

SALC BULLETIN

Newsletter of the South African Law Commission

NEW DEVELOPMENTS

Why a bulletin

The aim of the Bulletin is to inform people about and interest them in the work of the Commission. The Bulletin will contain information on the activities of the Commission, an update on current projects and items on new and completed projects.

Members of the Commission

The Chairperson is Judge I Mahomed, the Vice-President of the Constitutional Court. The Vice-Chairperson is Judge P J J Olivier, a Judge of the Appeal Court. The full time member is Professor T Nhlapo. The other members are Judge Y Mokgoro, a judge of the Constitutional Court, Advocate J J Gauntlett SC from the Cape Bar, Ms Z Seedat, an attorney practising in Durban, and Mr P Mojapelo, an attorney practising in Nelspruit.

During the course of this year the Commission has met on 23 and 24 February, 20 April, 15 June and 31 August. Its next meeting is due to take place early in November.

In order to assist the Commission with the performance of its functions, it has appointed a working committee consisting of Judge Olivier and Professor Nhlapo as the two fixed members. A third member

of the Commission will serve on the working committee on a rotating basis. Advocate Gauntlett SC is the first rotating member.

Appointment of project committee members

The following appointments have been made to project committees:

Aids

During 1995 the Commission published a working paper (Working Paper 58) on the legal aspects of AIDS for general information and comment. The comments received reflected major differences of opinion between interest groups on many of the issues covered by the working paper. In the light of this a project committee intended to reflect various skills and different experiences has been appointed to assist the Commission with the development of a final report for consideration by the Minister of Justice. The members of the project committee are:

Judge E Cameron: Chairperson and project leader.

Mr Zackie Achmat: Head, AIDS Law Project; Centre for Applied Legal Studies at the University of the Witwatersrand.

Mr Bokkie Botha: General Manager, Human Resources; A E C I Ltd.

Ms Mercy Makhalemele: Community representative.

Dr John Matjila: Lecturer, Department of Community Health; MEDUNSA.

Prof Thandabantu Nhlapo: Full-time member of the Commission.

Ms Ann Strode: National Co-ordinator, Lawyers for Human Rights: AIDS and Human Rights Programme; presently seconded to the Department of Health's National HIV/AIDS and STD Programme.

Prof Christa van Wyk: Professor of law in the Department of Jurisprudence, UNISA.

Arbitration

Since the investigation into arbitration has been broadened to include all aspects of alternative dispute resolution, the following additional appointments have made to the project committee:

Prof Radhakrishna Choudree: University of Durban Westville.

Ms Barbara Hechter: Office of the Family Advocate.

Mr Albertus Jooste: Chief Magistrate, Cape Town.

Ms Nombulelo Mkefa: Community Peace Foundation.

Adv Paul Pretorius: Johannesburg Bar.

Current members of the project committee are:

Judge Jan Steyn: Chairperson.

Prof David Butler: University of Stellenbosch.

Mr Richard Christie QC: Formerly a Professor of Law, University of Zimbabwe.

Adv Jeremy Gauntlett SC: Member of the Commission.

A sub-committee has been constituted consisting of the original members of the project committee to deal exclusively with international commercial arbitration, while the full extended committee will deal simultaneously with all other aspects of the investigation.

Class actions

The following appointments have been made to the project committee for the Commission's investigation into the recognition of a class action in South African law:

Judge P J J Olivier: Chairperson; Vice-Chairperson of the Commission.

Adv Jeremy Gauntlett SC: Member of the Commission.

Prof Cheryl Loots: Lecturer, University of the Witwatersrand.

Mr Ephraim Makgoba: Practising attorney.

Ms Shenaz Meer: Attorney, Legal Resources Centre, Cape town.

Mr Phineas Mojapelo: Member of the Commission.

Mr Donald Nkadimeng: Practising attorney.

Issue papers

In order to involve the community actively at an earlier stage, the Commission has decided to publish issue papers for appropriate investigations as the first step in the consultation process. The purpose of an issue paper is to announce an investigation, to elucidate the aim and extent of the investigation, to point to possible options available for solving existing problems and to initiate and stimulate debate on identified issues by way of including specific questions on relevant issues. The issue papers recently distributed by the Commission, namely those on family violence and money laundering, have proved to be a success in the light of the enthusiastic response received. The Commission wishes to thank all respondents for their valuable inputs.

Ms Shenaz Meer: Attorney.

Harmonisation of the common law and the indigenous law: Customary marriages and the conflict of personal laws in the application of customary law

The Commission has published, for general information and comment, an issue paper on customary marriages. The issues raised in this paper include: recognition of customary marriages, polygyny, consent of the spouses, bridewealth, consequences of marriage and division of property on divorce. The matter has been rendered urgent not only by the provisions of the Constitution recognising a right to culture and to personal family laws in addition to the commitment to equality and non-discrimination, but also by the continued denial of recognition by South African common law to marriages outside the civil/Christian format. The Commission's paper solicits views on questions such as whether there is a need for an all-new common marriage law for all South Africans, and whether certain customary practices are incompatible with the Constitution. The closing date for comments is 31 October 1996.

Published at the same time is a separate issue paper on the conflict of personal laws in the application of customary law. This relatively technical paper seeks to raise the issue of choice of law: *ie* what guidelines the courts should follow in making the decision whether to apply customary law or common law to the parties involved. Customary law now enjoys constitutional recognition on a par with common law as part of South Africa's legal system and clear choice of law rules are now required as a matter of urgency. The paper discusses choice of law in relation to succession, marriage and various other conflicts including the dissimilarities between systems of customary law. It also raises questions on the proof and application of customary law. 30 November 1996 is the closing date for comments in respect of this issue paper.

Discussion papers

Discussion papers, previously referred to as working papers, are documents in which the Commission's preliminary research results are contained. In most cases discussion papers also contain draft legislation which gives effect to the Commission's tentative recommendations and proposals. The main purpose of these documents is to test public opinion on solutions identified by the Commission.

Insolvency

The Commission has published a discussion paper (Discussion Paper 66) containing a draft Insolvency Bill and Explanatory Memorandum for general information and comment as part of the Commission's comprehensive review of the law of insolvency.

The Bill reflects the assimilation of comments on deficiencies in the Insolvency Act 24 of 1936 and related laws, and proposals for reform in respect of these matters, received since the commencement of the investigation. The Explanatory Memorandum expounds the proposed changes to the existing law and the reasons for them.

The Bill contains only preliminary proposals regarding the insolvency of individuals. One consolidated Act is however envisaged, incorporating the winding-up provisions of companies and close corporations as well as other legal entities such as banks, pension funds, building societies, medical funds, insurance companies and co-operatives.

The discussion paper is published to give those wishing to comment on the modernisation or reform of this particular branch of the law sufficient background information. The discussion paper is a voluminous document and an Executive Summary is available

which will afford those who may not wish to study the entire discussion paper an opportunity to comment on. At present the position in our law is that the termination of a person's life is unlawful, even if the motive for such conduct is to end the person's unbearable suffering, and this is the case even where the suffering person has expressed the wish to die or has even begged to be killed. At its last meeting on 31 August 1996 the Commission approved the distribution and publication of a discussion paper which deals with these sensitive issues.

Increased importance is, however, being attached to patient autonomy worldwide. The Commission is consequently considering proposals for possible law reform with regard to the following matters, namely, the right of a mentally competent person to refuse any life-sustaining medical treatment with regard to any specific illness from which he or she may be suffering, the circumstances in which it would be lawful for a medical practitioner to cease all further medical treatment of a patient who is braindead, whether it would be lawful for a medical practitioner to give effect to the request of a terminally ill, but mentally competent, patient to make an end to the patient's unbearable suffering by administering or providing a lethal agent, and the circumstances in which a court may order the cessation of medical treatment which would have the effect of terminating a patient's life, with regard to patients who are seriously mentally impaired or patients who are in a persistent vegetative state.

The Apportionment of Damages Act, 1956

As the Apportionment of Damages Act 34 of 1956 causes several problems in practice, the Commission decided to review the Act in its entirety. A discussion paper containing the main recommendations expounded below will be published for general information and comment shortly.

In the light of the Appeal Court's decision in *South British Insurance*

the review of the law of insolvency.

Co Ltd v Smit 1962 3 SA 826 (A) the Commission recommends that all references to "fault" in section 1 of the Act be substituted by "negligent conduct". This would further necessitate either the repeal or amendment of the partial definition of "fault" in subsection 1 (30) of the Act.

It is further recommended that the Act should apply to cases of breach of a statutory duty where fault is a requirement and breach of contract. However, it is equally clear that the Act does not cover no-fault liability on the part of the defendant.

In order to clarify the intention of the legislator, a short and simple definition of "joint wrongdoers" is included in the Act. The definition makes it clear that wrongdoers who are liable in terms of vicarious liability qualify as joint wrongdoers.

The various subsections dealing with costs are rearranged and simplified.

Consequential changes to the subsections dealing with contribution between joint wrongdoers, judgments in favour of the plaintiff and exemptions from or limitation of liability are suggested.

It is recommended that subsection 2(7) dealing with the recovery of payments in excess of the amount apportioned to the joint wrongdoers be repealed.

The Commission also deals with the problem of contribution in cases of insolvency. It invites comment on the problems experienced in practice in this regard, and especially on the possibility of making a re-allocation of the apportionment in the event of it becoming impossible to execute against one of the joint wrongdoers in respect of his or her share, the introduction of full proportionate liability whereby defendants would be liable to plaintiffs only for the amount of damages equal to their proportionate share of the fault in the plaintiff's loss or whether some form of modified proportional liability

Euthanasia

should apply.

The Commission does not recommend that the Act be made applicable to collisions or accidents at sea.

It is also recommended that the Act should provide for a court to grant a judgment sounding in money in favour of one wrongdoer against another. This will make the third party a co-defendant in the fullest sense, avoid a multiplicity of actions, and bring actions to a close faster.

The Commission finally recommends that the Rules Board should seriously consider introducing a third party procedure similar to that contained in Rule 13 of the Supreme Court rules for the Magistrate's Court.

Copies of the discussion papers on insolvency and euthanasia are available on request from the offices of the Commission. The discussion paper on the Apportionment of Damages Act will become available during October 1996.

Reports

Money laundering

The Commission undertook an investigation aimed at formulating administrative measures to control money laundering (Project 104: Money Laundering and Related Matters). A report on this investigation has recently been submitted to the Minister of Justice. The matters that were investigated in the course of this project include the following:

Customer identification

The aim in this respect is the elimination of anonymous accounts and the identification of hidden principals or beneficial owners. Institutions should establish the actual ownership of accounts, and

should refuse to enter into transactions with clients who fail to provide proof of their identity. By identifying the nature of the transaction and the true participants in that transaction, the money-laundering scheme can be exposed. The Commission therefore recommends measures to ensure that records are kept of information obtained when an account is opened or another form of business relationship is established. Records should also be kept of information in respect of specific transactions, carried out either in the course of a business relationship or as single transactions. Recorded information should be kept for a period of at least five years.

Reporting of information

The Commission recommends a reporting system that is based on reporting cash transactions above a prescribed threshold amount on the one hand, and reporting suspicious transactions irrespective of the amount involved, on the other. The threshold amount should be determined by the responsible Minister after consultation with interested parties

Internal policies

In their approach to implementing a framework of administrative measures, institutions should follow procedures that are based on responsible business practice. The Commission recommends that institutions be required to implement policies such as “know your customer”, internal reporting procedures and staff training. Provisions in this respect can, however, not be too prescriptive of the contents of the internal policies that institutions are required to adopt.

Financial Intelligence Centre

An integral element of a system to control money laundering is the establishment of a body to record and utilise reported information.

Record-keeping

The Commission recommends the creation of a statutory body referred to as the Financial Intelligence Centre. The task of such a body will mainly be to receive information through the reporting system, to analyse that information, to conduct investigations into money-laundering activities and to disseminate information that warrants investigation to the appropriate investigating authorities. The Financial Intelligence Centre should also be able to enforce the administrative framework through sanctions imposed upon institutions that fail to comply with this framework.

Scope

These administrative measures should apply to a wide variety of organisations in the business sector that are in a position to detect and deter money-laundering activities.

Implementation of previous reports

A Bill on *debt collecting* was introduced on 27 February 1995. The Bill is still being considered by the Select Senate Committee on Justice.

A Bill on *interest on damages* was approved by the Select Senate Committee on Justice on 28 February 1996. The Bill is currently under consideration by the Justice Portfolio Committee of the National Assembly.

A Bill on the *powers of natural fathers in respect of extra-marital children* was discussed by the Cabinet Committee for Social and Administrative Affairs on 28 February 1996. By direction of the Cabinet the Department of Justice has consulted with the Department of Welfare which made some new proposals. A revised Bill was approved by the Minister and

submitted to the State Law Advisers on 27 August 1996.

A Bill on *the Hague Convention on the Civil Aspects of International Child Abduction* was approved by the National Assembly on 28 August 1996 and referred to the Senate for consideration.

The Bill on *Jewish divorces* was introduced in Parliament on 3 September 1996.

The Bill on the *application of the trapping system* which was approved by Cabinet for introduction, is under consideration by the State Law Advisers.

The Bills on *international co-operation in criminal prosecutions* and *the simplification of criminal procedure* are under consideration by the Justice Parliamentary Committees.

Internet

Arrangements are under way to make the publications of the Commission available on the Internet.

Invitation

Interested parties are invited to submit proposals for law reform and information in respect of projects to the Commission.

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