be in contravention of the Act as held in the Nedschroef decision. In the absence of any jurisprudence and guidelines, competition law practitioners are in a dilemma as to what advice to give their clients. Notifiable transactions are in a better position as the



**MICHELLE MORRISON IS AN ASSOCIATE AT THE FIRM. SHE HOLDS A BA (CUM LAUDE) AND AN LLB (CUM LAUDE) FROM THE UNIVERSITY OF THE WITWATERSRAND AS WELL AS AN LL.M FROM COLUMBIA UNIVERSITY, NEW YORK SPECIALISING IN INTERNATIONAL TRADE AND COMPETITION LAW. IN 2005 AND 2006, MICHELLE WAS A DELEGATE TO TWO CONFERENCES, HOSTED BY THE TRADE LAW CENTRE FOR SOUTHERN AFRICA AND THE COMMONWEALTH SECRETARIAT, ON THE WORLD TRADE ORGANISATION'S HONG KONG MINISTERIAL NEGOTIATIONS AND THEIR IMPLICATIONS FOR SUB-SAHARAN AFRICA.**

## DEPARTMENT FOCUS

*competition (anti-trust), international trade and lobbying: are non-compete obligations violations of the competition act?*

By Lulama Mtanga

# murky waters ahead:

The South African Competition Commission, in line with section 79 of the Competition Act 89 of 1998 (from hereon referred to as the Act), and the worldwide trend in cartel prohibition, formulated and adopted the Corporate Leniency Policy (CLP) in 2004 (Gazetted in Notice 194 of 2004). The Commission's approach to hardcore cartels is to encourage corporations to reveal any anti-competitive conduct in return for immunity from prosecution. A cartel is "an association by agreement among competing firms to engage in price fixing, division or allocation of markets, and/or collusive tendering" (International Competition Network: Anti Cartel Enforcement Template: South Africa). The Commission had no other leniency policies or guidelines prior to adopting the CLP, which is modelled on that of the United States. The Commission has dealt with several cases involving cartel behaviour through its investigations and subsequent prosecutions (See also the Case Ansac/Botash Case Number 49/CR/A/ Jul00). Discretion to grant immunity rests with the Commission depending on whether the information amounts to conclusive evidence or not. This decision is based on whether the applicant cooperates fully and secondly whether or not the Competition Commission needs the assistance of the applicant in securing a conviction.

Two ways of detecting cartels have widely been acknowledged by authorities worldwide. Firstly, evidence of cartel activity is found by enforcers and secondly evidence is supplied to enforcers by self confessing cartel members. Where a party to the prohibited conduct supplies the information to the enforcers, certain questions regarding confidentiality and the net effect of the immunity granted arise. There can be no confidentiality agreement with the Commission because the information that is supplied by the participant will be used in prosecuting other cartel members. "The granting of immunity becomes

an incentive for a firm that participates in cartel activity to terminate its engagement, and inform the Commission". However, unlike in other jurisdictions such as the United States, South Africa does not have legislation imposing sanctions to hold individuals personally liable for a corporation's conduct. If granted immunity, the corporation will not be prosecuted, will have to confess and will not be found guilty of any offence related to that particular cartel's activities.

A cartel constitutes per se prohibited practice in terms of Section 4(1) (b) of the Act. Cartels are deceptive, collusive and secretive and are difficult to investigate without the assistance of an outsider, especially where lack of resources hampers the investigative functions of the authorities. A cartel's goal is to, to limit and to limit which leads to increased prices and diminished efficiency (<http://en.wikipedia.org/wiki/Cartel>). Cartels take advantage of countries lagging behind in terms of the antitrust enforcement. Several requirements and procedures must be followed before a corporation can be granted immunity. The analysis below will focus on the fourth and fifth requirements in the CLP.

Eight requirements must be met before a corporation qualifies for immunity. The fourth requirement: the applicant must immediately stop the cartel activity or act as directed by the Commission; and the sixth requirement, the applicant must not alert other cartel members that it has applied for immunity, are a contradiction in terms. The Commission requires the applicant to cease conducting any cartel related activities; however, ceasing these activities would defeat the requirement that the applicant does not inform other members or former members of the cartel of its leniency application. The Office of Fair Trade's view is that the corporation must carry on its basic

*the corporate leniency policy*

activities in the same way as if it had never been approached by the authority. Authorities are likely to adopt this approach where the applicant is required to act as directed by the Commission.

One of the main concerns where a corporation acts as directed by the Commission is the question of liability for injury suffered by a third party during the course of the investigation. There is no case law addressing the delictual liability of the Commission, however, there is case law dealing with other public bodies. The Supreme Court of Appeal recently held that where a public body, in the exercise of its function, which is in the public interest, made an erroneous judgment, the sense of justice of the community did not demand that the plaintiff be compensated in the circumstances (*Telematrix (Pty) t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)*). It would appear that a leniency applicant implicated in a civil suit will be exempt from civil prosecution, but only to the extent that they were acting under the direction of the Commission.

Lack of clarity as to how the Commission would deal with a civil suit against a party whom it granted immunity exists. Ordinarily, a matter would be reported to the Commission by the complainant and in determining the sanction, the Commission or Tribunal would take into account the amount of damages the complainant suffered (See

559 (3) of the Act). Therefore damages for the complainant are included in the fine. Section 65 (9) stipulates that a person's right to bring a claim for damages arising out of a prohibited practice comes into effect on the date that the Competition Tribunal made a determination in respect of a matter that affects that person. At issue is the fact that since the Tribunal dealt with and granted immunity to the applicant, a civil court will have to deal with the merits thereafter if a suit is brought against the immunity grantee by a third party. Section 65(2) stipulates that if, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, but must refer it to the Tribunal provided certain requirements are met. Furthermore, Section 67(2) stipulates that a complaint may not be referred to the Competition Tribunal against any firm that has been Respondent in completed proceedings before the tribunal under the same or another section of this Act relating substantially to the same conduct. It is not clear whether the use of the word "Respondent" is inclusive of the "Applicant" in CLP applications.

Even though leniency is granted on the basis of an agreement between the applicant and the Commission, the CLP states that the policy is purely aimed at providing guidance and is not binding on the Commission or other competition bodies in the exercise of their

respective discretions, or the interpretation of the Act. Where a complainant brings an application to the tribunal to issue a certificate in terms of section 65(6) (b), a problem arises. The immunity applicant might have been exempt from the sanction imposed on its cartel partners, and the tribunal might have issued a certificate certifying the guilty verdict, which would exclude the immunity applicant, but the rules of civil procedure would require the immunity grantee to be joined as a co-defendant in a civil claim. It is not clear whether the Tribunal will issue a new certificate certifying that the immunity grantee was guilty of an offence, which would be supported by the confession mentioned above or whether the certificate would merely indicate that the grantee was a member of the cartel. Whichever route the Tribunal takes erodes on the CLP's effectiveness. In addition, should the Tribunal issue a certificate certifying the immunity grantee guilty of cartel activity the issue of sanctions imposed always arises, but that is a debate for another discussion.

Lastly, the CLP does not stipulate the fate of ill-gotten profits accumulated when the applicant was acting as directed by the Commission. For instance, if the applicant makes more profit during the period after being granted conditional immunity rather than before they reported the cartel, no provision is made on how those profits will be recouped. Certainly, the applicant is exempt from

prosecution, will not plead and will not be found guilty of any offence related to that particular cartel's activities. However, the applicant will be required to sign a confession as part of the agreement. Total immunity extends to the point where the applicant cannot be asked to pay a fine of any sort in relation to the Competition Commission only. In clause 5.9, the CLP states that it would not absolve the applicant from criminal liability under any provision of the Act apart from Section 4(1)(b).

In conclusion, the Competition Commission is likely to review this policy and possibly adapt it to suit local needs because of the level of uncertainty it raises. Furthermore, the guidelines are open to abuse, particularly regarding the marker system. It would seem that the safest option for corporations, particularly international corporations, is to carry out investigations into the suspected cartel's operations, weigh the benefits and disadvantages of reporting and especially the consequences attached thereto. In most likelihood, if the Commission institutes investigations, other jurisdictions where that corporation operates are likely to follow suit, so a synchronisation of a client's immunity applications is worthwhile. ■



*The Commission's approach to hardcore cartels is to encourage corporations to reveal any anti-competitive conduct in return for immunity from prosecution.*

# A LOOK AT CONSENT ORDER PROCEEDINGS IN SOUTH AFRICA

By Iona Dhladhla



Consent orders are judicially approved agreements entered into voluntarily by parties to settle antitrust disputes and are generally regarded as necessary enforcement tools because, not only do they encourage parties to work together to resolve a dispute, they also facilitate creative problem solving. Consent orders are also an effective tool in seeking to avoid lengthy and often costly litigation.

These agreements have, however, been criticised for lack of sufficient judicial scrutiny. Concern has been expressed that courts (or competition tribunals) merely “rubber stamp” consent orders without subjecting them to adequate judicial review. To understand the basis of the criticism (within the South African context), it is important to understand the nature of complaint proceedings. A complaint alleging contravention of the Competition Act, 89, No. of 1998, amended (“the Act”) can be initiated by the Competition Commission (“the Commission”) or a complainant. This article will only look at complaints initiated by a complainant and consent orders concluded by the Commission and a respondent to settle such complaints.

Once a complaint is filed with the Commission, the Commission investigates it and then determines whether it should be referred to the Competition Tribunal

(“the Tribunal”). If it does refer it, then the Commission appears before the Tribunal as “prosecutor”. Unless a complainant applies for interim relief in terms of section 49C of the Act, the complainant’s hands are tied during the investigation period until such time that the Commission makes its determination whether or not to refer the complaint for prosecution. The Commission can decide to refer the complaint, enter into a consent order or not to refer. In the event that the Commission decides not to refer, the complainant has a right to refer the complaint to the Tribunal directly in terms of section 51(1) of the Act.

On the other hand, if the Commission decides to enter into a consent order, it must do so in terms of section 49D. In terms of this section, the Commission and a respondent in complaint proceedings can negotiate and “agree on the terms of an appropriate order” during the

investigation, on completion of the investigation or after investigation. In *GlaxoSmithKline South Africa (Pty) Ltd, Glaxo Group Limited and Mpho Makhathini and others*, the Tribunal found that the Commission’s power to investigate and its power to prosecute are coextensive and that once the power to investigate is lost, so is the power to prosecute. The Tribunal held that “...the Commission must retain its title to prosecute at the time a consent order application has been launched to avoid it facing prosecutorial impotence if the Tribunal does not sanction its bargain with the respondent. It can retain this title to prosecute either (a) by having the consent application considered during the one year period or an extended period [agreed to by the complainant or granted by the Tribunal upon application] or (b) after this period, provided it has referred the complaint to the Tribunal during this period thus preserving that right.”

If the Commission has failed to refer a complaint or to conclude a consent order within the periods mentioned above, the complainant can refer the matter for prosecution. Let us assume that the Commission decides to enter into a consent order, what effect would this have on a complainant, in particular, a complainant’s remedies? The effect of a consent order is that it brings a matter to finality. The Commission agrees to terms it believes, as an enforcement authority, are adequate to remedy the harm caused by the respondent’s conduct. This process allows the Commission to shorten what could otherwise be protracted litigation. It is not difficult, however, to appreciate why this process could be regarded by a complainant to be to its disadvantage. The power to prosecute and settle a complaint vests with the Commission and a complainant’s role or say in this process can be limited. Although the Commission is obliged to notify a complainant of a proposed consent order,

the input a complainant is generally able to make upon receiving such notification is to advise the Commission whether it is prepared to accept damages under such an order and, if so, the amount of damages claimed. The complainant is confined to two remedies, namely, the voiding of an agreement and a declaration that the conduct is unlawful. In *GlaxoSmithKline* the Tribunal observed that a consent order bars a complainant from a number of remedies that it might otherwise wish to seek to remedy its complaint. Also important to note is that even though the two remedies are available, they do not seem to be prerequisites for a consent order. The section states that “a consent order does not preclude a complainant from applying for a declaration in terms of section 58(1)(a)(v) or (vi)”. In other words, the fact that a respondent does not admit to having contravened the Act or that the conduct complained of constitutes a prohibited practice, does not mean that the agreement cannot be confirmed as a consent order. In the absence of this “admission” in the consent order, a complainant can apply to the Tribunal for a declaration that the conduct constitutes a prohibited conduct in terms of the Act.

The declaration would be sought under section 58(1)(a)(v) which gives the Tribunal power to “declare the conduct of a firm to be a prohibited practice in terms of the Act, for purposes of section 65”. A complainant would then use the declaration to institute a claim for civil damages in the High Court (if the consent order did not include an award for damages). Although a complainant is authorised under the Act to apply for a declaration, the procedure for such an application is not set out in the Act or the Rules. It is unclear what procedure the Tribunal will follow when such an application is lodged or the extent to which the respondent would be a party to such an application.

Although a complainant is generally not involved in the negotiation and conclusion of a consent order (except where damages are concerned), section 49D does give the Tribunal power to scrutinise the consent order if it deems appropriate. Unfortunately, the circumstances under which this power will be exercised are not set out. In the United States, however, factors of what a court must consider before confirming a consent decree are clearly defined. The Tunney Act of 1974 requires a court to find that entry of a proposed antitrust consent decree would be in the public interest before it can be entered. Among the facts a court is required to consider are the competitive impact of the settlement in the relevant markets and whether the public would benefit from the determination of the issues involved through trial. It also prescribes a public comment process (including participation by interested parties) which gives a court the benefit of views other than those of the parties prior to making its public interest determination. The prosecuting authority must also file with the court any public comments received in relation to the proposed decree.

Our Act is fairly new and with time clear criteria and procedures are likely to develop with regard to consent order proceedings. In the meantime, a complainant can be comforted by the Commission’s recent policy decision that a respondent who wishes to enter into a consent order must agree that the conduct complained of constitutes a prohibited practice. A complainant will therefore not need to apply for a declaration under section 58(1)(a)(v) prior to instituting a civil claim. As discussed above, on a strict interpretation of section 49D, it is doubtful whether such an admission is in fact required. ■

## DEPARTMENT FOCUS

*competition (anti-trust), international trade and lobbying: a look at consent order proceedings in South Africa*

By Iona Dhladhla

# THE MOVE TO FACILITATED MUTUAL GAIN NEGOTIATION IN SOUTH AFRICA

By John Brand

# win win



## Traditional negotiation

Traditionally, South African labour negotiations have been characterised by high levels of adversarialism and conflict with a strong focus on positions, demands, power and war talk. The parties engage in negotiation with relatively fixed and inflexible mandates and they prepare by determining in advance what their opening, ideal and fall back positions will be. They strategise about the order in which they will make concessions and how they will apply pressure on the other party.

Central to their thinking is the belief that they must start with high offers and respond with low counter offers. They fear that if they start with realistic positions they will be negotiated down from them and it will be less likely that the midway compromise will favour them. Negotiations usually progress slowly from one concession to the other with the parties exaggerating the value of their own moves and minimising the value of the other's moves. They also tend to manipulate information to hide what is harmful to their position and to emphasise what undermines their opponent's position. These tactics, together with the adversarial rhetoric which accompany them, increases levels of anger and frustration as the process progresses.

Frequently one party will remove important issues from negotiation in return for the other doing likewise until only the most pressing issue or issues like wages are left. As it becomes increasingly difficult to bridge the gap between them the parties often resort to the use of power to pressurise each other. This can range from subtle "go slows" to all out industrial or violent action. Eventually the parties do compromise, usually with significant loss of face to one or both of them. They leave the process dissatisfied with it and the outcome and harbour the belief that they will get their revenge in the next round of negotiations.

## Mutual gain negotiation

Fortunately some parties are finding that there is an alternative to this traditional stylised and uncreative negotiation process.

After joint training the joint negotiation team usually attends a facilitated pre-negotiation workshop at which it agrees on an overall goal and approach to the upcoming negotiations which is that the negotiations should have a mutual gain focus. They also agree on ground rules and a process for the negotiation which will facilitate this.

Typically they use the opportunity to share and discuss their needs, interests, fears, concerns and expectations and they clarify the range of issues that need to be negotiated. They also settle dates, times and venues for the negotiation and agree on a process of report back to their constituencies.

It is important that this engagement takes place prior to the parties obtaining fixed mandates. This means that when they do seek mandates from their constituencies they are able to influence those mandates with the knowledge of the other parties' needs and expectations.

Once the negotiations proper commence, those negotiations are characterised by an assumption that it is possible to find an outcome which meets both parties' needs. The facilitator ensures that there is a delay in seeking solutions until the underlying problem is properly understood and that there is a focus on underlying needs and interests rather than on positions or solutions. The facilitator encourages parties to resist the temptation to bluff one another with false offers and selective information. The facilitator helps the parties to exchange information openly and honestly and to really endeavour to understand before being understood. Respect for the dignity of the other party and recognition of the independence and inter-dependence of the parties is fostered. The facilitator also assists the parties to find and increase value and to seek solutions in a creative and flexible way. There is a lack of adversarialism and instead calmness, patience and restraint.

In this way the facilitator builds trust and helps the parties to find satisfactory and lasting outcomes. ■

John Brand specialises in dispute resolution and the training of negotiators, mediators and arbitrators. Over the past 20 years he has arbitrated and mediated some of the largest labour disputes in South Africa and he regularly facilitates negotiation, strategic planning and transformation processes.

He co-designed the conciliation and arbitration induction training for the CCMA and has trained many of South Africa's mediators and arbitrators for the past 15 years.

He was a member of the International Labour Organisation's team of international experts appointed to design mediation training for developing countries and he regularly trains mediators from countries in Africa, Asia, Eastern Europe and South America.

Recently John has focused on training and facilitating joint Union Employer negotiation teams in mutual gain negotiations. His latest successes in South Africa have been with the Road Freight and Furniture Bargaining Councils. Over the years, he has done similar work for many blue chip companies.

The International Labour Organisation has also commissioned John to design training material and train parties and trainers from countries across the world in mutual gain negotiation. This training material has been translated into French, Portuguese and Arabic and is used extensively throughout the world.

John has also participated in two major facilitations in the Northern Ireland peace process for the communities of Belfast and Portadown and has trained and consulted to parties in the Basque peace process.

*These days, it is well known that litigating is an expensive exercise, even for successful litigants.*

Generally speaking, a successful litigant will be entitled to recover its legal costs but, what does this mean from a practical point of view? Until a few years ago, this meant that a successful litigant would be entitled to recover between 40% and 50% of its taxed costs on a party and party scale. In addition, in the event of an unsuccessful litigant facing a punitive costs order, the successful litigant would possibly be awarded costs on an attorney and own client scale which would translate into a recovery of approximately 95% of capital outlay in respect of its costs. Today, however, things are very different.

Now a successful litigant who is awarded costs on a party and party scale, including the costs of two counsel will only be likely to recover between 15% and 30% of its capital outlay in respect of costs after taxation. The reason for this decline in percentages is that court tariffs are not increasing in line with the increase in attorneys' and counsels' charges. To give an example of this rate of recovery, we recently acted for a client with a claim of just under R50 million. After 4 years of litigating, we were successful and our client was awarded costs including the costs of two counsel. Our client had spent approximately R1.5 million in legal fees over the years in the lower courts and R121 795,25 in respect of the other side's application for leave to appeal. Of the total amount expended by our client, they recovered a total of R457 119,70 after taxation. In another matter, the attorneys for the appellant in an appeal were dilatory in their conduct and the court awarded our client costs de bonis propriis. This is a costs award which means that the attorney or representative of a party has to pay their client's costs as a result of that attorney's conduct. In this instance, on a bill of approximately R120 000, our client recovered just under R23 000 after taxation.

Let us now consider a hypothetical example. A has a claim against B for R1 million. A institutes action against B for recovery of the amount owing to it and the litigation lasts for a period of two years. A, during this period, incurs R1 million in legal costs. In the event that A is successful and recovers all amounts due to it, and on the basis that B does not appeal the finding (in that case the costs and time periods will obviously be higher and longer respectively), A will recover the R1 million from B (being A's claim) and between R150 000 and R200 000 in respect of its costs, after taxation. In the event that A is unsuccessful, not only will A not recover the R1 million claimed from B but it will also not recover any of its costs and will have to pay B's costs after taxation, whatever those may be. The upside of this is obviously that,

**the scales of justice are costly**

By Nicky Stetka and Adam Anderson

if a litigant is unsuccessful and ordered to pay their opponent's costs, that litigant will only end up paying between 15% and 30% of their opponent's costs after taxation.

We have been investigating the tariff which governs how much a litigant will recover on taxation. Ultimately, the Department of Justice,

through the Rules Board, is responsible for setting the tariff. We discussed the issue of the status of the tariff and what steps can be taken to amend it with one of the cost consultants, the services of whom we frequently employ, and we were advised that they have made a number of representations to the Rules Board regarding the tariff and those representations have fallen on deaf ears.

In an attempt to assist litigants who find themselves in this precarious position, there is now an insurance product in South Africa offered by Legal Protection Services (Pty) Limited ("LPS") and underwritten by Constantia Insurance Company Limited. This product is designed to protect a losing litigant against an adverse costs order, either at an interlocutory or a final stage. In the event that a litigant wishes to take out this insurance cover, the insurance is taken out after litigation or arbitration has commenced and the litigant has the option whether only to take out insurance in respect of their own costs, including all of their attorney's actual disbursements and not related to tariff at all and/or insurance in respect of the taxed costs of their opponent. The LPS insurance policy can also be used as security for costs in certain circumstances.

The premiums for this product are between 30% and 40% of the limit of indemnity in respect of the costs insured. However, arrangements are available in terms of which the payment of the bulk of the premium can be deferred to judgment or settlement in favour of the litigant. Under this arrangement the balance of the premium is effectively self insured and in the event of a judgment with costs against the litigant no further premium is payable and the policy will cover, up to the limit of indemnity, the costs incurred. If the case is won then the balance of the premium becomes payable. This means that, for example, in the event of a litigant being insured for an amount of R500 000 in respect of their own costs, and judgment being awarded against the litigant with costs, the litigant will be covered up to the limit of indemnity of R500 000 and no further premium will be payable. The total exposure for the litigant being the initial inception fee of R20 000.

In order to explain this product from a practical point of view, let's consider an example of a client faced with an application. The client incurs legal costs in the sum of, for example, R800 000. In the event that the client is unsuccessful and ordered to pay the applicant's costs, the client will be liable for its own full costs and the taxed costs of the applicant. If the client applies to LPS for insurance cover of, for example, R500 000 and is successful in its application to LPS, the client would have to pay a premium of R20 000 and would only have to pay out R300 000 in respect of its costs (i.e. the difference between R800 000 incurred and the amount of R500 000 insured for). In the event that the client is also insured against paying the other side's taxed costs, it would only have to expend R320 000 on legal costs.

Whilst this product is a fairly novel and unknown concept in South Africa, it is already common practice in the United Kingdom where solicitors are obliged to bring the existence of these types of insurance products to their client's attention at the outset of the matter. In our view, and given the level of costs recovery in South Africa currently, legal insurance will become more popular and common in South Africa in the near future. Should this not occur, or should the tariff not be amended to reflect the commercial realities of litigating, clients will soon be unable to litigate effectively. ■



**KNOCK**

# ing off the **KNOCK** -offs

By Quentin Boshoff

Recently, counterfeiters have targeted South Africa as a dumping ground for their counterfeit products. To gauge the extent of this problem, one only has to look at the projected retail value of the goods confiscated during the last five years. Since 1997, counterfeit goods worth in excess of R600 million have been seized. By way of comparison, this figure is much higher than the figure for the whole of the United Kingdom during the corresponding period.

The spotlight on the multi-award winning movie TSOTSI has been overshadowed in the local market by the rampant pirating of the film. The effect this has had on the fledging South African Film Industry is not insignificant. This has once again brought to the fore the debate around copyright theft in particular and counterfeiting in general.

A counterfeit or "knock off" is any product which is made, without the authority or licence of a brand holder and which imitates the original product of the brand holder in such a manner that it is confused with or taken to be the original product. In many instances the counterfeit goods are sold at a lower price to the original goods. However, the increased public awareness and greed on the side of counterfeiters has resulted in some counterfeit products being

"FROM TIME TO TIME... LAWYERS AND JUDGES HAVE TRIED TO DEFINE WHAT CONSTITUTES FAIRNESS. LIKE DEFINING AN ELEPHANT, IT IS NOT EASY TO DO, ALTHOUGH FAIRNESS IN PRACTICE HAS THE ELEPHANTINE QUALITY OF BEING EASY TO RECOGNISE." - LAWTON LJ IN MAXWELL V DEPARTMENT OF TRADE AND INDUSTRY [1974] 2 ALL ER 122

**KNOCK**

retailed at similar prices to the genuine. Consequently, the consumer is further prejudiced by paying a high premium for a product of inferior quality which comes with no warranties or guaranties.

It is impossible to calculate the precise losses in sales of genuine products attributable to counterfeiting. However, it is clear that counterfeiting erodes the market for those individuals and businesses selling genuine products. It is the sellers of genuine products who incur the expense of obtaining licenses to sell their products, invest heavily in infrastructure, and employ staff to assist in the running of their business. Counterfeit products, are almost without exception, sold at greatly reduced prices in comparison with the genuine articles and are often successfully passed off as the genuine products. The cumulative effect is a loss in sales and profits by the legitimate sellers of genuine products, culminating in retrenchments and adding to our ever-increasing unemployment figures.

It is illegal to commercially deal in counterfeit goods. This includes, having in your possession, making, selling, distributing and importing any counterfeit goods for commercial gain. However, the trade in pirate DVDs will remain lucrative for as long as the ordinary South African offers his or her financial support by buying these goods.

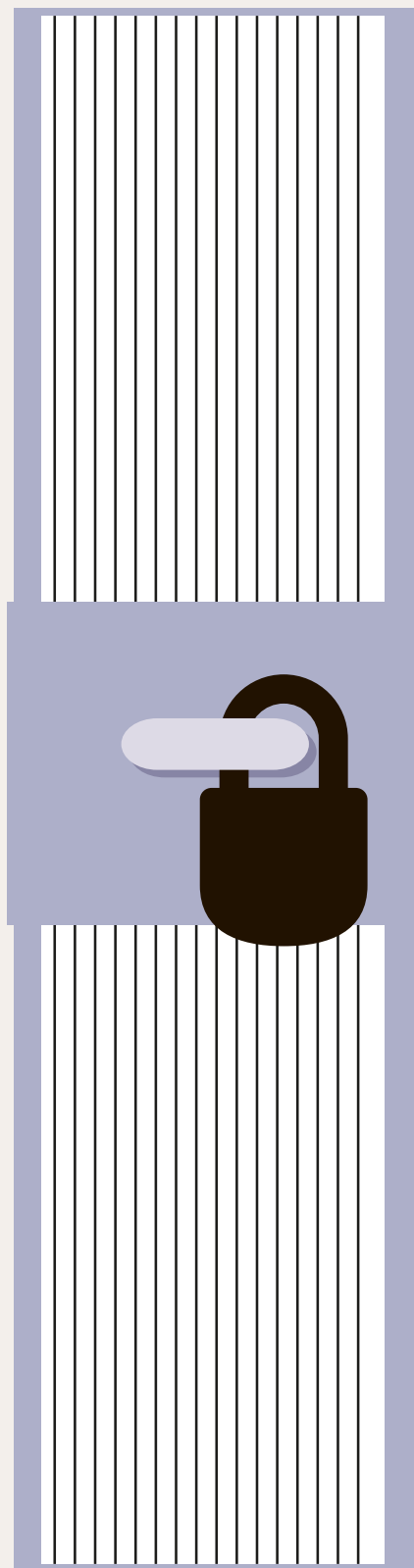
Piracy or counterfeiting of DVDs has a broader negative impact on the economy as it undermines intellectual property rights which are aimed at protecting and fostering local innovation and creativity as with the movie TSOTSI. Internationally, the ability of law enforcement to curb intellectual property theft will affect investment by international business in the local economy.

It is estimated that around R500 million a year is lost in revenue to the media and motion picture industry as a result of the trade in counterfeit DVDs and interactive games. While piracy is often considered as a trivial offence, the impact it has on the economy is far reaching. Counterfeit of DVDs alone threatens the legitimate business of video rental operators, distributors of movies and interactive games, movie production houses and cinema operators and actors.

The crime of dealing in counterfeiting is a serious one with first time offenders facing maximum fines of R5000 per item and/or a prison term of up to three years. With the increased efforts by law enforcement agencies, brand holders and the courts to apprehend counterfeiters, educate the public and meet out justice to the offenders, the knock-offs will be taken off our streets. ■

# DATA PROTECTION LAWS ARE COMING TO SA – ARE EMPLOYERS READY?

By Jessica Calcott



Data protection legislation for South Africa has been in the pipeline for a couple of years but many employers are unaware that the draft Protection of Personal Information Bill was published for consultation last October. The deadline for comments has now passed and final draft legislation is anticipated later this year.

Some employers, and especially those with international offices, will be familiar with the concept of data protection because legislation already exists in many countries around the world. Indeed, the need to conform to international norms regarding the protection of personal information is one of the drivers behind the introduction of domestic legislation in South Africa. The European Union Data Protection Directive of 1995 prohibits the transfer of personal data regarding EU citizens to any country outside the EU unless that country can guarantee “an adequate level of protection” for that information. As a result, the absence of comprehensive data protection legislation in South Africa is perceived to be a potential barrier to international trade and the participation of South African businesses in the global marketplace.

Data protection is an important aspect of the protection of an individual’s right to privacy. Both the common law in South Africa and the Constitution recognise a right to privacy but that right is limited in certain circumstances and does not provide “an adequate level of protection” of personal information in terms of prevailing international standards.

When it comes into force, the new Protection of Personal Information Act will provide for comprehensive regulation of all aspects of the collection, use, disclosure, storage of and access to “personal information” (the definition of which is extremely broad). The implications of the new Act will be extremely wide-ranging in

all areas but especially in the context of employment and even before an employee is appointed.

Recruitment and selection procedures including the giving and obtaining of references, application forms and pre-employment vetting, will all need to comply with the Act. Employers will need to audit all records held on job applicants as well as current and former employees for compliance with the Act. The Act will also have a bearing on the extent to which employers will be able to monitor employees’ communications and carry out medical testing.

Although, at first sight, the new obligations on employers may seem onerous, the good news is that the principles embodied in the draft legislation largely reflect common sense and existing good practice. It may, therefore, not be unduly optimistic to assume that many employers’ practices are already compliant and that the new legislation will require only relatively minor changes to their employment contracts, policies and procedures.

Among other things, the draft bill provides that the data subject should be informed of the purposes for which their personal information is required. Furthermore, the information collected must be relevant to the specified purposes and may not be used in any way that is inconsistent with those purposes.

In most cases, express consent is not necessarily required from the data subject for the processing of personal information. However, except where certain limited exceptions apply, explicit consent from the data subject is required for the processing of special (or sensitive) personal information regarding an individual’s religious or philosophical beliefs, race, political persuasion, health, sex life, trade union

membership, or criminal record. Employers should, therefore, review their application forms and contracts of employment to ensure that some appropriate wording is included specifying the purposes for which recruitment and employment records may be kept and, where necessary, providing that the employee consents to this.

An important new requirement in the draft bill which employers need to be aware of is that all employers will be required to notify certain details to the Information Protection Commission (the new body to be established which will be responsible for monitoring and enforcing compliance with the Act) including the employer’s name and address, the purposes for which personal information may be processed, a description of the categories of data subjects, the categories of recipients to whom information may be supplied, any planned cross-border transfers of information, and a general description of the security measures in place to safeguard the confidentiality, integrity and availability of the information. The contents of the notification will need to be carefully drafted to ensure that all potential processing of personal information by an employer is covered.

Employers can take comfort from the fact that the general principles espoused in the new legislation will, in due course, be supplemented by codes of conduct which will provide more detailed, practical guidance. In the meantime, it is not too soon to commence a review of existing contracts, policies and procedures and employers would be well advised to familiarise themselves with the principles set out in the South African Law Reform Commission discussion paper and draft legislation, both of which are available on the internet at [www.doj.gov.za/salrc/index.htm](http://www.doj.gov.za/salrc/index.htm) ■



**JOHN BRAND, THE HEAD OF OUR EMPLOYMENT LAW DEPARTMENT WENT TO THE INTERNATIONAL LABOUR ORGANISATION TRAINING CENTRE IN TURIN, ITALY TO TRAIN EMPLOYER, TRADE UNION AND GOVERNMENT REPRESENTATIVES FROM BARBADOS, BOTSWANA, ETHIOPIA, GEORGIA, HAITI, ITALY, JAMAICA, JORDAN, MONGOLIA, NIGERIA, SOUTH AFRICA, UKRAINE AND VIETNAM IN MUTUAL GAIN NEGOTIATION.**

# BANKING, INSURANCE *and financial services*



(FROM LEFT TO RIGHT)

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Anton Barnes-Webb  
Bester Ngoepe  
Don Allaway

Sylvia Lekhutlile  
Rudolph du Plessis  
Sanguita Poplatlal  
Craig Kennedy

Eitan Neishlos  
Michael Doherty  
Patrick Hirsch  
Jon Schlosberg

Ezra Davids  
ABSENT  
Heather Duffey

DEPARTMENT FOCUS

# Hedge funds in South Africa

By Lili Nupen and Kelebogile Modise

The hedge fund industry in South Africa has been growing at a significant rate over the past few years as institutional and sophisticated investors are realising that hedge funds can and should form a key component of any investment portfolio if they are to achieve optimal returns. Due to this development, regulatory frameworks must be implemented and are vital to ensure that the market evolves in a systematic and operationally efficient manner, thus allowing for South Africa to have a competitive edge in the global market. Below we will provide you with a brief overview of the applicable law as well as the current position relating to the regulation of hedge funds in South Africa.

## Definition of a Hedge Fund

There is no clear statutory or legal definition of a “hedge fund” in any of the relevant legislation. However a “hedge” has been referred to as a guard against the risk of loss and a “fund” as a reserve of money set aside for a certain purpose. The way hedge funds have been defined in the United States by the Managed Funds Association is as “any pooled investment vehicle that is privately organised, administered by professional investment managers, and not widely available to the public.” Creating any kind of regulated product is conditional on an agreement being reached on an acceptable definition of what a hedge fund is. It has been debated whether such definition in any new legislation should adopt a more narrow or broad and flexible approach. A wide definition, which was proposed in the Discussion Paper on the

Regulatory Position of Hedge Funds in South Africa, 2004 (“Discussion Paper”), states that hedge funds are “funds that utilise some form of short asset exposures or short selling to reduce risk or volatility, preserve capital or enhance returns.” This has been criticised for not encompassing all of the most common and important characteristics of a hedge fund such as:

- » the fund utilising some form of short selling to reduce risk or volatility, preserve capital and enhance returns;
- » the fund using some form of leverage, measured by gross exposure of underlying assets exceeding the amount of capital in the fund; and
- » the manager of the fund charging a fee based on the performance of the fund relative to an absolute return benchmark such as inflation or call interest rates.

It was proposed that if the first two characteristics are present, the fund may be referred to as a hedge fund.

## How Hedge Funds are Regulated in South Africa

There is no specific piece of legislation in South Africa which regulates hedge funds, however, there are discussion papers and certain sections of the Security Services Act, 36 of 2004 (“SS Act”), The Collective Investment Schemes Control Act, 45 of 2002 (“CISCA”) and the Financial Advisory and Intermediary Services Act, 37 of 2002 (“FAIS Act”) which apply to the sale of foreign hedge funds in South Africa. These provisions will be briefly discussed.

Despite the continuous growth in alternative investments, such as hedge funds and funds of hedge funds (“FOHF”) in South Africa, there has been much criticism around the competitive disadvantage in terms of the international market due to the immense limitations on regulatory procedures and restrictions on liquidity and diversity which

are in place in South Africa. It has been suggested that due to this growth, there is an urgent need for regulations to be put in place. The reason for the lack of regulation in South Africa hinges on the fact that investors employ strategies, such as short selling and the use of leverage, which fall outside the current regulatory framework utilised by the Financial Services Board (“FSB”). The major shortcoming of the lack of regulation is that shareholders are not permitted to solicit investments directly from the general public.

In addition, there has been increasing exposure of South African investors to offshore hedge funds and therefore the FSB should consent to the sale of foreign hedge funds in South Africa. As there is a lack of regulation, great uncertainty and therefore a hindrance of consistent growth has been created in the industry. The slight protection that is afforded to investors by the FSB has been criticised as being insufficient to encourage new investors to invest in hedge funds and this poses as a problem which must be addressed in South Africa.

## Relaxation of Hedge Fund Regulations

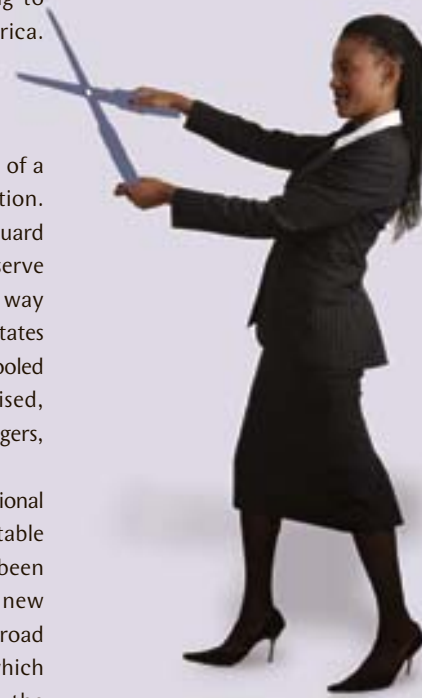
In March 2004, the FSB, the Alternative Investment Management Association (“AIMA”) and the Association of Collective Investments (“ACI”) issued a joint Discussion Paper calling for comment on the regulation of hedge funds in South Africa. Prior to this Discussion Paper only hedge fund managers were regulated and approved by the FSB, however, there was no form of regulatory approval for the hedge fund itself.

The Discussion Paper centred around a three pronged approach seeking local hedge fund managers to register as Alternative Investment Managers (“AIMs”); requiring intermediaries to qualify to sell hedge fund products as well as the major issue of altering the regulatory framework to facilitate the inclusion of hedge funds within CISCA.

Theoretically, CISCA, the FAIS Act and the FSB’s ability to set minimum requirements for investment managers provides a framework for the regulation of hedge funds. The FAIS Act applies to all persons who render financial advisory and intermediary services and who are, thus, required to be licensed by the FSB. Under the FAIS Act, hedge fund managers will be required to comply with the legislation from 30 September 2004 as well as meet certain prescribed minimum qualifications. The FAIS Act also applies to financial intermediaries who, in this instance, will market or sell hedge fund products. These requirements are only applicable to hedge fund managers and intermediaries and not to the hedge funds themselves. The Discussion Paper has recommended that different qualifications be set out to regulate both financial intermediaries who sell hedge funds as well as hedge fund managers so as to improve the level of disclosure and certainty that is made to potential hedge fund investors.

It may be noted that at present in South Africa there is generally no distinction to be drawn between levels of disclosure required to be made to an individual as opposed to a “sophisticated” or professional investor. However, this situation may change in the near future.

The Collective Investment Schemes Control Act (“CISCA”) which regulates and categorises collective investment schemes, repealed the provisions of the Unit Trust Control Act, 12 of 1998 and the Participation Bonds Act, 55 of 1981. Essentially, a collective investment scheme is an investment scheme in which there is a pooling of funds from members of the public, and investors in the scheme acquire a participatory interest in the scheme. A hedge fund may be referred to as a “collective investment scheme in securities”. If so and if it falls within the definition of a collective investment scheme contained in CISCA, compliance with CISCA is required. However, it has been raised that



most hedge funds are unable to comply with CISCA for the reason that CISCA does not permit collective investment schemes to engage in short-selling or leverage (other than borrowings for limited purposes or in the case of collective investment schemes in property). Hedge fund managers are, therefore, precluded from inviting or permitting members of the public to participate in hedge funds or are required to structure their funds such that they fall outside of the ambit of CISCA.

The Discussion Paper, however, recommends that hedge funds should be construed as mainly investing in similar instruments or underlying assets as a “collective investment scheme in securities,” which is already regulated under CISCA. Therefore, it is proposed that a similar approach be adopted to enable the establishment of hedge funds. This will allow hedge funds to be accommodated as a separate scheme or portfolio but under an existing scheme in securities. The advantage around utilising existing legislation is that hedge funds will have their own defined types of assets to be invested as well as asset of Registrars Conditions, without having to legislate further. This route will be more expeditious as the relevant regulatory body will favourably consider applications by hedge funds which have similar investors and products as “collective investment schemes in securities.”

Foreign collective investment schemes wishing to solicit investments from members of the public require approval, in terms of CISCA, from the FSB, which includes compliance with strict criteria set by the FSB. Such criteria include registering a foreign scheme in a jurisdiction acceptable to the FSB. This factor may prove complicated in relation to hedge funds as many of the jurisdictions in which hedge funds are registered are not currently regarded as being acceptable to the FSB. Under the current regulatory environment, the FSB will not approve a foreign scheme which

is not subject to similar restrictions as South African collective investment schemes or which is registered in a jurisdiction which is not recognised by the FSB. This means that foreign hedge funds which employ short-selling and leverage or make use of OTC derivatives or are domiciled in jurisdictions not recognised by the FSB, will not be approved for sale in South Africa. Furthermore, it is a requirement that the foreign scheme has appointed a custodian independent from all other parties to the scheme, including the administrator and manager.

The Discussion Paper indicates that the existing regulatory framework provides a sufficient scope to accommodate hedge funds without making any significant changes to legislation. However, the necessary alterations may be effected through subordinate legislation to the relevant Acts and must be in line with the FSB’s principles of regulation.

#### Potential Benefits of Hedge Funds

As is clear from the above discussion, the general perception held by investors is that hedge funds are risky and volatile. The primary reason being that there is no clear regulatory body in place to control the financial activity which occurs. There are certain proposed benefits which are associated with hedge funds and which will be enhanced in the event of an implementation of necessary regulations. Such benefits include the fact that:

- » many hedge fund strategies have the ability to generate positive returns in both rising and falling equity and bond markets;
- » the inclusion of hedge funds in a balanced portfolio reduces overall portfolio risk and volatility and increases returns;
- » having a variety of hedge fund investment styles provides investors with a wide choice of hedge fund strategies to meet their investment objectives;
- » academic research proves that hedge

funds have higher returns and lower overall risk than traditional investment funds;

- » hedge funds provide an ideal long-term investment solution, eliminating the need to correctly enter and exit markets; and
- » adding hedge funds to an investment portfolio provides diversification which is not available in traditional investing.

Therefore, the aim of most hedge funds is to reduce this uncertainty and risk while attempting to preserve capital and deliver positive returns under all market conditions.

#### Conclusion

The relatively short history and relatively small number of operating hedge funds in South Africa, as compared with the international market, as well as the broad definition of hedge funds, contributes to many of the challenges of regulating hedge funds in South Africa faced by investors both locally and abroad.

From this brief analysis, it is evident that with a regulatory framework in place, the South African hedge fund industry is likely to bring hedge funds within the scope of the CISCA allowing for them to be offered in the form of unit trust investments and resulting in a wider spectrum of investors investing their assets in these funds. Regulation will also create a greater feeling of certainty and comfort to other investors that hedge funds are in fact an acceptable form of investment.

It is important to note that regulation will not remove all the risks associated with investing in hedge funds, in the same manner as the regulation of conventional collective investment schemes does not remove the risks associated with investment of these funds. These risks, merely, need to be understood by potential investors and avoided as far as possible. ■

## LEX MUNDI UPDATE

### WORLD BANK COMPLETES LANDMARK CORPORATE GOVERNANCE STUDY WITH ASSISTANCE OF LEX MUNDI MEMBER FIRMS

(MARCH 22, 2006) - LEX MUNDI MEMBER LAW FIRMS IN MORE THAN 90 COUNTRIES COMPLETED PARTICIPATION IN A LANDMARK GLOBAL SURVEY OF CORPORATE GOVERNANCE REGULATION, UNDERTAKEN IN COOPERATION WITH THE WORLD BANK GROUP AND HARVARD UNIVERSITY. THIS SURVEY FOLLOWS A SIMILAR SURVEY INVOLVING LEX MUNDI MEMBER FIRMS ON JUDICIAL PROCEDURES COMPLETED IN 2001. BOTH SURVEYS HAVE BEEN INTEGRATED INTO DOING BUSINESS IN 2006, A FLAGSHIP PUBLICATION OF THE WORLD BANK AND THE INTERNATIONAL FINANCE CORPORATION. THE STUDIES HAVE ALSO BEEN THE SUBJECT OF ACADEMIC PAPERS AND PRESENTATIONS, IMPORTANTLY, HAVE SPURRED JUDICIAL AND CORPORATE GOVERNANCE REFORM.

THE LEX MUNDI CORPORATE GOVERNANCE SURVEY POSED A SERIES OF QUESTIONS IN SEVERAL CASE STUDIES, INTENDED TO CAPTURE DATA CONCERNING CORPORATE APPROVAL REQUIREMENTS FOR CERTAIN TYPES OF TRANSACTIONS, DISCLOSURE REQUIREMENTS, AVAILABILITY OF REGULATORY OVERSIGHT AND OF JUDICIAL RECOURSE BY MINORITY SHAREHOLDERS, ACCESS TO CORPORATE INFORMATION, STANDARDS OF DIRECTOR CONDUCT AND OF JUDICIAL REVIEW OF THAT CONDUCT AND AVAILABLE RELIEF. THE DATA PROVIDED BY THE LEX MUNDI PARTICIPANTS WERE COMPARED ACROSS COUNTRIES, CODED, INDEXED AND ANALYZED BY WORLD BANK STAFF AND HARVARD ACADEMICS.

THE LEX MUNDI CORPORATE GOVERNANCE SURVEY AND ITS EARLIER SURVEY ON JUDICIAL PROCEDURE HAVE BECOME DRIVERS OF JUDICIAL AND CORPORATE GOVERNANCE REFORM ON A GLOBAL SCALE. “CROSS-COUNTRY STUDIES LIKE THESE SHOW WHICH COUNTRIES HAVE GOOD PROTECTIONS FOR SHAREHOLDERS, AND WHICH DON’T.” SAID SIMEON DJANKOV, LEAD AUTHOR OF THE DOING BUSINESS REPORT. “SUCH COMPARISONS SPARK COMPETITION AMONG COUNTRIES – AND ULTIMATELY SPUR REFORMS.” MOST RECENTLY, THE MEXICAN GOVERNMENT USED ITS LOW PERFORMANCE ON THE LEX MUNDI CORPORATE GOVERNANCE SURVEY TO GALVANIZE SUPPORT FOR A NEW SECURITIES LAW. THAT LAW WILL TAKE EFFECT THIS JULY.

“WHEN WE WORK WITH LEX MUNDI LAW FIRMS, WE KNOW WE ARE GETTING ACCURATE, DETAILED INFORMATION FROM THE TOP LAWYERS IN THAT COUNTRY,” SAID MELISSA JOHNS, WHO MANAGED DATA COLLECTION FOR THE STUDY.

DOING BUSINESS IN 2006 IS THE WORLD BANK’S MOST WIDELY DISTRIBUTED PUBLICATION. COPIES OF THE PUBLICATION MAY BE ORDERED FROM THE WORLD BANK WEBSITE AT [WWW.DOINGBUSINESS.ORG/MAIN/ORDER\\_THE\\_REPORT.ASPX](http://WWW.DOINGBUSINESS.ORG/MAIN/ORDER_THE_REPORT.ASPX). THE RESULTS OF THE LEX MUNDI CORPORATE GOVERNANCE SURVEY HAVE ALSO BEEN PUBLISHED BY THE WORLD BANK AS A STANDALONE PUBLICATION, “DOING BUSINESS: PROTECTING INVESTORS.” THE PUBLICATION IS AVAILABLE FREE OF CHARGE IN “PDF” FILE FORMAT AT THE WORLD BANK DOING BUSINESS WEBSITE AT: [WWW.DOINGBUSINESS.ORG/MAIN/ORDER\\_THE\\_REPORT.ASPX](http://WWW.DOINGBUSINESS.ORG/MAIN/ORDER_THE_REPORT.ASPX). A PRINTED COPY OF THE PUBLICATION MAY BE REQUESTED FROM LEX MUNDI BY SENDING AN EMAIL TO [MKHUU@LEXMUNDI.COM](mailto:MKHUU@LEXMUNDI.COM).

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# THE CONTRACT OF



# GUARANTEE

## IN SOUTH AFRICAN LAW

By Sanguita Popatlal

In any financing transaction banks and other lenders seek to protect their financial exposure by taking some form of security. A guarantee by a third party, often the holding company of the borrower or a bank, is used if the banks are comfortable with the creditworthiness of such third party.

A contract of guarantee has been defined to mean a “collateral engagement to answer for the debt, default or miscarriage of another person”. It is thought to impose an absolute liability on the guarantor; if the guarantor fails to make good the guarantee, he will be liable for breach of contract.

Contracts of guarantee create primary obligations which are not dependent on the existence of any other debt or agreement. The contract of guarantee can be distinguished from the contract of suretyship, which create an accessory obligation. An accessory obligation is an obligation that is dependant on the existence or coming into existence of a valid and effective principal obligation. There can be no accessory obligation when the principal obligation to which it relates to is a nullity or if the principal obligation has

been extinguished, for example, by performance or payment. Therefore, in a contract of suretyship there must be an underlying valid principal obligation between someone other than the surety as debtor (the principal debtor) and the creditor that the surety binds himself to.

The contract of surety is of Roman Law import. A surety is “one who takes upon himself the obligation of another, that other still being liable”. Caney (*Caney, L.P: Caney's the law of Suretyship in South Africa, 5th edition, Cape Town: Juta, 2002, by C.F Forsyth, J.T Pretorius*) maintains that the surety firstly undertakes to the creditor that the principal debtor, who remains bound, will perform his obligation, and secondly that insofar as the principal debtor fails to do so, the surety will perform it or failing that indemnify the creditor. This indemnity usually takes place by the payment of money to the creditor. Caney distinguishes surety-ship from guarantee by stating that where a person has done no more than guarantee or undertake to pay in the event of the debtor not doing so, this is an original undertaking made on the condition of non-payment by the debtor.

Therefore, in a guarantee the guarantor does not undertake that the principal debtor will perform his obligations and only failing that will the guarantor be liable.

Joubert (*W.A. Joubert (series editor) Law of South Africa: Volume 26: Suretyships title, by JG Lotz, First Reissue (revised by JJ Hennings), Durban, 1993, par 192 footnote 9*) supports the view that contracts of guarantee create primary obligations which are not dependent on the existence of any other debt. Joubert is of the opinion that a parties' obligation will be termed as a primary one if his liability does not depend on the breach of contract of another person. On Joubert's view of the contract of guarantee. If a guarantee is made conditional on the default or breach of contract of the principal debtor is not a “guarantee” in the strict sense of the definition since it is dependent on the existence of another debt. In such a case, the undertaking to pay by the guarantor cannot come into existence until and unless the principal debtor has breached the contract with the creditor in some manner. The guarantor's liability would also be limited in those circumstances to the extent

of the liability of the principal debtor in terms of the principal obligation.

List v Jungers 1979 (3) SA 106 (A) remains the precedent in the distinction between the contracts of guarantee and suretyship. The Appellate Division held that the words “guarantee” and “warrant” have a variety of meanings and their precise meaning must be obtained from the particular context in which they are used. It was held that “guarantee” may in a particular context be used in connection with the accessory obligation of a surety but in other cases the parties may have intended that the guarantor undertake a primary obligation to pay the debt of the principal debtor.

In Carrim v Omar 2001 (4) SA 691 (W), the Honourable Judge Stegmann stated that the legal issue to be decided in the appeal was whether the defendant validly undertook the enforceable primary obligations of an indemnifier or guarantor or whether the defendant merely purported to undertake the accessory obligations of a surety for the indebtedness of the principal debtor (the Islamic Bank Ltd) to the plaintiff. Judge Stegmann disagreed with Caney's proposition

that an essential element of suretyship is that the surety must undertake that the debtor will perform his obligation to the creditor. There are times when the wording of the guarantee will be such that it is an unconditional undertaking to bind the guarantor as co-principal debtor. If the wording is such, then it is submitted that such a guarantee is not a suretyship and therefore, does not require the creditor to first try and obtain performance from the debtor, he can demand payment or performance from the guarantor first.

In terms of common law, a surety is discharged if the principal obligation is extinguished, for example, due to performance by the principal debtor or to impossibility of performance or invalidity of the debt. A suretyship may also be terminated if the accessory obligation between him and the creditor is extinguished even though the principal obligation between the principal debtor and the creditor is still in force. For example if the surety performs the accessory obligation or in the event of irregular conduct of the creditor that prejudices the interests of the surety.

A guarantee, on the other hand, due to the fact that it is a principal obligation, can only be discharged if there is performance of the principal obligation or payment on the part of the guarantor.

In conclusion, the contract of “guarantee” does not have a defined legal meaning in South African law. If a guarantee is given conditional upon the breach of contract, or default of the principal debtor, such a guarantee is accessory in nature and therefore, ranks as a suretyship. It is submitted that this is not a true “guarantee”. However, if a guarantee takes the form of an absolute and unconditional promise it cannot be a suretyship and is principal in nature. The practical implication of a guarantee drafted so that it creates a primary obligation, is that the guarantor does not have the same defences available to him as that of a surety, the main one being that of excussion, that the creditor should first try to obtain performance from the principal debtor and only insofar as he fails to do so will the guarantor be liable. ■

### DEPARTMENT FOCUS

*banking, insurance and financial services: the contract of “guarantee” in South African law*

By Sanguita Popatlal

# shareholder



## AN EXPOSITION OF THE LAW *on piercing the corporate veil*

By Lischa Gerstle and Kevin Titus

A company incorporated under South African law has a separate legal personality that is distinct from its shareholders. Piercing the corporate veil refers to a South African court disregarding a company's separate legal existence under South African law and (a) treating the shareholders of such company as the owners of such company's assets and as if they carry on the business of the company in their personal capacities or (b) assigning the rights and obligations of the company to its shareholders. The piercing of the corporate veil of a company is confined to the matter before the court, i.e. the corporate veil of such company remains intact for all other purposes.

South African law is not definitive as to the circumstances that must exist in order for the court to exercise its discretion to lift a company's corporate veil. The judgment handed down by the Supreme Court of Appeal ("SCA") (*Hülse-Reutter v Gödde* 2001 (4) SA 1336 SCA) on this point of law emphasised that a court should only pierce the corporate veil of a company in exceptional circumstances. The SCA also mentioned that "much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment". Essentially, the South African courts have taken the view that they do not have a general discretion to disregard a company's separate legal personality, simply because the court would consider it just to do so (*Cape Pacific Limited v Lubner Controlling Investments (Proprietary) Limited* 1995 (4) SA 790 (A)).

Exceptional circumstances must exist before a South African court will pierce the corporate veil of a company. In light of the fact that it is the conduct or acts of the shareholders of a company that may give rise to a court lifting the corporate veil of such company, such conduct or acts must be analysed in detail in each case to determine whether such shareholders dominate the finances, policy and business practice of the company to such an extent that the company can not be said to have a separate mind, will or existence. It has been repeatedly held by the South African courts that the presence of this type of dominance is a prerequisite for veil piercing, although such dominance in itself does not suffice to justify the veil piercing. The courts look for some misuse or abuse by the shareholders dominating or controlling the relevant company that results in an unfair advantage to such shareholders.

Although there is no exhaustive list as to what would constitute an unfair advantage to the controlling shareholders of the company, it has been accepted by the courts that the abuse giving rise to such unfair advantage may manifest in the form of misuse, dishonesty or improper conduct. For example, where a director purchases land for himself with the intention of re-selling it to his company ("the Company") at a profit, and first sells it to an intermediary company controlled by him for onward selling to the Company in order to avoid a breach of his fiduciary duty to disclose his interest in a contract concluded between himself and the Company, the courts have disregarded the intermediary company and treated the sale of such land as a sale agreement concluded between the director and the Company (*Robinson v Randfontein Estates Gold Mining Co Limited* 1921 AD 168).

In another example, a former employee of a company ("the Employer") was restrained from soliciting the customers of the Employer after termination of his employment with the Employer. The employee formed a company and used such company to solicit the employer's customers without breaching the employee's restraint. The court pierced the veil of the newly formed company and held that such company was merely a cloak of the employee and ordered the company restrained from soliciting the customers of the Employer (*Gilford Motor Co Limited v Horne* [1933] Ch 935 (CA)).

Another ground on which the South African courts have been willing to pierce the corporate veil of a company (in contrast to the situation of an unfair advantage to the controlling shareholders of a company described in the above paragraph) is where a company is merely the instrument or agent of its shareholders or such company's holding company. In this situation, misuse or abuse is not a requirement for veil piercing by the courts. The term "agent" or "agency" in this context must be understood more loosely than the normal principal/agent relationship that is well-known in South African law, as this ground for veil piercing deals with a situation where, for instance, the sole shareholder of a company manages the affairs and business of such company in such a way that there is no clear distinction between such shareholder's personal affairs and the affairs of the company. The "agency" ground for veil piercing is most likely to be encountered in a subsidiary/holding company scenario.

In deciding whether to pierce the veil of a subsidiary and to treat it and its holding company as one and the same entity, the courts have attempted to extract some guidelines that may assist in determining whether the subsidiary carries on its own business or merely that of its holding company (in which case, the subsidiary may be regarded as a façade of such holding company). These guidelines include the following questions:

- » are the subsidiary's profits treated as those of its holding company?
- » did the holding company appoint the persons who control and carry on the business of the subsidiary?
- » does the holding company act as the brain and mind of the subsidiary and dictate to the subsidiary what ventures it may embark on?
- » is the holding company in effective and constant control of the subsidiary?

Other guidelines that may assist in determining whether a subsidiary and its holding company are essentially one entity are whether (a) they have separate financial units, (b) the day-to-day running of each of their businesses (including the keeping of records) are kept separate, (c) they have separate management structures (e.g. separate board meetings) and (d) they are represented to the public as two separate entities. It is evident from the case law on the "agency" ground of veil piercing that the courts are reluctant to pierce the corporate veil of a subsidiary, as companies are separate legal entities and should generally be treated as such. ■

*The downloading and sharing of video and music files on the Internet is commonplace, but is not always lawful. Websites such as Napster, which allowed the free downloading of music files, have been forced to change their methods of doing business. The popular Apple iTunes music site also charges for each download and presumably pays a royalty to the owner of copyright in the particular musical work downloaded. There are now also local South African pay-per-download music sites.*

The main field of law dealing with the downloading and sharing of video and music files is that of copyright. However, South Africa has been slow in adapting to worldwide developments in the field of Information Technology. The Copyright Act provides for the protection of certain works. These include musical works, cinematograph films and sound recordings. Videos and music tracks would fall within these categories. The unauthorized copying of a copyright work amounts to copyright infringement. The Act does provide certain exceptions to infringement. In the case of musical works, these may be copied for the personal or private use of the person using the work, provided that this is consistent with fair dealing.

The downloading of a music track or a video necessarily involves the copying of the relevant work. So does the sharing of the music or video file with a friend. Clearly, the downloading of a music track or video without the authorization of the copyright owner is an act of copyright infringement. A further act of infringement takes place whenever the file is shared with another person. How do we know when the copyright owner has authorized the copying of the work? Well, this should be made explicit on the relevant website from which the work is downloaded. However, a good indication that the owner has given consent is that a charge is made for downloading the material. If the download is free, it is probably unlawful. Even if the download has been paid for, this does not imply that the file may be freely shared with others.

South African law also recognises that it may be unlawful to contribute to the infringement of a right such as copyright, by aiding or abetting another person to commit an act of infringement. This raises the question of potential liability for the providers of software for ripping music and video files and for sharing these files, either on a peer-to-peer basis on a one-to-many basis. There are no decided cases in South Africa on the liability for copyright infringement of such a software provider. In the USA the issue was decided in the well-known Grokster case. In that case, Grokster was held to have distributed file sharing software with the object of promoting its use to infringe copyright. There was clear evidence

of infringement of copyright by the downloading of music files “on a gigantic scale” and the court found that it may be impossible to enforce rights in the protected work effectively against all direct infringers so that the only practical alternative is to act against the software distributor for secondary liability. Grokster had profited from the direct infringement by the potential increase in advertising revenue and had made no attempt (other than some insignificant copyright infringement warning notices) to prevent infringement taking place. It had in fact broadcast a message designed to stimulate others to commit violations.

In Australia, a court faced with similar facts came to a similar conclusion. The court found against the operator of the Kazaa file sharing system, which is a free peer-to-peer file sharing system, on the basis that the operator had “authorized” the infringing acts of copyright infringement. Confusingly, the Dutch Supreme Court took a contrary view and ruled that the original providers of the Kazaa file sharing service were not acting illegally in making their software publicly available.

In both the US and Australian cases infringement of copyright by file sharing had taken place on a very large scale. The provider of the software was held to have had reason to believe that such copyright infringement was taking place. The provision of warnings to avoid copyright infringement was not held to go far enough to avoid liability. In both the Grokster and Kazaa cases, the courts found that the infringer had actively advertised their product and had virtually encouraged the infringement of copyright by the sharing of protected files. In both cases, it was found that there were means available to the software provider to at least limit the extent of copyright infringement and that these means had not been implemented. In both cases, the infringer had benefited commercially from increased advertising revenue.

The tendency of the US and Australian courts to find in favour of copyright holders in circumstances where means have been provided for the infringement of copyright by file sharing on a very substantial scale, will most probably be followed by South African courts. ■

## TO SHARE OR NOT TO SHARE: *file sharing on the internet*

By Frank Joffe



# ACCESS TO INFORMATION IN PRIVATE HANDS

By Saskia Price



# access

Section 50 of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) provides that a person must be given access to any record of a private body if that record is required for the exercise or protection of any rights. In the recent decision of *Unitas Hospital v Van Wyk* [2006] SCA 32 (RSA), the Supreme Court of Appeal considered a request for access to a record under the provisions of the PAIA and commented on the interpretation of “required” in section 50.

Mrs Van Wyk’s husband had died while he was a patient at Unitas, a private hospital. Mrs Van Wyk contended that her husband’s death had resulted from the negligence of nursing staff at Unitas. A report on the general nursing conditions in the ICU and high care units at Unitas had been prepared by a doctor employed by Unitas. The report did not mention Mr Van Wyk at all. Mrs Van Wyk had requested various documents including the report from Unitas under the provisions of the PAIA as she intended to claim damages from Unitas. Unitas refused her request in respect of the report and she then applied to the Pretoria High Court for relief. In her papers she did not state that she required the report to exercise any right, only that without it her right to claim damages would be affected. She alleged that the report was a result of an investigation into nursing conditions at Unitas undertaken specifically as a result of her husband’s death. Unitas stated that this was incorrect and the report was contemplated before Mr Van Wyk’s death. Unitas argued that Mrs Van Wyk did not require the report for the exercise or protection of any right as she was assisted by medical experts and had received a complete set of her husband’s medical records. Unitas contended that Mrs Van Wyk already had available all the information needed for her to bring her claim. The Pretoria High Court found that Mrs Van Wyk was entitled to a copy of the report. Unitas then appealed this decision.

In the majority judgment of the Supreme Court of Appeal it was noted that in general the question of whether a particular record is “required” for the exercise or protection of a particular right is inextricably bound up with the facts of the matter. The court found that the threshold requirement is that the requestor must show that the information will be of assistance although assistance alone is not sufficient. The information must be reasonably required in the circumstances and the requestor must demonstrate

an element of need or substantial advantage. The majority held that Mrs Van Wyk did not require the report in order to bring her claim for damages against Unitas as she could institute action on the information already available to her.

The court noted that once action was instituted Mrs Van Wyk may well be entitled to access the report under the ordinary rules for pre-trial disclosure of documents. However, this did not mean that access to documents should be allowed under PAIA before action was instituted. Although reliance on the provisions of the PAIA was not automatically precluded merely because the information sought would become accessible under the rules of discovery, access to documents under PAIA before litigation has commenced should only be allowed where a requestor has demonstrated that the documents are required. PAIA may be used to identify the correct defendant before instituting litigation but one is not entitled to all the information which would assist in evaluating one’s prospects of success against the only potential defendant.

Judge Cameron disagreed with the findings of the majority. He found that the report would allow Mrs Van Wyk not only to particularize her claim but to assess its ambit and viability and this satisfied the element of need. He relied on the fact that the purpose of the PAIA is to promote “transparency, accountability and effective governance” in private bodies and that it was important to differentiate between private bodies in this respect. As Unitas was a hospital offering essential services to the public it was a “rather public private body” and hence it would give effect to the intention of the statute to provide access to the report. His third point was that the report would assist Mrs Van Wyk in deciding whether to bring her claim at all. This would potentially promote an early settlement of the dispute and avoidance of speculative litigation.

In upholding the appeal the Supreme Court of Appeal has provided direction on the interpretation that is to be placed on “required” in section 50 of the PAIA. In order to satisfy the requirements of the section a requestor must show that the record is reasonably required in the circumstances by demonstrating an element of need or substantial advantage. ■

# TAXATION OF *non-south african resident* entertainers AND SPORTSPERSONS By Rabalao Moalosi and Georg Kahle

*The fledgling South African entertainment industry has the potential to expand and develop into a significant contributing factor in the South African economy. With the spotlight having recently fallen on the South African film industry, with the film Tsotsi winning an Oscar, with several high-profile international artists, acts and musicians performing in South Africa and the awarding by FIFA of the 2010 Football World Cup to South Africa, the industry is set to become a prominent landmark on the South African economic horizon. The South African Revenue Service ("SARS") has identified this potentially lucrative source of revenue and has introduced new legislation which seeks to tax the earnings of foreign artists and sportspersons.*



The Revenue Laws Amendment Act of 31 of 2005 ("the Act") came into effect on 1 February 2006, and imposes a withholding tax on non South African artists and sportspersons. This provision is not yet in operation, as its effective date has not yet been announced by the President. Historically, if foreign artists and sportspersons did not pay tax on their income earned from a South African source, SARS had practical difficulties in collecting any tax due. The revenue earners' short stay in South Africa often made it difficult for SARS to enforce compliance with existing tax laws.

The proposed new provision will introduce two withholding tax rates:

- » artists and sportspersons from other African states will be liable for a withholding tax of 5% on any amounts earned in South Africa; and
- » international participants will be subject to a withholding tax of 15%. The artist or sportsperson is obliged to pay the tax to SARS within 30 days from the date on which the compensation is received or is accrued. The 30 day period can be extended, if SARS agrees to an extension.

The tax is a final (non deductible) tax. In other words the foreign entertainer or sportsperson cannot deduct expenses incurred from the remuneration.



The terms 'entertainer' or 'sportsperson' have a wide meaning, and include any person who is not a South African resident and who comes to South Africa to perform activities, such as actors, artists, musicians, or any person who takes part in any type of sport or any other activity which is usually regarded to have an entertainment character.

If an artist or sportsperson, comes to South Africa to perform one or more of the specified activities for reward, and then remains physically present in South Africa for more than 183 days in aggregate for the year of assessment, or comes to South Africa to perform specified activities as an employee of a South African resident employer, the withholding tax will not be imposed and normal income tax will be payable on the remuneration earned.

The artist or sportsperson can arrange with a South African resident who is primarily responsible for the founding, organising, or facilitating of the event in which the artist or sportsperson participates, to deduct the tax due to SARS. Where such arrangement has been made, the Act requires the organiser to pay the tax to SARS before the end of that month.

If the artist or sportsperson is ordinarily resident in a country which has concluded a double taxation agreement ("DTA") with South Africa, then such DTA will apply. As at 3 March 2006, South Africa had concluded approximately 90 comprehensive DTA's. The artist or sportsperson will not be subject to double tax, the effect of the DTA being that tax is paid only once, in one country, on any revenue earned in South Africa.

Where an arrangement exists in terms of which an organiser must deduct or withhold the tax payable and pay it over to SARS, and the organiser fails to do so, the organiser will be held personally liable to pay tax due by the artist or sportsperson to SARS.

SARS also obliges the organiser to advise them if he or she directly or indirectly, receives a reward for the activities to be performed by the artist or sportsperson. The organiser must notify SARS of the proposed activity or event within 14 days from the date of conclusion of any agreement relating to the activity or event. ■

FROM OUR LONDON OFFICE...

# WANT TO KNOW A SECRET?

*A comparative analysis of the duty of confidentiality in regard to information obtained during a due diligence exercise in England and South Africa.*

By Matthew Bonner



When purchasing the shares or assets in another company the proposed purchaser will inevitably go through a long due diligence process where certain confidential information in regard to the business at hand will be disclosed to the purchaser's representatives. If the proposed purchase does not go through the purchasing company, will have been exposed to certain valuable confidential information and trade secrets belonging to the seller. While this risk is usually protected by the purchaser and its representatives signing certain confidentiality or non-disclosure agreements, what is the situation if these agreements are not entered into? Given the prevalence of cross border transactions this article will look at such a situation in both the South African and English law contexts and briefly set out the various remedies available to a company to protect such information.

#### **The position in England:**

While there have been arguments presented in English law that a separate and distinct tort may exist for breach of confidence it is more commonly held that such a remedy exists not in tort but rather within the equitable jurisdiction of the English Courts (*Kitechnology BV v Union GmbH Plastmaschinen* [1995] FSR 765 at 777-778).

While there are numerous ways for a party to bring such an action, in the case of information obtained during a due diligence investigation it is likely that the party would be able to bring the action on the basis that the defendant received information known to be confidential under an agreement not having contractual force (i.e.: there exists no valid Confidentiality or Non-Disclosure Agreement). It must be noted here that while there may be an oral or implied agreement in place this agreement will be subject to the requirements of consideration and it is doubtful whether such consideration would have passed between the two parties. It is for this reason that but for the requirement of consideration the same facts that would give rise to an implied contractual obligation of confidence would also found an action for an equitable obligation of confidence.

In order for a party to be held liable for breach of confidence the plaintiff must show that (1) the material communicated to the defendant had the necessary quality of confidence (i.e.: it must be of limited public availability and of a specific character that is capable of clear definition); (2) the material was communicated or became known to the defendant in circumstances entailing an obligation of confidence; and (3) there was an unauthorised use of that material by the defendant.

If the information obtained during the due diligence investigation possessed the necessary quality of confidence and the defendant intended to use such information then it appears likely that the plaintiff would succeed in an action based on breach of confidence. As the action is one based on equity and not tort or contract, common law damages may not be available (although there is some debate on this issue and the case law is still, unfortunately, unclear). The equitable remedies available to the plaintiff would consist of any or all of the

following: (1) an injunction; (2) an account for profits and/or (3) an order for the delivery up or destruction of the confidential material. While the English Court of Appeal or High Court has the power to award damages in addition to or in substitution of an injunction, it is not settled in England whether such compensation is available for a breach of an equitable obligation of confidence (although the remedy is currently available in New Zealand).

#### **The position in South Africa:**

In South Africa a company may protect confidential information obtained during a due diligence by way of an action based on contract or delict.

In order to proceed by way of a contractual action the plaintiff may allege that there was a verbal Confidentiality or Non Disclosure Agreement entered into. Unlike in English law, South African contract law has no doctrine of consideration and the plaintiff would thus not be hampered in this respect. However, the plaintiff would still have to overcome the hurdles presented when alleging a verbal contract, that of proving its existence and the precise nature of the terms. If the plaintiff is able to prove such a contract the normal contractual remedies would obviously be available to it (i.e.: specific performance, interdict, declaration of rights, cancellation and damages).

It may be wiser for the plaintiff to proceed in delict by way of an unlawful competition action, based on the acquisition and use of trade secrets or confidential information, and thus avoid the difficulties of having to prove the existence of a verbal agreement. Should the plaintiff choose to go this route it would have to rely on aquilian principles (i.e.: wrongfulness, fault, causation and loss). The plaintiff may recover damages and, in appropriate circumstances, obtain an interdict against the defendant.

In order to bring such an action the information which the plaintiff seeks to protect must (1) be confidential (i.e.: it must be limited to certain people or be something which is not public property or public knowledge); (2) must have economic value. When deciding on the unlawfulness or wrongfulness of the act in question South African courts have held that the norm to be applied is the fairly wide-ranging one of fairness and honesty (determined by the *boni mores* and general sense of justice of the community).

#### **Conclusion:**

While the methods of protection differ in England and South Africa it is clear that even without a written and signed Confidentiality or Non Disclosure Agreement a company that allows a potential purchaser access to its confidential information for the purpose of a due diligence exercise should be able to prevent the use of that information by the proposed purchaser if the proposed transaction does not materialise. That being said, it is obviously always wiser to have a signed Confidentiality or Non Disclosure Agreement in place which clearly and concisely sets out the obligations of all the parties involved. ■

pro bono

#### MAKING DREAMS COME TRUE AT ONS PLEK

For some girls, going to their matric dance is the stuff dreams are made of. But for too many girls, just going to school – let alone getting to matric – is beyond dreaming. These are girls who, through circumstances beyond their control, are forced to survive on the streets. For them, the term “Children’s Rights” is an oxymoron.

Ons Plek in Cape Town is an organisation dedicated to restoring these children’s rights and enabling them to realise their dreams.

Although it’s a shelter for girl children living on the street or at risk of living on the street, it does more than provide the girls with a safe and relatively warm place to sleep and a regular meal.

Ons Plek’s vision is to successfully reunite the children with their families. At the very least, its goal is to offer the girls a chance to claim their rights as children, to recreate

their lives and to prepare them to take their place as full, participating members of society.

In other words, Ons Plek works to give the girls a chance to dream about a future that will not resemble the nightmare they are currently living – and to equip them to make that dream come true.

Sometimes, however, legal assistance is required to make dreams come true.

Enter Bowman Gilfillan. By providing pro bono legal aid to Ons Plek as the organisations works through the maze of legislation that touches on these children’s rights - family law, labour law, criminal and even property law - we are contributing to the upholding of one of the most fundamental rights enshrined in our Constitution – Children’s Rights.

Of course, we are also helping to make dreams come true.

#### BOWMAN GILFILLAN ‘GETS DOWN’ ON YOUTH BUSINESS

Is big business serious enough about youth business? That was the question posed recently by the National Business Initiative (NBI), a business coalition focused on the broader role of business in sustainable development, which was launched by former President Nelson Mandela in 1995.

And the answer, at least as far as Bowman Gilfillan is concerned, is a resounding “yes”.

Through its Economic Growth & Equity Unit, the NBI is leveraging the capacity of established companies to strengthen their contribution to the development of small and medium-sized enterprises.

Associated with this is an initiative to provide quality legal assistance to beneficiaries of the NBI’s Youth Enterprise Volunteer Mentorship Programme through the establishment of legal clinics. That’s where Bowman Gilfillan is playing a key role.

The beneficiaries are mainly black young entrepreneurs who are unable to access or afford such support. The

first set of clinics was a resounding success with nearly 100 entrepreneurs participating in lectures on topics such as contracting, forms of trading entities, joint ventures and employment law.

*“We believe that the development of small, medium and micro enterprises and entrepreneurship in generally, is undoubtedly in the public interest, and we provide opportunities for our attorneys to become involved in such projects,”* says David Geral, Director of Bowman Gilfillan.

*“The NBI is more than just an opportunity for our lawyers to assist people who would otherwise not be able to afford legal services and, in so doing, operate legally and enhance their ability to compete with established businesses”.*

*“It is an opportunity for our younger lawyers to understand business basics better, and for all participants to make an individual contribution towards a better society.”*

## Easter Bunny backed by Bowman’s

The generosity of Bowman Gilfillan staff brought Easter cheer to hundreds of children around Gauteng this year.

Thousands of eggs were distributed to children at:

- » Chris Hani Baragwanath Hospital
- » Johannesburg Hospital
- » Bramley Children’s Home
- » SOS Children’s Village, Ennerdale
- » Shalom Ministries Orphanage
- » Little Eden Society for the Care of Persons with Mental Handicap, Edenvale.

In addition, we were able to buy toys for the children’s wards at Chris Hani Baragwanath and Johannesburg Hospitals.

The delight on the faces of the youngsters will be etched in the memories of those who had the privilege to play the role of Easter Bunny.

Special thanks to the following people for their assistance: Justine Huddle, Julie Openheim, Aimee Foreman, Daniella Zussa, Timothy Jones, Guy Potter, Beatriz Padilha, Aline Shuttleworth, Alayne Meinesz, Erik van der Vyver, Inal Henry, Tinyiko Ribisi, Mellenthri Govender, Vicky Plumpton, Donna Gewer, Jared Nickig, Jacqui Cohen, Zukiswa Tsengiwe, Julie Brider and Rachel Underwood.



## A well-executed lift for South African ballet

The South African Ballet Theatre (SABT) has risen like a phoenix from the ashes of the State Theatre in Pretoria.

Following the withdrawal of government funding a few years ago, the State Theatre collapsed and the disciplines housed there – the orchestra, drama, opera and ballet – were doomed. But the six principal dancers of the former ballet company refused to let ballet die.

Equipped with little more than talent and determination, they formed the South African Ballet Theatre – and ambitiously undertook to stage one of the most popular and difficult ballets - Giselle - at the State Theatre. It seemed so simple really: they contracted with commercial concerns such as the ticket company, printers, choreographers.

Then cold, hard, commercial reality set in. They learned they could all be liable in their personal capacities. So they formed a Section 21 company...

But having formed a company, they faced a myriad of legal and administrative obligations that, as ballet dancers, they knew very little about. They certainly knew how Giselle’s vengeful spirits dealt with contracts – individuals who broke them were danced to death. But this extra-legal system bore little resemblance to real-world board meetings, financial statements, good governance, contracts, labour issues, tax issues and dealing with donations.

**Enter Bowman Gilfillan.**

We have adopted the SABT as a

pro bono project. Rather than just donating cash – although cash is always welcome – Bowman’s professional staff give up their time to help drive the company. We assist with a range of issues from providing advice on labour matters to advising on trust matters. We also assisted the company to obtain tax exempt status, freeing up funds that the company can use to expand its outreach initiatives into the country’s townships.

Thanks to this programme, dozens of children in Alexandra, Soweto and other townships attend ballet classes regularly. This gives them a clear purpose in life and hopefully, some of these children will graduate and become principal dancers in their own right.

And one day, when Giselle from Soweto takes her third curtain call on the State Theatre stage, Bowman Gilfillan could claim to have had a small role in that triumph.

Roz Jackson has been enormously helpful in connection with labour matters including wage negotiations, employment contracts, conditions of employment and misconduct issues.

Sanguita Popatlal attends board meetings and keeps the minutes (dancers understand Minuettes, not minutes).

Lorraine Fisher assisted in drawing up the constitution of the SABT’s “Friends of the Ballet” and has also advised on various other trust matters and contractual agreements.

Stephan Spamer and Justine Huddle assisted the SABT in registering the company as a Public Benefit Organisation and in obtaining tax exempt status – an important requirement for donations from large organisations. They also advised the SABT on its current structure.

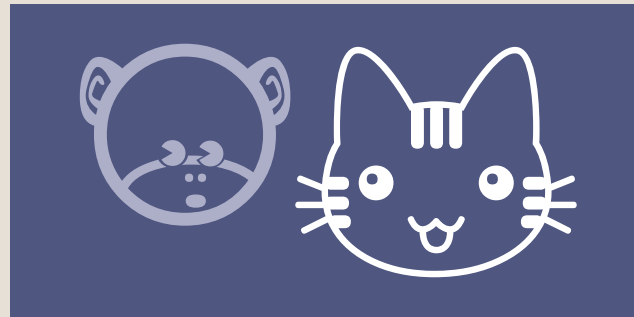


## MAN'S BEST FRIEND HAS A FRIEND IN BOWMAN'S

When Claire van Zuylen received a request from the Sandton and Eastern Metro SPCA to assist with walking and socialising their dogs, she didn't realise just how many of her Bowman Gilfillan colleagues would want to get involved.

Almost every Saturday morning

since then, Claire, Ceri von Ludwig and a contingent of Bowman employees arrive at the SPCA armed with donations of cash, blankets, food... and lots energy to walk the dogs and cats. It's a labour of love that is amply rewarded by the obvious delight of the SPCA 'specials'.



## Bowman Gilfillan helps international charity set up in Africa

Room to Read is a \$10 million organisation that has opened thousands of libraries and schools for children in six Asian countries. It's estimated that Room to Read has impacted the lives of nearly 900 000 children.

Now Room to Read is coming to Africa – and Bowman Gilfillan is helping to pave the way.

Room to Read was established by a computer technologist, John Wood who, at age 34, quit his job as a senior executive in Microsoft's Asian operation to collect books for schools in Nepal.

Then in 2000 he established Room to Read to supply not just books but also libraries, schools, computer labs and scholarships to the children of poverty-stricken communities.

The approach taken by Room to Read demands community involvement in its projects. It doesn't

donate – it matches an amount raised by a community for a specific project. No commitment from a community – no commitment from Room to Read. Wood calls this the "challenge grant model."

Despite his already considerable success, Wood has set some big goals for the future. By 2020, he wants Room to Read to have established 20 000 schools and libraries around the world, including Africa.

Bowman Gilfillan's Kim Goss and Simla Ramdayal are advising Room to Read on the appropriate corporate entity to establish in South Africa, assisting with the setting up of the corporate entity and providing related advice on how to get their office up and running here.

## Bowman Gilfillan commits to developing African leadership

» Africa is the only continent to have grown poorer in the last 40 years – a period in which living standards in the rest of the world rose to unprecedented levels.

» Corruption costs African economies more than US\$148 billion each year. This is equivalent to 25% of Africa's GDP.

» Africa has a larger proportion of wealth (39%) held overseas by residents than any other continent. This impedes growth by reducing domestic investment and tax inflows.

» In the past 15 years, 32 of the 54 African countries have experienced violent conflict.

» Average life expectancy in Africa has declined by 15 years over the past two decades. Life expectancy in Africa is now only 41 years, as compared to 78 years in Europe.

These horrifying statistics – and more – are to be found on the website of an embryonic organisation called the African Leadership Academy.

The implication is that Africa is a basket case. But the Academy, with its founders and patrons, who include some of the world's most respected businesspeople and educationalists, disagree.

They believe Africa needs aid – but not just the billions of dollars that have been spent on so-called Aid to Africa. They believe aid is needed to address one of the root causes of Africa's problems – the continent's undersupply of leaders.

Bowman Gilfillan agrees. As a

leading law firm, we understand the value of insightful, committed and energetic leadership. That's why we have committed our resources to assisting the African Leadership Academy, an organisation that is dedicated to developing the next generation of African leaders.

As a private, co-educational boarding school located in Gauteng, the Academy will bring together outstanding 15-18 year old students from all the 54 countries in Africa for an intense, two-year residential programme. These students, who will be chosen entirely on merit, will develop their leadership skills and receive a world-class academic education that will equip them with the skills necessary to become effective leaders on the continent.

Margaret Mead once wrote: "Never doubt that a small group of thoughtful, committed citizens can change the world: indeed, it is the only thing that ever has." In Africa, individuals like Nelson Mandela, Seretse Khama, and Wangari Maathai have demonstrated how a single person can create monumental change.

By supporting the Academy through the provision of pro bono legal services, Bowman Gilfillan will be making a tangible contribution to that change.

thank you  
letter to  
David Geral

sports

Dear David,

### RE: LEGAL CLINIC HOSTED FOR YOUTH ENTERPRISE VOLUNTEER MENTORSHIP PROGRAMME

On behalf of the National Business Initiative (NBI) and The Nations Trust (TNT) I would like to sincerely thank you for hosting a legal clinic at your offices on 15 February 2006 (Jhb) and 28 February 2006 (Cape Town) for young entrepreneurs; as part of your commitment to provide legal assistance to the Youth Enterprise Volunteer Mentorship Programme run by TNT and NBI.

The attendees who were present at both events were highly appreciative of the knowledge gained and the manner in which they were hosted on the day.

I would also like to extend our gratitude to Mike du Toit and Neteesh Ramjee for their support and to the attorneys who lectured to the participants. Their input was highly appreciated.

Once again thank you all for your hospitality and we look forward to future sessions.

Thank you.

Yours sincerely,

Xolile Caga  
National Business Initiative



## lawyer profile



**TAMMY BEIRA**  
**CORPORATE**

Tammy works in the Corporate department and became a partner at Bowman Gilfillan in March 2005. Tammy was admitted as an attorney and notary public of the High Court of South Africa in 2000 and practices in the areas of corporate and commercial law. She advises clients on all aspects of merger and acquisition transactions for listed and unlisted companies. Tammy made the decision to become a lawyer when she was in standard seven and watched her first episode of LA Law. "I love my job and I'm really dedicated to what I do. I really enjoy the big mergers and acquisitions, especially when I am able to work with the senior partners. They have a wealth of expertise and knowledge and the intellectual stimulation of working with people like that is wonderful". Tammy loves working at Bowman

Gilfillan and describes the firm as one that "has a warm culture, nice people and a great open door policy where you can walk in and out of anyone's office at any time. It's a friendly and non threatening environment to work in". Tammy enjoys traveling, with Italy being her favourite destination. "I love to research my holiday before I go so that I have train times, maps and museum times all prepared before I leave. In my spare time, I love playing with my seventeen-month-old son, and generally spend weekends with the family. When I get a chance, I enjoy a bit of escapism in the form of a good novel or movie".



**CRAIG CUNNINGHAM**  
**MARITIME AND TRANSPORT**

Craig works in the Maritime & Transport department and became a partner at Bowman Gilfillan in 1997. Craig did his articles at Findlay and Tait and started his career in the Maritime and Transport department. "I couldn't imagine practicing in any other department- probably because this is where I started my career. I really enjoy the international clients and cases and in maritime law there is always a sense of urgency as a ship is either sinking or has to leave port!" Craig's job also involves quite a large

technical aspect as there are often mechanical or engineering problems that need to be dealt with. "This makes the job interesting and I really enjoy working with the engineering experts too". There is unfortunately also a sad side to maritime law and Craig often has to deal with the tragic and unnecessary loss of life. When Craig is away from the office, he'd ideally like to be on the slopes skiing. "I also enjoy a good game of golf and on the weekends I love interacting with my two daughters, age 4 and 7. I'm passionate about entertaining and cooking too. With regards to sport, I'm a retired hockey player. My team retired me and I got the message!"



**ASHLEIGH HALE**  
**CORPORATE**

Ashleigh joined Bowman Gilfillan in 1997 after completing her BA LLB at the University of Cape Town. Ashleigh is a partner in the Corporate Department with a focus on mergers and acquisitions, privatisation and restructuring of State assets and advises a range of multinational and local companies. Ashleigh was part of the team which advised Transnet in relation to its proposed restructuring of Spoornet during 2000 and was co-lead attorney representing

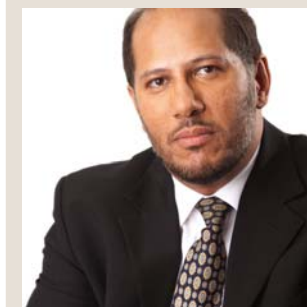
Turbomeca SA in relation to its acquisition of the Airmotive Division of Denel. More recently, Ashleigh was involved in advising Transnet in relation to the corporatisation of one of its transportation and logistics divisions. "I enjoy the variety of work and every transaction is different. It's definitely the people involved that make my job interesting. There is complete variety in what I do and I love the pace of the corporate world, markets and corporate activities - but when things are moving you really need to be available 24 hours a day." When Ashleigh isn't immersed in a transaction, she enjoys running, cycling and mountain biking. "When I have the time I also enjoy reading and like a variety of fiction and non-fiction but try to stay away from business books!" Ashleigh also has a 1-year-old son.



**KELEBOGILE MODISE**  
**CORPORATE**

Kelebogile Lele Modise joined Bowman Gilfillan at the beginning of 2003 after initially completing her articles at a medium sized firm and then spending 2 years with a bank. Kelebogile knew that she would become a lawyer from childhood, it was only a question of which field she would specialise in, and that became clear when she got into the practice. Kelebogile is passionate about what she does. "It's an honour to work on BEE transactions because I would like to see black people getting the economic benefits that are due and it's a privilege to be involved in a process that ensures that will happen." "Mergers and acquisitions in themselves are extremely interesting, but the BEE angle gives a totally different perspective to M&A from a human perspective and also from the vision that the government wants to achieve. It's all very interesting but rather challenging!" In her spare time, Kelebogile enjoys researching different topics of interest "something that really interests me is finding another solution to funding BEE transactions". Kelebogile also has a real passion for

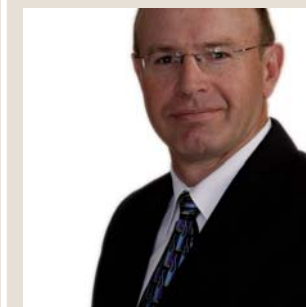
travelling and a heart for Africa, with Mozambique and Nigeria only the beginning of her travel portfolio! When she isn't at the office, she enjoys playing squash and the occasional game of tennis when a partner arises. "I really enjoy listening to acid jazz, deep house and blues from days long past! I find music really soothing and comforting".



**SHAHID SULAIMAN**  
**CORPORATE**

Shahid Sulaiman joined Bowman Gilfillan in 2001 and works in the Corporate department. He's mainly involved with agreements reflecting the contractual relationships of the parties involved, and more recently in financial services and mergers and acquisitions. "I really enjoy working in my specialization and there is never a dull moment. I meddled with a few other fields before turning to law but I have definitely found my calling. The law gives one an excellent understanding of how the world works." Shahid believes Bowman Gilfillan is a great firm as there is opportunity to grow within the organization and the preparedness

of people in the firm to facilitate that growth is excellent. On the weekends, Shahid tries to get out of Cape Town and really enjoys mountain hiking and the occasional swim. "I also have quite an interest in growing plants, especially succulents and even dabble with a bit of calligraphy when I get the chance. Shahid loves spending time with his family and has three wonderful children.



**EUGENE HONEY**  
**INTELLECTUAL PROPERTY**

Eugene Honey joined Bowman Gilfillan in 1993 and heads up the Trade Mark Prosecution and Commercial IP Department. Eugene's father was a lawyer and he made the decision to follow in his footsteps at the tender age of 5 years old. His trademark practice includes availability searches, registration of trademarks, trademark portfolio reviews and strategic intellectual property and trademark management. He also specializes in copyright and commercial IP including license and franchise agreements, strategic intellectual property advice and intellectual property due diligence exercises. "It's a really interesting,

exciting area of law, new ideas and brands and the licensing of brands. I enjoy it because it's a clean, positive area of law and a nice area to specialise in. Also, not many people do it and it's an area that's developing rapidly. Bowman Gilfillan has many strengths as a firm and it has a broad range of specialists in a broad range of areas. In fact there isn't another Top 10 Law firm with a full IP Department". Eugene acts for many leading franchisors and manages their brands and brand portfolios. I spend the weekends with my family at the coast or in the bush. I have three children, and lead an active lifestyle away from the office. I enjoy golf, gym and watching good sport. I also listen to a lot of music".

*Disclaimer: This publication is not intended to constitute legal advice which can only be given having regard to particular facts and circumstances. Any liability that would or could arise from or of the contents hereof is hereby excluded. Always seek professional advice from a suitably qualified lawyer on any specific legal problem or matter.*

MEMBER

LEX  MUNDI

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