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No Win No Fee

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Who is responsible for accounting records?

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14 Decoding s 2(1)(a) and (b) of the Contingency Fees

Clients should be protected against potential abuses, but the question is: What constitutes a reasonable fee and what is regarded as over-reaching? In this article, Gert Nel discusses s 2 (1)(a) and (b) of the Contingency Fees Act 66 of 1997 and focusses on a number of issues, including the origin of contingency fees, foreign law, incentives for attorneys, the reasonability of fees and how the fees should be calculated. Mr Nel also asks if the client should be protected against potential abuses? He adds that guidance should be given as to the qualification of what constitutes a reasonable fee and what should be regarded as over-reaching, which is always subject to scrutiny by either the professional controlling body or the courts.

20 The right to road safety

South Africa is internationally one of the most unsafe countries for road travel. Fourteen thousand of its citizens (38 per day) die on its roads and as many as an estimated 524 000 persons – based on annual hospitalisation figures and fatality rates - are annually injured in road crashes. The Road Safety Annual Report 2017 published by the International Traffic Safety Data and Analysis Group and the International Transport Forum states that out of 40 countries South Africa has the highest fatality rate per 10 000 vehicles. Professor Hennie Klopper writes that the economic costs of traffic crashes amount to a staggering R 142,92 billion per annum. Although the South African government has framed an impressive and credible road safety strategy its practical implementation seems to be inefficient and/or ineffective.

24 A ‘without prejudice’ letter breathes new life into prescribed matter

According to South African law, and more specifically in the case of ABSA Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA), one exception to without prejudice communication being inadmissible to court is correspondence amounting to an acknowledgement of insolvency. The rationale behind the exception being, that such an admission, even if made in confidence, cannot be considered to be privileged as public policy dictates that liquidation or insolvency proceedings are a matter, which by its very nature, involve the public interest. The question posed to the Supreme Court of Appeal (SCA) in KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd (2017) 3 All SA 739 (SCA) was whether a second exception to without prejudice rule is recognised in South African law. The so-called second exception refers to where inadmissibility would not apply to correspondence amounting to an acknowledgement of insolvency. The rationale behind the exception being, that such an admission, even if made in confidence, cannot be considered to be privileged as public policy dictates that liquidation or insolvency proceedings are a matter, which by its very nature, involve the public interest. The question posed to the Supreme Court of Appeal (SCA) in KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd (2017) 3 All SA 739 (SCA) was whether a second exception to without prejudice rule is recognised in South African law. The so-called second exception refers to where inadmissibility would not apply to correspondence amounting to an acknowledgement of insolvency.

26 Reinstatement except when ‘not reasonably practicable’ – a discussion of s 193(2)(c) of the LRA

Tamsanqa Mila writes that the primary remedy for an unfair dismissal is reinstatement or re-employment, because of the importance of job security in our country. Reinstatement for a dismissed employee means returning to the position the employee held at the time of the dismissal. Re-employment may place the employee into a different position, other than the one held at the time of dismissal. For many employers facing the reinstatement of an employee they have dismissed is unpalatable and will seek to persuade the Commission for Conciliation, Mediation and Arbitration or Labour Court that it is not practicable to do so.
Proxi Smart loses conveyancing battle against the LSSA

In the editorial ‘Conveyancing work encroached upon’ (2016 (Dec) DR 3) Editor, Mapula Sedutla, wrote about the proposed business model by Proxi Smart Services (Pty) Ltd (Proxi Smart).

Proxi Smart sought to render certain conveyancing-related services, which are exclusively performed by conveyancers, who are regulated by the statutory provincial law societies.

The Law Society of South Africa (the LSSA), its constituents and the Attorneys Fidelity Fund (AFF) were of the view that the proposal by Proxi Smart could not be supported, as the full conveyancing process is regarded as work exclusively performed by attorneys and should remain so in the interest of the public.

The LSSA prioritised the matter and attorneys were cautioned against participating in the Proxi Smart initiative. The LSSA's concerns included:

• members of the public being denied the protection of statutory bodies overseeing strict compliance by conveyancers of rules directed at the ethical and professional conduct of conveyancers;
• members of the public losing confidence in conveyancers;
• conveyancing as a profession losing its attraction to new entrants; and
• conveyancing being attended by persons and institutions that do not qualify as officers of the court, with the concomitant dissipation of the safeguards such a system holds' (see ‘LSSA takes on Proxi Smart model in the Gauteng High Court’ 2017 (July) DR 14).

Proxi Smart brought an application for declaratory relief concerning the lawfulness of its business model for performing the administrative and related services pertaining to property transfers that it contended was not by law reserved to conveyancers or legal practitioners.

The matter of Proxi Smart Services (Pty) Ltd v the Law Society of South Africa and Others (GP) (unreported case no 74313/16, 16-5-2018) (Mafojane J) (Van der Westhuizen J and Strijdom AJ concurring) was heard in the Gauteng Division of the High Court in Pretoria (GP) on 6 and 7 February, where judgment was reserved.

Judgment was delivered in favour of the respondents on 16 May 2018. Although the application was dismissed on technical grounds, the judges set out their views on the merits clearly.

The proposed model, according to the court, was based on supporting documents that may be required to be lodged in a ‘typical transfer of immovable property’ involving the sale by private treaty of a freehold property. ‘This ignores the fundamental reality that every property transaction is unique and is not typical’ (para 17).

In para 5 of the judgment the court stated: ‘The opposing respondents contend that all work, of whatever nature associated with immovable property transactions and transfers indivisibly and inseparably forms part of conveyancing practice, which has, by usage, custom and practice over centuries, became work that is performed, and ought to continue to be performed, exclusively by conveyancers.’

In considering the financial aspects of the proposed scheme, the court referred to the AFF, whose purpose is to reimburse persons who suffer pecuniary loss as a result of the misappropriation of trust money by a practitioner or their subordinates.

At para 50 Mafojane J stated: ‘The highest standard of professionalism and honesty are fundamental to conveyancing transactions which involve large sums of money represented by undertakings exchanged on trust. The public derives comfort from the fact that attorneys and conveyancers are regulated by statutory law societies, the Attorneys Fidelity Fund and a Code of Conduct that prescribes high ethical standards which they must adhere to ensure that the public is protected.’

The court held that the applicant did not make a case for the relief it sought and dismissed the application with costs.

In a press release, the LSSA Co-chairpersons, Ettienne Barnard and Mvuzo Notyesi, welcomed the judgment and noted that specialised skills of conveyancers have been acknowledged.

• The full judgment can be found on the LSSA website at www.lssa.org.za.

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EDITOR'S NOTE

Upcoming deadlines for article submissions: 18 June and 23 July 2018.
Hurdles faced by start-up law firms

I am a candidate attorney, having previously worked in the small, micro, medium enterprises (SMME) sector as, inter alia, a Senior manager: Legal, corporate governance and compliance, as well as Deputy Company Secretary. I was fortunate enough to be an ex officio member of the executive committee and a permanent invitee to all board and board committee meetings by virtue of my role towards the board and the executive management. Among the regular agenda items were ‘reasons why most SMME’s fail at the infancy stages’. Research has shown that these SMME’s are not necessarily failing on their own, but are rather being deliberately failed by big businesses for fear of competition and the greed to monopolise the business sector. Government has, by its own failure to control this economic inequity, exacerbated the situation and thereby, consciously or inadvertently, colluded in the perpetration of economic injustice at the expense of the poor SMME’s.

While the definition of a SMME appears to be that the annual income thereof should be within certain thresholds it does not, however, seem to be inclusive of providers of professional services, such as law firms, specifically start-up law firms. This exclusion has created an impression that law firms are equal, which assumption is incorrect. Consequently, start-up law firms are unable to get projects from both big corporate firms and government as they are subjected to the same selection criteria as the established law firms. Banks, for example, outsource collection and conveying work worth millions of rands to select established law firms because of their ‘experience’. Government does the same. There are regular reports of municipalities and other state entities outsourcing huge debt collection contracts to a single law firm because of the so-called ‘the law firm is reputable’ excuse. Surely these projects can be awarded equitably to several law firms regardless of size. There must be obligatory open and transparent reporting by big corporates and government, through regular engagements with the legal industry, on how projects are being awarded and, where there are inequities, reasons thereof be provided.

This inequity has tremendously added to the strain experienced by start-up law firms operating in cities around the country to the extent that they cannot keep up with the ever increasing prices in office rental resulting in them either sharing small cubicles in order to pay less, however, at the expense of their growth. Government must come in here. Either categorise the start-up law firms at the same level of SMME’s and provide them with incentives, such as a rental rebate at a reasonable rate or allow them to establish offices in private homes around the various suburbs of the cities within which they operate, of course subject to proper regulation, perhaps up to the first two years of practice and as may be permissible in terms of the rules of the provincial law society.

The cake is big enough for all to share but the hyenas are so greedy they will not allow the helpless jackals to have a piece. Start-up law firms also aspire to grow and participate actively in the economy of South Africa.

Puledi Terrence Shoba, candidate attorney, Polokwane

This letter was written in Mr Shoba’s personal capacity.

Editor

What does a comma have to do with it?

The importance of the correct use of English grammar is constantly stressed in legal drafting. No matter the type of drafting, whether it is a contractual, legislative or testamentary, it is the draft-
The importance of correct English usage was recently illustrated in the United States case of O’Connor v Oakhurst Dairy (First Cir. 2017, 16-1901). The judgment’s opening line aptly summarised the kernel of the issue by stating ‘[f]or want of a comma, we have this case.’

The case, on appeal, revolved around whether the dairy farmer’s drivers fell within the ambit of the Maine’s overtime law reflected in the Maine Revised Statute or whether their activities fell within the Exception F that reads as follows:

1. Agricultural produce;
2. Meat and fish products; and
3. Perishable foods’ (my italics).

The italicised section was the root of the ambiguity and brought into question the scope of the exception. One of the arguments was that without a comma after the word ‘shipment’, the provision could read that ‘shipment’ and ‘distribution’ were synonyms and that the legislature had included two words to deal with the same concept. By including, what the court called a serial comma (sometimes also referred to as an Oxford comma), so that the provision would read ‘packing for shipment, or distribution’ it would then have been clear that the legislature had intended to use ‘shipment’ and ‘distribution’ as two separate and distinct concepts.

Both parties attempted to resolve this ambiguity by using a number of legislative aids, including grammatical arguments, legislative comparisons where similar terminology was used, the Chicago Style Guide (that recommended that serial comma’s not be used in the drafting of legislation), and the drafting history of the legislation. The court noted that if the serial comma had been used it would have provided clarity, however, ultimately found that the Exception F remained ambiguous irrespective of the legislative aids presented by the parties.

The court’s decision ultimately hinged on how to achieve the purpose of the legislation, which was to provide protection of overtime pay to employees. The court found that the dairy farmer’s drivers did not fall within the scope of Exception F and were, therefore, protected by the Maine’s overtime laws.

Even though this case does not have authority within the South African context, it illustrates the importance of the correct use of punctuation and grammar when drafting any document. It also highlights that a drafter should rather focus on ensuring clarity in their drafting than rigidly following the prescribed style guide.

Michele van Eck, legal adviser, Johannesburg
Land expropriation discussed at Cliffe Dekker Hofmeyr briefing

Cliffe Dekker Hofmeyr (CDH) together with the Afrika-Verein (the German-African Business Association) held a media briefing with regard to land expropriation on 11 April in Johannesburg. CDH and Afrika-Verein said the purpose of the briefing was to have a discussion with regard to questions that investors had around the continued protection of property rights in light of the motion adopted by the National Assembly on 27 February, to initiate an amendment of the Constitution in order to allow for expropriation of land without compensation.

Director in the Dispute Resolution department at CDH, Jackwell Feris, said that clients and foreign investors had raised a number of concerns about the proposed amendment on s 25 of the Constitution and the element on compensation. He added that Parliament had established a review committee to set out terms of reference in terms of how Parliament would embark on the constitutional review. He pointed out that a fundamental part of the process includes public participation in order to make sure that the facts in the report, which the committee will set forward to Parliament, takes the views of the public into account.

Mr Feris said the report will consider the issues that will need to be put forward for purpose of reviewing s 25. He pointed out that when one looks at the review from a parliamentary perspective it is not definitive that s 25 will be amended, but it asks if there is room to look at the context of land ownership disparities in South Africa (SA). He added that the debate of land expropriation predates back to 1994, where there were discussions during multi-party talks on s 25 of the interim Constitution that had opposing views on the issues, and asked if there was a need from a South African perspective to have a property clause, where property rights were protected.

Mr Feris pointed out that when the issue of expropriation without compensation is discussed, it has to be looked at from a South African perspective and from a foreigner’s perspective. He said a South African citizen or corporate is essentially bound by South African law. He noted that there is the Constitution and domestic policies, which set forth domestic legislation. He added that SA citizens are confronted with issues from domestic legislation and customary international law, which the Constitution refers to. He noted that under customary international law it states that if foreign nationals are expropriated from their land they are entitled to compensation. He pointed out that foreign nationals are in a better position than many South Africans.

Mr Feris added that if the Constitution is amended, foreign nationals can go back to their home countries and report that SA expropriated their property. If there is a bilateral investment treaty, foreign nationals can initiate an investors state arbitration against SA, and SA may be obliged to compensate. He said those are facts that Parliament should look at if they looking to review s 25. He added that there is a need to have a discussion on whether s 25 needs to be reviewed. He pointed out that there is still a fundamental disparity on ownership of land in SA.

Afrikan-Verein’s, Ignaz Fuesgen, said the issue of land must be addressed properly. He added that if one looks back at 1994 the policies that were put in place, have not gone as far as they should have and they a liability. He said the question that must be asked is how to marry the interest of the people in SA and the interest of the economy and those of foreign investors. He pointed out that the reason why interest of foreign investors should be looked at, is a simple one according to former President Jacob Zuma’s 2016 State of the Nation Address, when he stated that around 35% of gross domestic product (GDP) is directly linked to foreign investments.

Mr Fuesgen said if SA does not look after foreign investors, it would be taking a chance with 35% of GDP. He added that foreign direct investment did not come from Asian or American countries, but from the European Union. He pointed out that Europeans were a part of the problem during Apartheid and now they want to be part of the solution in the post-Apartheid era. He noted that if one looked at the German-African Business Association, SA has been seen as an opportunity and not as a liability.

Mr Fuesgen said the issue of land will be a lengthy one and not everyone may agree with the outcome of the process. There could be court challenges and there would be constant renegotiations. He questioned how much it would cost the citizens to fund ongoing battles. He pointed out that ultimately someone would have to pay and it is going be the tax payers. He asked how the process would paralyse new investments, new policies and the investment climate, which would impact the overall economy?

Mr Fuesgen said the question that must be asked is how does SA look at the needs of citizens at grass-roots level and...
The Attorneys Fidelity Fund offers bursaries to candidate attorneys and practising attorneys for further study in all fields of law at South African Universities.

Applications close on 15 August 2018.
AgriSA showed black land owners own Eastern Cape and KwaZulu-Natal. than half of the agricultural land in the that black people already owned more noted that their audit findings showed and where they could not find informa- tion used is old information the government land audit, is that the dit. She said the biggest problem with the areas, land ownership is in favour people live on that land. which include areas such as the Ingony- ama Trust that cannot be given away as people live on that land.

Prof du Plessis noted that in some of the areas, land ownership is in favour of white people according to a land audit. She said the biggest problem with the government land audit, is that the information used is old information and where they could not find informa- tion they used title deeds and guessed the race of people by looking at their surnames, and added that the method- ology was questionable. Prof du Plessis said there is also the audit from AgriSA, which focuses on agricultural land and noted that their audit findings showed that black people already owned more than half of the agricultural land in the Eastern Cape and KwaZulu-Natal.

Prof du Plessis said findings made by AgriSA showed black land owners own 26% of the agricultural land in terms of hectares and control more than 46% of the potential land. She added that land owned by black people and land owned by government has an interest- ing economic trickery to make a point that private land reform is better than government land and make a point using statistics that land reform should not be privatised. She said the truth lies somewhere between the two audits. She added that another problem is that it is not known what equitable land redistribu- tion looks like.

Prof du Plessis pointed out that land reform in SA is a big deal. She said the focus is mainly on land restorations and distributing agricultural land, but it is a much broader programme than just that. She noted that redistribution states that people should have equitable access to land and redistribution is largely based on the idea of the ‘willing buyer, willing seller’ principle. Prof du Plessis said those who know expropriation law, must not confuse it with the method of calcu- lating market value. She added that the willing buyer, willing seller principle was a policy decision made by government that they will not expropriate land for reform purposes, but they are going to market transactions with people, so that it is transferred by contracts.

Prof du Plessis said that redistribu- tion of land is mostly driven by poli- cies that follow presidents as well. She pointed out that in the beginning the idea was that anybody who earned less than R 1 500 per month, could through certain mechanisms apply to government for a transfer to get land. She added that one did not have to show proof that they had any connection to the land in question and it was aimed at giving poor people access to land. She noted that there were a few other policies in place to help peo- ple, once acquired land to use the land. It was not based on big agricultural farming and was to give more people access to the land.

Prof du Plessis spoke about the Set- tlement Land Acquisition Programme, in terms of the programme 6,5% of land was transferred. She said the idea of land redistribution in former President Thabo Mbeki’s era was to settle more commer- cial black farmers. However, she added that there were few requirements that if you wanted to have land you must have a business plan and you had to farm com- mercially. She noted that the programme was agricultural only and it was not known how beneficiaries were chosen.

Prof du Plessis said there was then the Proactive Land Acquisition Strategy. She added that with this programme government was to provide land to its citizens. She pointed out that the problem was that when government said it was going to rely on private individuals to make the land available, the land that became available was highly unprotected land, which led to people selling that land be- cause the land was not fertile or was far away from infrastructure. Prof du Plessis noted that would have been a recipe for disaster.

Prof du Plessis said another problem was that land redistributed to farm- ers was without water rights. She noted that a recommendation was made that if government was going to redistrib- ute land, there had to be water on that land. Prof du Plessis said another issue was that only a very small percentage of the budget is spent on land reform. This was according to a report that was tabled in Parliament, led by former Presi- dent Kgalema Motlanthe, in November 2017. She added that the recommenda- tion that was made was that SA needed a new framework and legislation that will give guidance to principles that will de- fine to who the beneficiaries of land are, including what quitable redistribution is and also give institutional arrangements on what will happen with the land.

North West University’s Faculty of Law, Professor Elmarie van der Schyff, said the question that has arisen is whether it is necessary to change s 25 of the Consti- tution in order to facilitate expropriation of land without compensation. She add- ed that it was surprising to realise that s 25 of the Constitution, also known as the property clause as it currently stands, does not guarantee an ownership or pri- vate property. She pointed out that s 25 does not grant the right to property, but merely regulates or prescribes the man- ner in which property may be interfered with. She noted that she thought that this is one of the mistakes of the biggest as- pects that must be considered if s 25 is amended.

Prof van der Schyff said s 25(1) stated that no one may be deprived of property except in terms of law of general applica-
The Portfolio Committee on Labour (the committee) released a statement through the Parliamentary Communication Services that said it was satisfied with the progress made in the processing of the National Minimum Wage Bill and related legislations. In the statement Acting Chairperson of the committee, Sharome van Schalkwyk, said the process had shifted to the department and that the Bill would be sent for redrafting to effect the input received from the public, as agreed to by the committee.

Ms van Schalkwyk said 'The Department of Labour must take its time and a great deal of commitment when dealing with this piece of legislation, and that committee members had shown maturity in expressing their positions on the matter. Ms van Schalkwyk added that: 'This is a piece of legislation that will change the course of vulnerable workers in our country for a long time, and it ought to be close to perfection when it is tabled before the National Assembly.' She added that the committee had demonstrated a great deal of commitment when dealing with this piece of legislation and that committee members had shown maturity in expressing their positions on the matter.

Ms van Schalkwyk said this is only for the good and that it is solely intended to protect the most exploited workers in the country. She added that at no point will the legislation take away the right to strike, as is often claimed and that the R 20-per-hour amount is a starting figure, which will be reviewed annually.

Portfolio Committee satisfied with progress made on National Minimum Wage Bill

People and practices

Norton Rose Fullbright has three new appointments in Johannesburg.

Patrick Colegrave has been appointed as a director. He is based in Johannesburg and Harare.

Hogan Lovells in Johannesburg has five promotions and one new appointment.

Siafa Chauke has been promoted as a partner in the commercial litigation department.

Ayanda Nondwana has been promoted as a partner in the insurance department.

David Donaldson has been promoted as a partner in the corporate department.

Ghassan Sader has been promoted as a partner in the corporate department.

Karin Krisch has been promoted as a partner in the banking and finance department.

Lerato Letsebe has been appointed as an associate in the business rescue and insolvency department.
Eversheds Sutherland in Johannesburg has appointed Themba Khumalo as a partner in the litigation department.

VZLR Inc in Pretoria has three new appointments.

Azraa Janse van Vuuren has been appointed as a director in the personal injury and third party claims department.

Bhavna Singh has been appointed as an associate in the litigation and administrative law department.

Tshepo Fari has been appointed as a director in the banking and financial law department.

Clyde & Co in Johannesburg has two new appointments.

Cindy Leibowitz has been appointed as a senior associate in the corporate and regulatory department.

Thandi Mawasha has been appointed as an associate in the medico-legal department.

Eversheds Sutherland in Johannesburg has appointed Themba Khumalo as a partner in the litigation department.

DSC Attorneys in Cape Town has five promotions.

Jan Potgieter has been promoted as a senior associate.

Johann Roux has been promoted as a senior associate.

Daniel Botha has been promoted as a senior associate.

Jacqueline Hudson has been promoted as an associate.

Handrie Smalberger has been promoted as an associate.

RWI Attorneys in Pretoria has four new appointments.

Antoinette Grace Nyathela has been appointed as a professional assistant.

Mukovhe Ravhura has been appointed as a professional assistant.

Delmaine Michael September has been appointed as a professional assistant.

Devon Eugene Brikkels has been appointed as a professional assistant.

Knowles Husain Lindsay Inc in Johannesburg has five promotions.

Back, from left: Ryan Brittan, Fraser Van Der Watt and Cristy Lelean have been promoted as senior associates.

Front, from left: Sarah Haken and Katherine Arnold have been promoted as partners.
More often than not, legal practitioners outsource their accounting duties to qualified accountants or bookkeepers. Reasons for the outsourcing will, for obvious reasons, differ from one legal practitioner to another. Reasons range from an inability to prepare and/or balance books, to the need by the legal practitioner to focus on their area of expertise.

The Attorneys Fidelity Fund (AFF) have had a number of encounters where the trust accounting records were not necessarily well prepared, maintained and/or retained. The AFF has had encounters where legal practitioners were unable to provide the accounting records, (both firm and trust records) when so required, citing reasons such as the records were kept with their accountants and/or bookkeepers.

This article seeks to clarify who is responsible for accounting records, and what should happen to the accounting records at any given point.

**Legislative requirements**

Legal practitioners are currently legislated by the Attorneys Act 53 of 1979 (the Attorneys Act), and will in future be legislated by the Legal Practice Act 28 of 2014 (the LPA), which is set to replace the Attorneys Act. In this article, the AFF will deal with both legislations as far as possible.

The Attorneys Act requires under s 78(4) that "[a] practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her for or on account of any person, of any money invested by him or her in a trust savings account or other interest-bearing account … and of any interest on money so invested which is paid over or credited to him or her.'

The Legal Practice Act under s 87 requires that:

'(1) A trust account practice must keep proper accounting records containing particulars and information in respect of –
(a) money received and paid on its own account;
(b) any money received, held or paid on account of any person;
(c) money invested in a trust account or other interest-bearing account referred to in section 86; and
(d) any interest on money so invested which is paid over or credited to it.'

There is often a misunderstanding on what constitutes 'accounting records', and practitioners and inspectors would often not be in agreement in terms of what is expected. Both the Attorneys Act and the LPA define what 'accounting records' are, and the definitions provided by legislation are below:

- The Attorneys Act under s 78(6) defines the accounting records as including 'any record or document kept by or in the custody or under the control of any practitioner which relates to –
  (a) money invested in a trust savings or other interest-bearing account … ;
  (b) interest on money so invested;
  (c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which such practitioner is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or
  (d) his practice.'

- The Legal Practice Act under s 87(3) defines the accounting records as including 'any record or document kept by or in the custody or under the control of any trust account practice which relates to –
  (a) money held in trust;
  (b) money invested in terms of section 86(2), (3) or (4) and interest thereon;
  (c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which an attorney in the trust account practice is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or
  (d) the affairs of the trust account practice.'

From the definitions above it becomes apparent that source documents from which the accounting books/records were prepared also form part of the accounting records.

**Regulatory requirements**

The Rules for the Attorneys' Profession (GenN2 GG97440/26-2-2016) state as follows:

35.5 A firm shall keep in an official language of the Republic such accounting records as are necessary to enable the firm to satisfy its obligations in terms of the Act, these rules and any other law with respect to the preparation of financial statements that present fairly and in accordance with an acceptable financial reporting framework in South Africa the state of affairs and business of the firm and to explain the transactions and financial position of the firm including, without derogation from the generality of this rule:

35.5.1 Records showing all assets and liabilities as required in terms of section 78(4) and section 78(6) of the Act;
35.5.2 Records containing entries from day to day of all monies received and paid by it on its own account, as required by sections 78(4) and 78(6) of the Act;
35.5.3 Records containing particulars and information of:
  35.5.3.1 All monies received, held and paid by it for and on account of any person;
  35.5.3.2 All monies invested by it in terms of section 78(2) or section 78(2A) of the Act;
  35.5.3.3 Any interest referred to in section 78(3) of the Act which is paid over or credited to it;
  35.5.3.4 Any interest credited to or in respect of any separate trust savings.

It should be noted that 'Act' referred in the foregoing rule refers to the Attorneys Act. At the date of drafting this article, the rules in respect of the LPA were not yet finalised, and were still under consideration.

In terms of r 35.8 of the Rules:

35.8 A firm shall retain its accounting records, and all files and documents relating to matters dealt with by the firm on behalf of clients:
35.8.1 For at least five years from the date of the last entry recorded in each particular book or other document of record or file;
35.8.2 Save with prior written consent of the Council, or when removed therefrom under other lawful authority, at no place other than its main office, a branch office or, in the case of electronic accounting records or files, the location at which such accounting records or files are ordinarily hosted; provided that:
35.8.2.1 In the case of electronic accounting records or files hosted offshore, such records or files shall always be reasonably secured and shall remain immediately accessible to authorised persons from the office of the firm, and to the Council; and
35.8.2.2 In the case of a branch office, only insofar as they relate to any part of its practice conducted at that branch office."

According to r 35.13 dealing with accounting requirement for trust account transactions, sub-rule 35.13.6, "[t]he firm’s accounting records shall not, save with prior written consent of Council
or under lawful authority, and except for electronic records in terms of rule 35.12.2 and backups of computerised records, be maintained at any place other than its main office or branch office, but in the latter instance, only insofar as they relate to any part of its practice conducted at that branch.'

Outsourcing of accounting services by practitioners

Accountants’ and bookkeepers’ role in the accounting records of a legal firm is the preparation of the accounting records using the information at their disposal. This information is provided by the legal firm or legal practitioner. Accountants and bookkeepers are not responsible for determining what should be receipted and what should be paid, but the legal firm or legal practitioner is.

However, when the legal firm or legal practitioner has determined what it is that should be receipted, and what it is that should be paid, with reasons therefor, they will then instruct the accountant or bookkeeper to post or allocate the transactions or actions in the accounting books. The accountant or bookkeeper, therefore, acts on the instruction of the legal firm or legal practitioner by applying their accounting knowledge or expertise to correctly allocate the transaction in the accounting books, be it firm or trust accounting books, in terms of the acceptable financial reporting frameworks as required by r 35.6 of the Rules.

While a legal practitioner provides legal services (due to the practitioner running a business and being responsible for the running of that business, and ensuring compliance of that business with all legislative and regulatory requirements) it is in the best interest of the practitioner to appreciate accounting principles, and at least be able to interpret accounting records should the preparation thereof be outsourced to an accountant or bookkeeper.

The legal practitioner remains responsible for the accounting records of a legal firm and must ensure that the accounting books prepared by the accountant or bookkeeper correctly and accurately reflect the activities of the firm, both from a business and trust perspective. This therefore calls on the legal practitioners to review the records that the accountant or bookkeeper has prepared, as they are ultimately responsible for these records, though not physically prepared by them.

Both the legislative and regulatory prescripts, therefore, do not absolve a legal practitioner from producing the accounting records when so required, irrespective of who prepared the said records. The AFF have noted a number of instances where legal practitioners are unable to immediately produce their accounting records when required, be it for purposes of a routine inspection or a cause-driven inspection or investigation, and citing reasons of the accounting records being with their accountants or bookkeepers. Should the accountants or bookkeepers be offsite, it is entirely incumbent on the legal practitioner to get hold of the accounting records from the accountants or bookkeepers who prepare the records on their behalf, and produce the records when so required. As the rules clearly require, these should be kept in the office, be it main or branch, of the legal firm.

Inspectors appointed by the Council are often confronted with difficulty in getting the cooperation by some of the practitioners to produce the accounting records for inspection purposes.

Rule 35.21 of the Rules explicitly states that ‘[a] firm shall allow an auditor or inspector appointed under rule 35.19 access to such of its records as the auditor or inspector may deem necessary to examine for the purposes of discharging his duties under rule 35.23 and shall furnish the auditor or inspector with any authority which may be required to enable the auditor or inspector to obtain such information, certificates or other evidence as the auditor may reasonably require for such purposes.’

Section 87(5) of the LPA states as follows:

'(a) Despite section 37(2)(d), any attorney or an advocate referred to in section 34(2)(b) or an employee of a trust account practice must, at the request of the Council or the Board, or the person authorised thereto by the Council or the Board, produce for inspection a book, document or article which is in the possession, custody or under the control of that legal practitioner or such employee, which book, document or article relates to the trust account practice or former trust account practice of such attorney or advocate: Provided that the Council or the Board or person authorised by the Council or Board may make copies of such book, document or article and remove the copies from the premises of that attorney, advocate or trust account practice.

(b) The legal practitioner referred to in paragraph (a) or employee in question may not, subject to the provision of any other law, refuse to produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client.’

Conclusion

Readers are urged to familiarise themselves with the legislative and regulatory prescripts, which govern their operations all the time, and to ensure adherence thereto. Readers are further urged to read this article together with ‘Outsourcing by legal practitioners’ 2015 (Sept) DR 28.

In conclusion, practitioners are duty bound to produce and make available the required accounting records to appointed auditors or inspectors for purposes of fulfilling their appointment without any restrictions. Practitioners should shy away from citing reasons of the accounting records being with their accountants or bookkeepers, but make every effort to produce these on request, as they are responsible for maintaining these and keeping them at their offices.

The Practitioner Support Unit of the Attorneys Fidelity Fund is situated in Centurion.

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Decoding s 2(1)(a) and (b) of the Contingency Fees Act

By Gert Nel

Section 2 (1)(a) and (b) of the Contingency Fees Act 66 of 1997 (the Act) states:

(a) that the legal practitioners shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreements;

(b) that the legal practitioners shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement'.

This article focuses on a number of issues, including the origin of contingency fees, foreign law, incentives for attorneys, the reasonability of fees and how the fees should be calculated.

Clients should be protected against potential abuses, but the question is what constitutes a reasonable fee and what is regarded as overreaching?

The origin of contingency fees was discussed in the case of Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd 2004 (9) BCLR 930 (SCA).

The government of the United Kingdom (UK) published a green paper on Contingency fees in 1989. After a consultation process, it was decided to consider:

• the introduction in England and Wales of speculative actions on the Scottish model of a ‘no win, no fee’ basis; and

• the validation of agreements for an increase in terms in the costs payable. That way to encourage lawyers to undertake speculative actions, such as being unrelated to the amount of the damages or property recovered.

The above proposals led to the enactment of s 58 of the United Kingdom Courts and Legal Services Act of 1990. This permitted speculative actions and a conditional fee agreement. The most important being the strict regulation of the percentage whereby the fee was to be increased.

According to the case, the importance of this change was emphasised by Steyn LJ in Giles v Thomp- son and related appeals [1993] All ER 321 at 331 d – f. The court pointed out that the ability to recover fees - beyond what was otherwise reasonable - was intended to be an incentive to lawyers to undertake speculative actions, and these developments have been mirrored from English law to South African law.

Project 93 ‘Speculative and contingency fees’ report

In 1996, the South African Law Commission (the Commission) investigated and reported on the question of contingency fees in Project 93 ‘Speculative and Contingency Fees’. The Commission recommended that contingency fee agreements should be legalised in South African law and that common law prohibitions on such fees should be removed. The South African legislature followed the English example of permitting contingency fee arrangements namely, the ‘no win, no fees’, and increased fees in case of success, but this was subject to strict controls.

The Commission was requested to investigate the desirability of a system of contingency fees and published a working paper for general information and comment during March 1996. The report was approved by the Commission and was submitted to the Minister on 6 December 1996.

According to the report, the Commission’s main recommendation was that contingency fee agreements were to be legalised in South African law and that common law prohibitions on such fees had to be removed.
The Commission concluded that a system of contingency fees – in terms of which a prospective litigant was only liable to remunerate their legal representative in the event of successful litigation – could contribute significantly to promote access to the courts and that such a system was desirable.

The report further stated: ‘Should the client win the case, the fee payable to the legal practitioner – in terms of a contingency fee agreement – may be recovered from the proceeds of the litigation (in those cases where the claim concerned is one sounding in money) and is usually higher than the practitioner’s normal fee. This is so because the legal practitioner bears the risk of not being compensated in a number of cases.

In view of these risks the Commission recommends that legal practitioners, in the event of successful litigation, should be entitled to receive, in addition to their normal fees for the case in question, an uplift to a maximum of 100 per cent of their normal fees. In practice this would mean that legal practitioners will be entitled to charge double their normal fees if they conduct their clients’ cases successfully’ (my italics).

Another important safeguard recommended by the Commission was, that the success fee payable to the legal practitioner – in the event of success – should not exceed 25% of the proceeds of the litigation in the case of claims sounding in money. The reason for this was to prevent a situation in which all proceeds were swallowed up in legal fees. The Commission also recommended that both attorneys and advocates be entitled to enter into contingency fee agreements with their clients.

**The Act**

The Act came into operation on 23 April 1999 and provides for two forms of contingency fee agreements, which attorneys and advocates may enter into with their clients, namely –

- the first, is a ‘no win, no fees’ agreement (s 2(1)(a)); and
- the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)(b)).

The second type of agreement is subject to limitations. According to the *Price Waterhouse* case, at para 41 it was held that the ‘[h]igher fees may not exceed the normal fees of the legal practitioner by more than 100 per cent and in the case of claims sounding in money this fee may not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs’ (section 2(2)). The Act has detailed requirements for the agreement (section 3), the procedure to be followed when a matter is settled (section 4) and gives the client a right of review (section 5).

The Act was ‘enacted to legitimise contingency fee agreements between legal practitioners and their clients, which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is, therefore, illegal.’

In the *Price Waterhouse* case it was held at para 41 and 42 that by ‘permitting increased fee agreements the legislature has made it possible for legal practitioners to receive part of the proceeds of the action.

As in England, this Act [has been] designed to encourage legal practitioners to undertake speculative actions for their clients.’

I now focus on the case of *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ), where the court stated at para 3: ‘In terms of both our law and the English law, which the development of our law on the subject mirrored, contingency fees agreements are allowed and recognised as valid, subject to the provisions that they will be supervised strictly by the courts to ensure that the rights of the clients in litigation are protected and not compromised’.

**International law**

The Courts and Legal Services Act of 1990, was an Act, which reformed the legal profession and the courts of England and Wales, which included Conditional Fee Agreements in s 58. A conditional fee agreement is an agreement with a person providing advocacy or litigation services, which provides for their fees and expenses, or any part of them, to be payable only in specified circumstances. It also provides for a success and references a success fee. Further conditions are applicable to a conditional fee agreement, which provides for a success fee as follows –

- (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
- (b) it must state the percentage by which the amount of the fees, which would be payable if it were not a conditional fee agreement, is to be increased; and
- (c) that percentage must not exceed the percentage specified in relation to the description
of proceedings to which the agreement relates by order made by the Lord Chancellor.'

According to s 58 the additional conditions are applicable to a conditional fee agreement, which –

- provides for a success fee, and
- relates to proceedings of a description specified by order made by the Lord Chancellor.

Section 58(4)(b) states: 'The additional conditions are that –

(a) the agreement must provide that the success fee is subject to a maximum limit,
(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,
(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and
(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.'

The approach in English law is that in matters where a lawful conditional fee agreement in terms of s 58 had been entered into with the client, the practitioner will be allowed to charge a 'success' fee in addition to his base costs ('normal' fee).

**Incentive for attorneys**

In England, the law had been incentivised to allow practitioners willing to risk speculative litigation to charge in case of success, a normal fee (based on hourly billing plus a profit element) plus statutory capped success (or bonus/upsell) fee.

In the matter of *Mfenguwana v Road Accident Fund* 2017 (5) SA 445 (ECG) the court stated at para 6 that:

'The basic idea behind a contingency fee agreement is that the attorney takes on the risk of financing his or her client’s litigation in the hope – or anticipation – of succeeding. If the litigation is not successful, the attorney will not be paid. If the litigation is successful, the attorney will be entitled to a success fee that is higher than his or her normal fee' and further stated at para 11: 'Section 2 of the Act is the core of the Act. It makes provision for contingency fee agreements and for the higher than normal fee that an attorney may charge to "offset" the risk of earning no fee in the event of him or her not concluding a case successfully'.

In the *Masango* case at para 12, Mojapelo DJP, stated:

'For the attorney (legal practitioner) is authorised in terms of s 2(1)(b) read with 2(2) of the [Act], as an incentive, to charge a success fee which is higher than his or her normal fee, subject to the two caps'.

**Definition of normal and success fees**

Mojapelo DJP remarks in the *Masango* case at para 13 that:

'The term "fees" and its derivatives "normal fees" and "success fees" are not defined in the [Act]. One should therefore consider the ordinary meaning of these concepts'.

According to the Legal English Dictionary, ‘ordinary meaning rule’ implies: ‘A rule of a statutory construction under which statutes should be interpreted using the ordinary meaning of the language used unless a statute explicitly defines some of its terms otherwise' (www.translegal.com accessed 23-5-2018).

- **Normal fees**

In *Masango* the term 'normal fees' was described at para 17 as follows:

‘In a sense normal fees that an attorney charges his client are the fees which are included in what is referred to as attorney and client costs. Leaving aside the disbursement part of such costs, attorney and client fees are the fees that an attorney is entitled to recover from his client for professional services rendered. Such fees are payable by the client regardless of the outcome of the matter for which the attorney’s services were engaged'.

The court stated at para 12 that ‘[t]he normal fees of the attorney are taken as a base and the attorney is authorised to increase the normal or base fee by up to 100%. The attorney may thus increase the normal fee by say 10%, 20%, 30%, 45% etcetera, but the percentage increase may not exceed 100%. This is the first cap on success fees. What is important is that there is a base (the normal fee) from which a percentage increase is permissible.'

- **Success fees**

Mojapelo DJP further stated in *Masango* at para 18 that:

"Success fees" are contemplated and explained, but are not defined, in s 2(2) of the [Act]. They are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in the litigation to the extent set out in the agreement concluded in terms of the [Act]. The subsection requires the legal practitioner and the client to specify in the agreement what they will regard as success in the particular litigation. A success fee is a normal fee which has been increased by a pre-agreed percentage. There is no other way of increasing the normal fee to the increased or success fee other than through a percentage. The normal fee may be increased by up to 100% to reach the success fee. A success fee may thus be in or double the normal fee.'

At para 19 the court stated: 'The second cap on the increase that the attorney may charge is introduced as a proviso to s 2(2) and applies only in claims sounding in money.'

**Stringent requirements of the Contingency Fees Act**

Both types of agreements in subs 2(1)(a) and (b) are still bound to the stringent requirements of the Act.

Mojapelo DJP in *Masango* quoting Fabricius J in *De la Guerre v Ronald Bobroff & Partners Inc and Others* (GP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J) reaffirmed in para 58 to 60:

‘[T]he Contingency Fees Act is exhaustive on its stated object, and any contingency fee agreement not in compliance with it is invalid.

The court in *Tjatji v Road Accident Fund and Two Similar cases* 2013 (2) SA 632 (GSJ) came to the same conclusion, holding that the intentions of the Act and the use of peremptory language pointed towards non-compliance of a contingency fees agreement being visited with invalidity.

Furthermore, compliance must be substantial and not merely formal compliance with the prescribed form.'

**Fees must be reasonable**

In terms of r 28 of the Rules for the Attorneys’ Profession a practitioner is entitled to a reasonable fee for professional services rendered.

Under s 2(1)(b) of the Act the practitioner may contractually negotiate a ‘higher’ normal fee with their client without having to reduce their fee subject to the statutory ‘cap’.

In the matter of *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) the court stated in para 55 that practitioners fees are 'subject always to the caveat that the normal fee should never amount to overreaching in the first place.'

Both types of agreements are still subject to ‘the principle of reasonableness’ and practitioners will always be subject to the application of this approach either practicing under a s 2(1)(a) or (b) agreement.

When determining the reasonableness of a fee the court discussed the following guidelines at para 10 in the case of *Coetzee v Taxing Master, South Gauteng High Court and Another* 2013 (1) SA 74 (GSJ) at para 29: 'The payment by a client to the client's own attorney is not aimed at a "full indemnity", but rather is aimed at payment of a reasonable recompense for services rendered.'
The tariff in r 70 is not binding on attorney and own client scale costs, and is merely a guide for taxation.

‘In exercising the discretion to determine a reasonable rate for time charges for services rendered the practice is to have regard to:
1. Fees charged by other legal practitioners.
2. The seniority of the attorney.
3. The time taken over the work.
4. The nature of the work performed.’

These guidelines should always be applied in determining the reasonableness of the practitioner’s fee regardless the outcome or the value of the claim and any agreement that caters for an inappropriately large fee could be subject to review and be found to be unenforceable.

A reasonable principle to follow in the application of fees under contingency fee agreements, is to be found in the *Thulo* case, where Morison AJ, remarks in para 59: ‘That the client is assured of being paid at least 75% of the money amount obtained by successful litigation.’

Method of calculating fees

In the case of *Masango* Molapelo DJP gave the following guideline in para 12 of the judgment:

‘The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fees agreement, and then increases it in terms of the contingency fees agreement. The success fee is a fee which has been increased from the normal fee.’

He adds in para 24: ‘The first cap is the percentage by which the legal practitioner is entitled to increase his fee, which is from 0% up to 100%. The second cap is a percentage of client’s capital award, which the success fee may not exceed, namely 25%.’

In matters where the practitioner assumed liability for all the disbursements, much of which will be recovered from the party-to-party costs, I submit that those costs could reasonably be recovered from the party-to-party costs and make up for any shortfall in fees and disbursements.

Any excess remaining after the fees (normal/success) and disbursements had been recovered will accrue to the client.

The practitioner must account to their client for the balance of the capital and party and party costs.

Current case law comments

Morison AJ, in *Thulo* took the position on s 2 of the Act to imply:

‘The true function of a proviso is to qualify the principal matter to which it stands as a proviso - as to which see, for example, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 79 F - J and the cases there cited. In other words, a proviso taketh away, but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double – 100% more than – the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.

... The practitioner’s fee is limited, on a proper reading of the section, to (i) 25% of the amount awarded in the judgment, or (ii) double the normal fee of that practitioner, whichever is lower.’ (See para 51 and 52).

Morison AJ’s approach had a startling result that the client would receive more than the capital award.

By not allowing for an uplift or success fee over and above the normal fee the client was enriched at the expense of the practitioner under a s 2(1)(b) agreement.

Having regard to the approach in English law, the definition of ‘normal’ and ‘success’ fees, dealt with above and the recommendations by the Commission, I submit that it is not the total fee that is so limited, but only the ‘success fee’.

It is quite evident that any other approach would defeat the purpose of the Act in as far as making allowance for an ‘incentive’ to be paid to the practitioner willing to engage in speculative litigation on behalf of a client that would, otherwise, not have had the means to approach the courts.

The comments made by the Commission is explained in the following examples:

For purposes of the examples discussed, VAT was not included in the fee as per Molapelo DJP in *Masango*, as I am of the opinion that VAT is not a fee but a tax.

Example A – normal plus capped success fee approach (the Commission)

<table>
<thead>
<tr>
<th>Step 1: Calculating the fee (normal and success)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital:</td>
</tr>
<tr>
<td>R 208 456 (representing the capital settlement)</td>
</tr>
<tr>
<td>Normal fee:</td>
</tr>
<tr>
<td>R 86 830 (as taxed in accordance with the agreed normal fee tariff)</td>
</tr>
<tr>
<td>Plus success fee:</td>
</tr>
<tr>
<td>R 52 114 (25% of capital, which is lesser than double the normal fee)</td>
</tr>
<tr>
<td>Subtotal:</td>
</tr>
<tr>
<td>R 138 944 (total fees)</td>
</tr>
<tr>
<td>Plus expenses:</td>
</tr>
<tr>
<td>R 196 142</td>
</tr>
<tr>
<td>Total fees/expenses:</td>
</tr>
<tr>
<td>R 335 086</td>
</tr>
</tbody>
</table>

Example B – applying Morison AJ’s approach

<table>
<thead>
<tr>
<th>Step 1: Calculating the fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital:</td>
</tr>
<tr>
<td>R 208 456</td>
</tr>
<tr>
<td>Less success fee:</td>
</tr>
<tr>
<td>R 52 114 (25% of capital or two times the normal fee, whichever is lesser)</td>
</tr>
<tr>
<td>Subtotal:</td>
</tr>
<tr>
<td>R 156 342</td>
</tr>
<tr>
<td>Plus expenses:</td>
</tr>
<tr>
<td>R 196 142</td>
</tr>
<tr>
<td>Total fees/expenses:</td>
</tr>
<tr>
<td>R 248 256</td>
</tr>
</tbody>
</table>

Choosing between s 2(1)(a) or (b) agreement

In accordance with s 2(1)(b) a ‘success’ fee is normal fee, which has been increased by a pre-agreed percentage.

There is no other way of increasing the normal fee to the
increased or success fee other than by applying a percentage, as Mojapelo DJP, stated in the Masango case.

The increase, incentive, uplift or elevated normal fee may be increased by up to 100% to reach the ‘success’ fee.

The practitioner wishing to engage a client on speculative cases may thus charge an ‘uplift’ fee in addition to their normal fee subject to the statutory cap as per the Commission’s recommendations.

Unfortunately these types of agreements are the most contentious, as they need to balance the rights of the client and the practitioner equally.

The debate surrounding the correct interpretation of s 2(1)(b) agreements continues.

In most, if not all of the case law on the Act, the validity of a particular contingency fees agreement was addressed as in the Masango matter where the agreement was clearly invalid as it constituted a common law agreement.

However, in none of the current case law, clear guidance is given as to the approach to be taken on what constitutes ‘normal’ and ‘success’ fees.

In many of these cases it is acknowledged that our Act is derived from the English law, yet these judgments give a totally different approach to the interpretation of the Act.

I acknowledge that our judiciary is independent; however, in seeking direction, even the Commission’s recommendations are in line with the approach of the tried and tested English law approach on contingency fees.

Currently s 2(1)(a) agreements are a safer option as the Act clearly defines the practitioner’s right to draw a ‘higher’ uncapped fee, without the risk of being questioned by client or peer, as long as the fee is reasonable and does not amount to overreaching.

However, there is another alternative, by combining the two scenarios, for example, stipulating that in case of ‘partial success’ claims under R 1 000 000, s 2(1)(a) would apply, and in cases of ‘success’ in matters settled in excess of R 1000 000, a 2(1)(b) would apply.

**Conclusion**

Practitioners are currently left with having to engage in speculative litigation and having to decide between two different approaches either s 2(1)(a) or (b) with the latter placing the practitioner at an enormous risk, either financially and legally due to the lack of clear and concise guidelines.

I acknowledge that the client should be protected against potential abuses and for that reason guidance is given as to the qualification of what constitutes a reasonable fee and what should be regarded as overreaching, always subject to scrutiny by either the professional controlling body or the courts.

The fact is that the courts are conservative in their approach, to the extent that practitioners are actually being prejudiced to the benefit of their clients, is in stark contrast to the intention of contingency fee legislation.

In conclusion, by following the guidelines offered in terms of the English law and by applying the recommendations by the Commission, which were aimed at preventing exactly the challenges practitioners are facing today, the general principle is simply that in matters where a case is successful, the practitioner may charge a ‘success’ fee in addition to his ‘normal’ fee, subject to the statutory limitations and principle of reasonableness.

Gert Nel BProc LLB (UP) is an attorney at Gert Nel Inc in Pretoria.

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South Africa is internationally one of the most unsafe countries for road travel (see ‘South African road deaths vs the world’ https://businesstech.co.za, accessed 9-5-2018). Fourteen thousand of its citizens (38 per day) die on its roads and as many as an estimated 524 000 persons - based on annual hospitalisation figures and fatality rates – are annually injured in road crashes.

The Road Safety Annual Report 2017 published by the International Traffic Safety Data and Analysis Group and the International Transport Forum states at p 16 that out of 40 countries SA has the highest fatality rate per 10 000 vehicles (see http://dx.doi.org, accessed 9-5-2018).

Financial cost
In ‘Costs of crashes in South Africa – Research and Development Report August 2016’ by the Council for Scientific and Industrial Research (CSIR) and commissioned by the Road Traffic Management Corporation states that the 2015 cost to the South African economy is stated as R 142,95 billion equating 3,4% of Gross Domestic Product (GDP) (www.arrivealive.co.za, accessed 9-5-2018). These costs are calculated on the graph (on p 21) by the Road Traffic Management Corporation (RTMC) report at p ii.

According to GA Kumar, TR Dilip, L Dandon, and R Dandon in ‘Burden of out-of-pocket expenditure for road traffic injuries in urban India’ (2012) BMC Health Services Research 285 the pervasiveness of financial cost of road crashes is illustrated by a study in India where public spending on health is low. Significant ‘out-of-pocket expenses’ for the mostly impoverished communities are high – the average being 2,5 times more than average usual annual medical expenditure. Transport costs, food, etc., was equal to the average medical expenditure for hospitalisation due to any other illness, creating a double burden on households.

Social and intangible consequences of road crashes
A study conducted by the European Federation of Road Traffic Victims (FEVR) indicated that immediate and long-term psychological, practical and legal support was essential. In general, rehabilitated and disabled victims, victims and surviving family members were satisfied with the medical and health care received, but most felt that criminal proceedings, court proceedings and insurance issues were unsatisfactory. Psychological consequences of survivors and family members, included: insomnia; headaches; nightmares and general health complaints. Survivors reported increased use of medication (especially tranquillisers and sleeping tablets) as well as increased consumption of alcohol (see European Federation of Road Traffic Victims (FEVR) 1997 ‘Impact of road death and injuries Proposal for improvements’, European Commission, Geneva, Switzerland.)

Road safety management
The RTMC is responsible for road safety in SA and operates under the auspices of and reports to the Department of Transport.

The Department of Transport in cooperation with the Road Safety Advisory Council have devised a National Road Safety Strategy for the period of 2015 to 2020, which deals with practical issues, such as -

- million vehicle checks a month project;
- re-energise AA brand – with RTMC;
- Administrative Adjudication of Road Traffic Offences implementation;
- implement periodic vehicle testing;
- regulation of the driving school industry;
- learner licences for matric learners; and
- improved professional driver permit training and qualification.
Further strategies, such as, road safety management, infrastructure, etcetera echo the government's international road safety obligations.

These strategies are devoid of unequivocal, conscious concentrated and concerted actions focused on law enforcement. The building of capacity for law enforcement is not mentioned, which is central to the Australian Road Safety Action Plan, which emphasises the reduction of drunk driving and the enhancement of national law enforcement (http://roadsafety.gov.au, accessed 11-5-2018). For example, since the introduction of random breath testing in Australia in 1982, fatalities decreased from a high of 28,9 per 100 000 of population in 1970 to 4,1 in 2014. In 2017 the New South Wales (NSW) Government spent AUD$282 million on road safety. The Australian Government is responsible for regulating safety standards for new vehicles, and for allocating infrastructure resources, including for safety, across the national highway and local road networks (https://infrastructure.gov.au, accessed 11-5-2018). In SA Road Safety is a national responsibility, for example, the 2015/2016 Gauteng Provincial transport budget did not make any provision for road safety. Department of Roads and Transport was allocated R 6,6 billion for its core programmes. This was allocated to five programmes, namely, Administration (R 318 million); Transport Infrastructure (R 2,26 billion); Transport Operations (R 2,19 billion); Transport Regulations (R 281 million) and Gautrain (R 1,5 billion) (www.polity.org.za, accessed 23-5-2018).

A concerted effort to the active promotion of road safety in SA is mostly only visible during peak holiday periods, such as Easter and Christmas. The results of these periods are usually touted as being a positive outcome of such campaigns. This strategy is misconceived. First, fatalities occur throughout the year at a rate of 14 000 per annum. This figure translates to 1 167 deaths per month or 39 deaths per day. During the 2017 December holiday period 1 527 South Africans lost their lives. Of these 37% were pedestrians (see Paul Herman 'Pedestrian deaths biggest contributor to festive season road death toll', www.news24.com, accessed 11-5-2018). The festive season started with the schools closing on 6 December 2017 and ended when they re-opened on 17 January 2018, which is a period of 42 days. The corresponding previous period was from 7 December 2016 to 11 January 2017 or 35 days. The death rate for the 2016/2017 festive season was 1 714 (49 per day) and for 2017/2018 1 527 (36 per day). When the period of the festive seasons for the periods compared are equalised to 35 days, the fatalities during 2017 reduces to 43 per day - a positive outcome of six fatalities. This outcome does not consider the comparative traffic densities for the periods compared, which were not revealed in the government’s press releases. Against the six lives saved during the 2017/2018 festive season, 12 837 South Africans lost their lives in the 11 months preceding the 2017/2018 festive season. Second, most fatalities occur within a 60 km radius from the deceased’s residence (see CM Leveau and MN Vacchino ‘Residence place as a risk factor in different types of fatal car accidents’ 2015 22(2) International Journal of Injury Control and Safety Promotion 95 www.tandfonline.com, accessed 11-5-2018 and see P Lehohla ‘Road Traffic Accident Deaths in South Africa, 2001 - 2006: Evidence from death notification’ www.statssa.gov.za, accessed 11-5-2018). This is because more kilometres are travelled near a road crash victim’s work and residence compared to festival season and vacation journeys.

The Victoria, NSW, zero tolerance approach was adopted by the KwaZulu-Natal (KZN) provincial government in 1998 with limited success. Reasons for the failure have been researched and were given as the limited success in the transfer of skills, knowledge and understanding of the theory and practice of the Victoria’s Road Safety Strategy leading to the conclusion that the Victoria Solution cannot be transposed into foreign environments without significant review and adaptation based on local expectations and conditions. Nothing has transpired since and KZN road fatalities went into serious regression since 2002. No recent evaluation could be found but the 2016 RTMC fatality figure for KZN is given as 2 715 (see D Myers ‘The KwaZulu-Natal Road Safety Project five years on: Success or myth? An External evaluation’ https://repository.up.ac.za, accessed 11-5-2018).

The reasons advanced for South African road fatalities are rampant corruption in the obtaining of driver’s licences, inadequate and improper driver testing, bribery of traffic officials, ineffective and unethical traffic law enforcement (see Justice Project South Africa ‘Road Safety’ www.jp-sa.org, accessed 11-5-2018).

From the 2015/2016 RTMC Traffic Offence Survey report, indications are that compared to speed checking, offences such as ignoring barrier lines and dangerous overtaking were by far offences that were not adequately policed (speed checking amounted to 270 000 enforcement actions. Combined dangerous overtaking (inconsiderate driving) and ignoring barrier lines to 105 000 actions (see Traffic Offence Survey December 2016 www.rtmc.co.za, accessed 11-5-2018). Common causes of road traffic collisions, include -

• speeding;
• distraction through use of cell phones;
• dangerous overtaking;
• failing to indicate;
• failure to use seat belt or crash helmet;
• driving without taking weather conditions into account;
• driving while intoxicated;
• tailgating; and
• unsafe infrastructure.

Constant and effective law enforcement has the potential to produce effective and immediate positive results due to the correlation between the number of vehicles involved in collisions and traffic offences (see RTMC 2011 Road Traffic Report www.arrivealive.co.za, accessed 11-5-2018).

Another contributory reason for the lack of road safety may be the insufficient number of traffic officers (usually blamed on lack of funding). Nationally there are only 18 000 officers when 100 000 are required (see S Sesant ‘Dire shortage of traffic officers’ 23-11-2016 accessible at: www.iol.co.za, accessed 11-5-2018).

Of course, road safety is not only concerned with law enforcement. Other aspects such as infrastructure, safe vehicles, road user behaviour and post-crash care are relevant and should be separately thoroughly investigated.

Road safety funding and related spend
It is obvious that to be effective the RTMC must be adequately funded. A comparison between the RTMC (preven-
Road safety funding and related spend

Right to road safety
Section 11 of the Constitution provides that: ‘Everyone has the right to life’, while s 12(1)(c) states that everyone has the right to freedom and security of the person, which includes the right ‘to be free from all forms of violence from either public or private sources’. Section 21(1) guarantees the right to freedom of movement. I submit that the conjunctive reading of these sections lay the basis for a right to live free from the threat of death and debilitating injury. It, in my view, particularly obligates the state to ensure that its citizens are not exposed to violence, which originates from the use of roads.

Section 12(1)(c) underpins s 3 of Universal Declaration of Human Rights of the United Nations. This international obligation of governments has seen the establishment of the rights of the child, the rights of women, the rights of workers, and the rights of people in development in general. These rights have further been elaborated and substantiated by international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Declaration on the Elimination of Violence Against Women; and the Employment Policy Convention (Convention No. 122) (see D Mohan ‘Safety as a Human Right’ Health and Human Rights Harvard University 2003 161 and United Nations, International Human Rights Instruments www.uohchr.org, accessed 11-5-2018). These rights and their extension, lay the basis for the recognition of a right to safety (Mohan in Mike Mitke ‘WHO declares the individual’s right to be safe’ (2002) 17 Journal of the Am-

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Canadian Medical Association 306.) This notion of a right to safety was translated by the Delhi Declaration into material form and explicitly stated by the Montreal Declaration at the sixth World Health Organisation Conference on Injury Prevention and Control held in Montreal in May 2002. Section 1 states that safety is a fundamental right and is essential for the attainment of health, peace, justice and wellbeing. Section 11 places a responsibility on states to respect and protect the right to safety and to develop mechanisms to protect the people’s right to safety against any violation by agencies, including corporate bodies.

Based on the Constitution and internationally accepted principles, I submit that South Africans have a right to live free from debilitating injury and threats, which impinge on their right to life. In the context of road travel this right translates into a governmental obligation to protect its citizen’s right to safety. Or stated differently, to take practical, proactive and efficient action to ensure effective road safety.

Conclusion
The economic costs of traffic crashes amount to a staggering R 142,92 billion per annum. Although the South African government has framed an impressive and credible road safety strategy its practical implementation seems to be inefficient and/or ineffective. Judged on the level of its spending on road safety, its political will to effectively grapple with the pressing road safety issue is not demonstrated. The lack of adequate road safety and its consequences is costing the country billions and unduly exposing its citizens to death and debilitating injury which impinge on their constitutional right to life and right to be free from all forms of violence from either public or private sources. In this regard the citizens of this country have a constitutional right to road safety and the consequent drastic reduction of road crashes to protect its citizens who are involved in road crashes and of which a sizeable proportion are the poor against the likelihood of violence emanating from their use of South African roads. After all, this in completely in line with the government’s overarching policy of ‘A better life for all’. Ignoring its duty in this regard can hardly be said to be the hallmark of a caring government.

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A ‘without prejudice’ letter breathes new life into prescribed matter

By Herbert James David Robertson

According to South African law, and more specifically in the case of ABSA Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA), one exception to without prejudice communication being inadmissible to court is correspondence amounting to an acknowledgement of insolvency. The rationale behind the exception being, that such an admission, even if made in confidence, cannot be considered to be privileged as public policy dictates that liquidation or insolvency proceedings are a matter, which by its very nature, involve the public interest.
The question posted to the Supreme Court of Appeal (SCA), during May 2017, in KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd (2017) 3 All SA 739 (SCA) was whether a second exception to without prejudice rule is recognised in South African law. The so-called second exception refers to where inadmissibility would not apply to without prejudice communication when the communication is solely relied on to prove an acknowledgement of liability, which would have the effect of interrupting prescription in terms of s 14 of the Prescription Act 68 of 1969.

I thus deal with two conflicting pieces of public policy. On the one hand there is the prescription principle, which has long been accepted in South African law, as it brings with it certainty to debtors in that a debtor can have confidence in the fact that a debt is no longer payable, as it has been extinguished by prescription. On the other hand, the working of the without prejudice rule offers the opportunity to avoid litigation and resolve any difference amicably with full and frank discussion without the fear, that should negotiation fail, any admission made will not be used against said party in litigation. Already in 1978, Trollip JA quoted Lord Mansfield, in his judgment of Naidoo v Marine & Trade Insurance Co Ltd 1978 (3) SA 666 (A) stated the true purpose of the without prejudice letter is to ‘buy their peace’.

Foreign law

The case that best deals with this question of law is the matter of Bradford & Bingley PLC v Rashid UKHL [2006] 4 All ER 705. This matter concerns a respondent who had owed money, after mortgaging property to the appellant, writing a letter wherein he admitted that he could not settle the debt, but acknowledged that he indeed owed the money to the appellant. The court found that the admission was not made without prejudice to rights. Lewis JA in the KLD Residential case referred to the Bradford case where Lord Mance found that should the exception to the without prejudice rule be applied it would lead to parties not being able to speak freely as they would have to ‘monitor every sentence to avoid making an acknowledgment of liability that would subsequently be admissible in litigation.’

It is noteworthy to mention that the court in Bradford referred to the South African decision of Kapeller v Rondalia Verkeeringskorporasie van Suid-Afrika Bpk 1984 (4) SA 722 (T) wherein the court clearly distinguished between open admissions made and negotiations during without prejudice communications.

In essence the court ruled in the Bradford case, as summarised in the KLD Residential case, that it’s in the public interest that a debtor who acknowledges his debt “and so induces his creditor not to have immediate resort to litigation,” should not be able to claim that the debt has prescribed because “the creditor held his hand”.

The new SCA precedent

The facts of the KLD Residential case are that KLD had to market and sell the residential property of the respondent, KLD Residential (then trading as Seeff). The appellant was alleged to have sold 99 units of the respondent during 2008 and 2009 and, thereafter, in 2013 claimed commission for same in an amount exceeding R 2 million.

A special plea of prescription was raised by the respondent. In response the appellant claimed that the claim could not have prescribed as a without prejudice letter, transmitted by the respondent’s attorney in 2011, had the effect of interrupting prescription and thus cause prescription to start to run afresh.

The court now had to decide whether an acknowledgment of debt contained in a without prejudice letter could interrupt prescription. The court a quo had answered this question in the negative. The SCA, in its decision of 2017, held that it was bound by the Naidoo decision. However, the SCA came to the opposite finding and decided that the appeal was upheld with costs.

In essence the court found that the content of a without prejudice letter would be admissible, but solely for the purposes of interrupting prescription as the remainder of the content of the letter, specifically the quantum of the debt concerned, would remain protected.

The reason the court offered in support of its finding is that ‘there is nothing to prevent the parties from expressly or impliedly omitting it [the so-called second exception] in their discussions.’ The court continues by stating that ‘the debtor should not be permitted to escape the obligation because the admission was made in the course of negotiations to settle a dispute.’

This in effect means that one may still engage with the opposing party in without prejudice communication only if both parties, prior to any negotiation, agree that the exception regarding admissions of liability and its effect on prescription, will find application of their settlement talks.

This, I believe, to be an unfortunate situation the South African law profession now finds itself in. Surely a reasonable person or attorney would never make such a concession prior to entering negotiations. This would be detrimental to the client’s case and it can be argued that this might even be construed as professional negligence on the attorney’s part, as this concession would effectively exclude prescription from ever taking effect.

The court further found that it was not a question of whether the without prejudice rule trumps the prescription but rather recognising that both prescription and the without prejudice rule protect public interest and in applying the exception the courts are ensuring that both interests are properly served.

How to negotiate a settlement without causing the interruption of prescription?

A practical solution would be to contact the creditor or their attorney and request that they provide a settlement offer. The debtor will then either accept the offer, which would bring an end to any litigation or prevent the institution of a claim, had same not yet been issued, or reject the offer which action can never be construed to be an acknowledgement of debt.

The problem with the possible solution alluded to above is that one does not simply accept the first offer but rather engages in further negotiations in an attempt to best serve the interest of the client. The opposing party may also elect not to make any settlement offer, leaving the client in an unfavorable position.

Another possible solution would be to state that any reference made to a claim, does not amount to the recognition of the validity of such a claim and may not be constructed to be an acknowledgement of debt, but is merely done for the purposes of negotiating settlement. This however, has its own risks since despite such a deliberate and express statement, the content of such communication may later be construed to amount to some kind of acknowledgement.

I would think that the court was referring to this very instance when it noted, in its decision of KLD Residential, that the application of this exclusion to the without prejudice rule will always be governed by the facts.

What these facts are, unfortunately still remains to be proven.

- See law reports ‘Prescription’ 2016 (Dec) DR 40 for the WCC judgment and 2017 (Dec) DR 44 for the SCA judgment of the KLD Residential case.

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Reinstatement except when ‘not reasonably practicable’—a discussion of s 193(2)(c) of the LRA

Reinstatement:  
☐ Practicable  
☐ Not practicable

By Tamsanqa Mila

The primary remedy for an unfair dismissal is reinstatement or re-employment, because of the importance of job security in our country. Reinstatement for a dismissed employee means returning to the position the employee held at the time of the dismissal. Re-employment may place the employee into a different position, other than the one held at the time of dismissal. For many employers facing the reinstatement of an employee they have dismissed is unpalatable and will seek to persuade the Commission for Conciliation, Mediation and Arbitration (CCMA) or Labour Court (LC) that it is not practicable to do so. There is therefore, contestation about the circumstances in which this may occur.

There are exceptions to the remedy of reinstatement (or re-employment), which are set out in s 193(2) of the Labour Relations Act 66 of 1995 (LRA). These exceptions are:

(a) the employee does not wish to be re-instated or re-employed;

(b) if the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure'.

This article deals with the circumstances in which the CCMA (including, bargaining councils) and our courts have found it reasonably practicable to re-instate and when they have not.

The term ‘not reasonably practicable’ is not defined in the LRA, but a recent Labour Appeal Court (LAC) decision has provided some clarification. In Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others (2016) 37 ILJ 2313 (LAC) at para 11, the court held that: ‘The object of s 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to re-instate; for instance, where the employee’s job no longer exists, or the employer is facing liquidation, relocation or the like. The term ‘not reasonably practicable’ in s 193(2)(c) does not equate with “practical”... It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile.’

Reinstatement must also be shown to be fair, when considering the competing interests of employees and employers. In DHL Supply Chain (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Others [2014] 9 BLLR 860 (LAC), the LAC held that ‘Labour Relations Act 66 of 1995 prescribes reinstatement unless it is proven to be intolerable or impracticable (section 193(2)(b) and (c)). The evaluation of this question is clinically objective, having regard to the balance of fairness between employer and employees and a decision is the outcome of the exercise of a discretion ... A decision in terms of this section is therefore, in part, a value judgment and, in part, a factual finding made upon the evidence adduced about the unworkability of the resumption.’

To succeed in a claim that the resumption of the employment relationship is not reasonably practicable, the employer has the onus to adduce evidence to prove that submission. The CCMA Guidelines on Misconduct Arbitration, expound further at para 115 with '[t]his criterion [not
reasonably practicable] will be satisfied if the employer can show that reinstatement or re-employment is not feasible or that it would cause a disproportionate level of disruption or financial burden for the employer.’

What can be seen from the cases and guidelines is that reinstatement will be applied as the primary remedy on a finding of an unfair dismissal if it is fair, practicable, appropriate and feasible. It should not be applied if the converse is true — if the reinstatement would be unfair, disruptive, burdensome, intolerable or impracticable for the employer.

Noting the above, the question the arbitrator (or the court) has to answer is: Is it feasible for the employer to re-engage the employee and re-integrate them back into the workforce or is reinstatement potentially futile?

The courts have dealt with the applicability of s 193(2)(c) in the following circumstances:

• replacement of one employee by another;
• changes in the identity of the employer;
• the nature of the misconduct; and
• delays in litigation.

This article will discuss these circumstances.

Replacement of an employee by another

Often in CCMA arbitrations, employers give evidence that they cannot reinstate an employee because they have filled that employee's position. This is persuasive when the arbitrator — on a finding of unfairness — considers the question of the appropriate remedy, and may in light of that evidence decide instead on compensation. However, this argument does not always hold water, and the LC when faced recently with an urgent application to interdict an impending appointment, in the face of an unfair dismissal arbitration at the CCMA warned employers of the perils of pursuing a replacement (regardless of the outcome of the dispute in progress) (see Mashaba v SA Football Association (2017) 38 ILJ 1668 (LC)).

Mr Mashaba was the head coach of the South African National Football team. He was dismissed allegedly after a poor year at the helm, and referred an unfair dismissal dispute to the CCMA. He feared that if SAFA replaced him before the conclusion of his CCMA case the commissioner would find it reasonably impracticable to reinstate him. In other words, assuming that he was successful in proving a case of unfair dismissal, the commissioner would not award reinstatement simply because he had been replaced.

Lagrange J summarised the primary right of an employee to be reinstated on a finding of unfairness in para 13 as follows: '[A]n order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement. That is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position.’

Therefore, the mere replacement of an employee by another during the litigation process does not render the remedy of reinstatement reasonably impracticable.

Lagrange J goes on to say that employers should be more proactive. He stated at para 10 that ‘if the employer does not take suitable steps in its contract with the replacement it ought to realise that it runs the risk that it will be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement’s contract if the former incumbent is reinstated.’

If an employer has run the risk and it has materialised the employer is now faced with two employees in the post (the new appointment and the reinstated employee) the CCMA guidelines (para 115) suggest that retrenchment of the new appointee may be the solution for the employer on the grounds of their operational requirements.

Section 197 transfer of a business as a going concern

In the transfer of a business, the court has held that employees who refuse to move to the new employer, and then claim an unfair dismissal, will not meet with an order of reinstatement back to the old employer as it is 'not reasonably practicable'. In Halgarg Properties CC v Wembley Investments (Pty) Ltd. The sale triggered the provisions of s 193(2) of the LRA, reinstatement would not follow as a matter of course.

Another v Ace Wholesale (Pty) Ltd and Others [2015] 7 BLLR 683 (LC)

The nature of the misconduct

In some cases the nature of an employee’s misconduct is unacceptable and despite a finding that a dismissal was substantively unfair the courts applied s 193(2)(c) to deny the primary remedy of reinstatement. In a recent case, SA Revenue Service v Commission of Conciliation, Arbitration and Mediation and Others (2017) 38 ILJ 97 (CC), the Constitutional Court (CC) highlighted an arbitrator’s responsibility to consider the provisions of s 193(2) when deliberating on the appropriateness of the remedy of reinstatement in those circumstances. In the Sars case an employee pleaded guilty to using the ‘K’ word and the chairperson of the disciplinary hearing sanctioned him with a final written warning. Sars overruled that sanction and imposed dismissal. The unfair dismissal dispute wound its way through the CCMA and courts and was ultimately heard in the CC. Mogoeng CJ held that “After concluding that Mr Kruger’s dismissal was unfair, the arbitrator immediately ordered his reinstatement without taking into account the provisions of s 193(2). She was supposed … to determine whether this was a case where reinstatement is precluded. … By ordering SARS to reinstate Mr Kruger the arbitrator acted unreasonably. She also does not appear to have been mindful of the fact that in terms of s 193(2) of the LRA, reinstatement would not follow as a matter of course.’ A failure by a commissioner to consider s 193(2)(c) when deliberating on the appropriateness of a remedy, in circumstances in which the misconduct is grave or contrary to public policy, thus rendering such a remedy ‘not reasonably practicable’ is likely to give rise to an award vulnerable on review.

When faced with the limitations of reinstatement in s 193(2) as a remedy to countenance the unfair dismissal, the alternative remedy is compensation, up to a maximum of 12 months for an ‘ordinary’ unfair dismissal and 24 months for
Delays in prosecuting a matter

Delays in finalising litigation may be a sufficient justification to deny an employee the primary remedy of reinstatement, because it would not be reasonably practicable to do so. In the case of Republican Press (Pty) Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers’ Union and Others (2007) 28 ILJ 2503 (SCA) the SCA considered the appropriateness of the remedy of reinstatement in the face of a six year delay. The question before the court was whether the selection criteria used by the employer in a retrenchment process was fair and objective. The court found in favour of the employees, however, when deciding on the appropriate remedy, it considered the fact that the employer had embarked on further retrenchments since the employee’s dismissal and in addition, some of the company’s operations had been restructured. The SCA held that the remedy of reinstatement was inappropriate and ordered 12 months compensation instead.

In the case of protracted litigation the employer is required to adduce evidence as to why reinstatement is not the appropriate remedy. In the absence of such evidence, the courts have held that s 193(2)(c) is not applicable. In Visser v Mopani District Municipality and Others ([2012] 3 BLLR 266 (SCA) the matter took six years to finalise. The SCA held that in the face of systemic delays it was unjust to punish the employee who was completely blameless, and that he was entitled to be reinstated.

The principle seems to be that reinstatement, despite delays, may still be ordered provided that it is still practicable for the employer to take back the employee, and the employer has failed to lead evidence as to why it would be unduly onerous to do so.

Conclusion

Noting that reinstatement is the primary remedy – on a finding of an unfair dismissal – in line with the LRA’s principle of security of employment, the courts are likely to order that remedy unless persuaded by an employer that it would not be reasonably practicable. The term ‘not reasonably practicable’ means more than inconvenience, and requires evidence of compelling operational burden as demonstrated in the Halganyg Properties, Republican Press and Maepe cases.
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Immigration Law in South Africa

F Khan (Editor)

This book outlines the existing law applicable to foreigners as reflected in the Immigration Act, the Citizenship Act, the Domicile Act and the Extradition Act as at 31 July 2017. The book also draws attention to the policy shifts by the South African government in the White Paper on International Migration, the Border Management Act, and the Discussion Paper on the repositioning of the Department of Home Affairs within the security cluster.

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T W Bennett, assisted by A R Munro and P J Jacobs (eds)

Ubuntu: An African Jurisprudence examines how and why South African courts and law-makers have been using the concept of ubuntu over the last thirty years. Included in this work are discussions of two traditional institutions that provide model settings for the realisation of ubuntu: imbizo, national gatherings consulted by traditional rulers to decide matters of general concern, and indaba, a typically African process of making decisions based on the consensus of the group.

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April 2018 (2) South African Law Reports (pp 327 – 655);
December [2017] 4 All South African Law Reports (pp 605 – 928);
February [2018] 1 All South African Law Reports (pp 317 – 619);
March [2018] 1 All South African Law Reports (pp 621 – 880);
April [2018] 2 All South African Law Reports (pp 1 – 309);
2018 (2) Butterworths Constitutional Law Reports – February (pp 119 – 258);
2018 (3) Butterworths Constitutional Law Reports – March (pp 259 -385)

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

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Abbreviations

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LC: Labour Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Limitation on duty to exhaust internal remedies: Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that no court or tribunal shall review an administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted. The section also provides that a court or tribunal must, if it is not satisfied that any internal remedy has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review. The section goes further to provide that a court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

The question whether there were exceptional circumstances, which exempted the person concerned from the obligation to exhaust an internal remedy arose in Basson v Hloa and Others (2008) 1 All SA 621 (SCA) where the appellant, Basson, was a cardiologist practising in the Western Cape. In 2007 he was charged with, and found guilty of, unprofessional conduct by a professional conduct committee (the Committee) of the third respondent Health Professions Council of South Africa (the Council) for participating in chemical and biological warfare research during his employment with the South African Defence Force in the 1980s. Apart from a retired judge the other members of the Committee were the first respondent Professor Hugo and Professor Mhlanga. When the disciplinary hearing entered the second stage of determining appropriate penalty to be imposed, the appellant asked for recusal of Professors Hugo and Mhlanga on the basis that Professor Hugo had an interest in the subject matter of the inquiry and apprehension of bias in the case of both of them. The recusal request was refused by the Committee. In terms of the rules of the Council made under the Health Professions Act 56 of 1974 (the Act) the next step to have been taken after refusal of recusal was for the appellant to have appealed to the ad hoc appeal committee of the Council. Instead of doing so the appellant approached the High Court for an order reviewing and setting aside the decision of the Committee. The review application was dismissed, the GP holding that the appellant had to exhaust his internal appeal remedy before an ad hoc appeal committee first. As a result the appellant appealed to the SCA against the decision of the High Court.

The appeal was upheld with costs to be paid by the Council. The matter was remitted to the High Court to decide the review application. Shongwe AP (Seriti, Swain JJA, Mkgohloa and Schippers AJJA concurring) held that it was settled law that the impugned decision constituted administrative action as defined in PAJA. Therefore, an internal remedy had to be exhausted prior to judicial review, unless the appellant could show exceptional circumstances to exempt him from that requirement. Factors to be taken into account in deciding whether such circumstances existed were whether the internal remedy was effective, available and adequate. An internal remedy was effective if it offered a prospect of success and could be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. It was available if it could be pursued without any obstruction, whether systemic or arising from unwarranted administrative conduct.

In the present case the internal remedy in s 10(3) of the Act was an appeal in the narrow sense as it did not include the power to set aside the proceedings before the Committee and, was therefore, inadequate. The internal remedy was ineffective and inadequate. It did not offer a prospect of success and could not redress the appellant’s complaint. Furthermore, it could not be implemented in accordance with the relevant principles and values of administrative justice of the Constitution.

In a separate concurring judgment, Swain JJA, held that the High Court erred in classifying the claim of bias as an issue, which was amenable to an appellate jurisdiction by the ad hoc appeal committee. To reduce the inquiry to whether the decision by the Committee in refusing the application for recusal was right or wrong ignored the judicial nature of claim of bias, as well as the legal effect on the proceedings of the Committee if the claim were to be upheld. The internal remedy of an appeal to the ad hoc appeal committee did not provide an available, effective and adequate remedy to protect the appellant’s constitutional right to a fair and impartial hearing before the Committee. The appellant would suffer irreparable harm if he was unable to secure immediate judicial consideration of his claim of bias on the part of the Committee. In addition, the ad hoc appeal committee was not competent to adjudicate the issue of bias because it lacked the necessary authority to grant the type of relief requested, namely setting aside the proceedings on the ground that they were a nullity.

THE LAW REPORTS

April 2018 (2) South African Law Reports (pp 327 – 655);
December [2017] 4 All South African Law Reports (pp 605 – 928);
February [2018] 1 All South African Law Reports (pp 317 – 619);
March [2018] 1 All South African Law Reports (pp 621 – 880);
April [2018] 2 All South African Law Reports (pp 1 – 309);
2018 (2) Butterworths Constitutional Law Reports – February (pp 119 – 258);
2018 (3) Butterworths Constitutional Law Reports – March (pp 259 -385)

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

Mechanism for removal of the President of the country: Section 89(1) of the Constitution provides that the National Assembly (NA), by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of a serious violation of the Constitution or law or due to serious misconduct. Although it has the power to remove the President the NA has not put in place a mechanism in terms of which the removal can take place. However, the alternative mechanism of an ad hoc committee, which was not created specifically to deal with removal of the president and can be used for a number of purposes, is available to achieve the removal.

In Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC), the applicants, the Economic Freedom Fighters (EFF), United Democratic Movement (UDM), Congress of the People (COPE) and the Democratic Alliance (DA), all being opposition political parties, directly approached the CC seeking several orders. In the main application, the applicants sought an order declaring that the NA had failed to put all appropriate mechanisms and processes in place to hold former President Jacob Zuma (the President) accountable for violating the Constitution in failing to implement the recommendations contained in the report of the former Public Protector relating to non-security upgrades at his private residence in KwaZulu-Natal (the Nkandla saga). The applicants also sought an order directing the respondent NA, represented by the Speaker as a nominal respondent, to put in place the requisite processes and mechanisms in place to hold the President accountable, as well as one directing the NA to convene a committee of Parliament or other appropriate independent mechanism to conduct an investigation into the conduct of the President regarding the question whether he had committed serious violation of the Constitution or the law. The application was a sequel to an earlier decision of the same court in Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) (the EFF 1) (see ‘Constitutional law’ 2016 (Aug) DR 36) in which it was held that the President had violated the constitution by failing to uphold, defend and respect it when he failed to implement the recommendations of the Public Protector.

The court held that it had exclusive jurisdiction to hear the application and that by failing to make rules regulating removal (impeachment) of the President in terms of s 89(1) the NA was in violation of its constitutional obligation. The NA was accordingly ordered to make such rules without delay. The NA and the President, the second respondent who did not participate in the proceedings, were ordered to pay costs.

Reading a majority decision Jafta J (Cameron, Froneman, Mhlantla, Theron JJ and Kathree-Selitoane, Kollapen AJJ concurring while Zondo DCJ, Mogoeng CJ, Madlanga J and Zondi AJ dissented) held that the existing ad hoc committee rules of the NA did not cater specifically for impeachment proceedings envisaged in s 89(1). The power to remove the President from office was available to the NA only if one of the listed grounds was established, none of which was defined in the Constitution. Since the determination of those issues fell within the exclusive jurisdiction of the NA, it alone was entitled to determine them. That meant that there had to be an institutional predetermination of whether there was a serious violation of the Constitution or the law. Therefore, any process for removing the President from office had to be preceded by a preliminary inquiry during which the NA determined that a listed ground existed. Without rules defining the entire process it was impossible to implement s 89. The section implicitly imposed an obligation on the NA to make rules specially tailored for an impeachment process therein contemplated, which the NA failed to make. The ad hoc committees did not constitute a mechanism contemplated in the section.

In a dissenting judgment Zondo DCJ held that although the NA had not put in place a mechanism that was specially tailored for s 89, it had put in place a mechanism that could be used effectively for the removal of the President in terms of the section. That mechanism was one of ad hoc committee. In a further dissenting judgment Mogoeng CJ held that the majority judgment was a textbook case of judicial overreach, a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament. When all the information or evidence necessary to resolve any issue was already well established, available or known to decision-makers (as was the case in the present matter due to the findings of the court in the EFF 1 case) embarking on an investigation or inquiry, just because the evidential material was documented or recorded, would be an austerity or sheer waste of resources. There was no justification for the inflexible position to the effect that the grounds for impeachment should always be established before the motion to remove the President from office was debated and voted on.

Delegation of powers – suspension of head of department: Section 38 of the Public Service Act 103 of 1994 (the Act), which has since been repealed by s 12 of the Public Service Amendment Act 30 of 2007, provided that the President of the country had power to undertake and manage the appointment and career incidents of Heads of National Departments and organizational components, which power could be delegated to ministers.

The application of the above provisions was dealt with in Apleni v President of the Republic of South Africa and Another [2018] 1 All SA 728 (GP) were the applicant Apleni was head (Director-General) of the department of Home Affairs. In 2007 the Minister of Home Affairs placed him on ‘precautionary suspension’. Aggrieved by this the applicant approached the High Court by way of urgent application in terms of which he sought to have the suspension declared unconstitutional, invalid and of no force and effect. It was alleged that the minister had no authority to suspend him. Fabricius J held that where allegations were made relating to abuse by a minister or other public officials, which could impact on the public purse, the relevant relief ought normally be urgently considered. Section 12 of 2007 Amendment Act pro-
vided that the appointment and other career incidents of Heads of Department that shall be dealt with by the Presi-
dent. That was not the case in the instant matter where it was common cause that no delegation of authority by the President to the minister took place. The purported letter written by former President Thabo Mbeki in 1999 in terms of which he delegated authority to ministers was an execu-
tive act and accordingly had to comply with the provisions of s 101(1) of the Constitu-
tion. There was no evidence that the minister signed such delegation or that it was signed by a Cabinet member as envisaged by the section. For that reason there was no lawful delegation in terms of s 101(1)(a). The purported delegation was in any event rendered ineffective by the repeal of the provisions of the Act. Accordingly, the minister had no lawful authority to suspend the applicant.

Courts

Jurisdiction of the LC to de-
clare legislation unconstitutional: Section 38(2)(b) of the Public Service Act 103 of 1994 (the Act) provides that if an employee has in respect of their salary been overpaid, an amount equal to the over-
payment shall be recovered from them by way of deduc-
tion from their salary of such instalments as the relevant accounting officer may deter-
mine if they are in the service of the state. In Public Servants Associationobo Ubogu v Head, Department of Health, Gauteng and Others 2018 (2) SA 365 (CC); 2018 (2) BCLR 184 (CC), the respondent De-
partment of Health, Gauteng Province, relied on the sec-
tion to unilaterally, without agreement with the affected employee, Ms Ubogu, to court order, to deduct an amount allegedly owed to it by the employee, a member of the applicant trade union, the Public Servants Association. That was after Ms Ubogu, a chief executive officer of a hospital in Tshwane, had been transferred to a hospi-
tal in Johannesburg in 2010 and given the position of a clinical manager: Medical and put on a salary scale of grade 12. Five years later, and in 2015, it was established that Ms Ubogu’s correct position was clinical manager: Allied, which carried a salary scale of grade 11. As a result she a-
legedly received overpayment in the amount of R 675 000. The Department unilat-
erally resorted to self-help and started deducting instal-
ments from Ms Ubogu’s sal-
ary without agreement with her or court order.

The LC held that the De-
partment acted unlawfully in resorted to self-help and de-
clared the section unconsti-
tutional. The present application was for confirmation of the order of invalidity of the section, as well as an appeal against the order of the court. The two were heard together after the Chief Justice directed that they be consolidated into one. The CC confirmed the order of invalidity of the section and remitted the dispute about money allegedly owed by Ms Ubogu to the LC for ventilation. The Minister for Public Service and Admin-
istration, under whom the Act fell, was ordered to pay costs.

The majority judgment was read by Nkabinde ADCJ who held that in terms of s 151(2) of the Labour Relations Act 66 of 1995 (the LRA) the LC’s inherent powers and stand-
ing were equal to those of the High Court, it being a court of similar status as the High Court. That being the case it had power to make an order concerning the constitutional validity of an Act of Parlia-
ment and grant an effective remed[y] to safeguard against the alleged violation of em-
ployees’ rights, including the right to fair labour practices.

Although s 38(2)(b) of the Act was a statutory mech-
anism to ensure recovery of money wrongly paid to an employee out of the state coffers, the provision gave the state free rein to deduct whatever amounts of money allegedly wrongly paid to an employee without recourse to a court of law. The deduc-
tions in terms of that provi-
sion are an example of self-help, the taking of law by the state into its own hands and enabling it to become the judge in its own cause, in viola-
tion of s 1(c) of the Consti-
tution. By aiding self-help, the impugned provision allowed the state to undermine judi-
cial process, which required disputes to be resolved by law as envisaged in s 34 of the Constitution. The latter section not only guarantees access to courts but also safe-
guarded the right to have a dispute resolved by the appli-
cation of law in a fair hearing before an independent and impartial tribunal or forum.

In a dissenting judgment, Jaftha J held that the LC lacked jurisdiction to declare the im-
pugned provisions of the Act invalid. The power of the LC to declare something uncon-
stitutional was contained in s 157(2) of the LRA. That pow-
er was limited to the consti-
tutionality of executive acts, administrative acts or com-
duct or threat to commit any of those acts. The list did not include the constitutionality of Acts of Parliament.

Education

Liability of divorced parents for school fees: Section 40(1) of the South African Schools Act 84 of 1996 (the Act) pro-
vides that a parent is liable to pay the school fees determined in terms of s 39 unless or to the extent that the parent has been exempted from pay-
ment in terms of the Act. In Head of Department, Western Cape Education Department and Others v MS 2018 (2) SA 418 (SCA); [2018] 1 All SA 640 (SCA), the issue was whether in the case of divorced par-
ents, liability for payment of fees was joint or joint and several. That issue arose af-
fer the respondent Ms S, who was divorced, sought exemp-
tion from payment of fees for her child for the school year 2013. In order for her appli-
cation for exemption from payment to be processed by the school, Fish Hoek High School in the Western Cape, required her to declare com-
bined gross annual income of her and her divorced husband Mr G. However, she was not able to do so as Mr G was not cooperative and would not provide information regard-
ing his financial position. As a result her application for exemption was declined. For that reason she approached the High Court for an order declaring that her liability for school fees was joint and sev-
eral and not joint, as well as another one to the effect that Mr G was not a parent. In oth-
er words she wanted her ap-
plication for exemption from the gross annual income assessed on her financial position alone.

The WCC per Le Grange J held that Ms S and her former husband Mr G, were ‘jointly’ and not ‘jointly and severally’ liable for school fees. The ap-
pellants, being the Head of Department of Education in the Western Cape, the MEC for Education in the province and the Minister of Basic Edu-
cation at national level, ap-
pealed against the decision, while Mr S cross-appealed against the dismissal of the further orders she had sought in the High Court. The SCA upheld both the appeal and cross-appeal to the extent specified in the order. It was held that in terms of s 40(1) Ms S and her former husband Mr G were jointly and sever-
ally liable for the fees and that such provision would ap-
ply countrywide to all parents who were in a similar situa-
tion. It was held further that granting exemption did not preclude the public school from taking legal steps to en-
force payment by the other parent of the learner con-
sidered of the school fees or balance thereof, as the case might be. The appellants were ordered to pay costs.

Nvusa ADP (Tshiqi, Seriti, Saldulker JJA and Makgopa AJA concurring) held that as there would be equita-
ble burden between parents within a school, and inter se, and that non-custodian par-
ents should not escape legiti-
mate responsibility for paying school fees, a contextual, pur-
posal and literal reading of s 40(1) compelled the conclu-
sion that parents were jointly and severally liable for school fees. Where the gross income of both the parents was a de-
nominator, a parent could not be granted a total or partial exemption where they were unable to or did not provide the gross annual income of the other parent.

However, in the Regulations relating to the Exemption of Parents from payment of school fees in Public Schools
A person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fell within the scope of protection provided by s 24 of the Constitution. The Municipality had further constitutional and statutory obligations and duties such as in terms of Disaster Management Act 57 of 2002 to implement measures aimed at preventing or reducing the risk of further disasters and mitigating the severity or consequences of disasters, which had already happened.

Dignity, freedom, security of person and privacy: In Dladla and Others v City of Johannesburg and Another 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC) the applicants, Dladla and others, had been evicted in terms of a court order from property they were occupying in Berea, Johannesburg. The eviction order directed the first respondent, the City of Johannesburg, to provide temporary accommodation to the applicants. That was done in terms of an agreement with the owner of a certain property, Ekuthuleni Shelter (the shelter) whose rules had lockout and family separation provisions. In terms of the lockout rules the applicants and all other residents of the shelter had to leave the property by 8:00 in the morning and could not return until 17:30 in the evening. Thereafter, the gates were locked at 20:00 with the result that late comers were not allowed to enter the premises. Family separation rules provided for separate dormitories for men and women with the result that partners were not allowed to live together. The applicants challenged the rules on the ground that they infringed their fundamental rights to dignity, freedom, security of person, privacy and access to adequate housing. The CJ held that rules infringed the applicants' rights to dignity, freedom, security in person and privacy. However, the rules were not imposed by a law of general application and therefore did not represent a justifiable limitation of the applicants' rights in terms of s 36 of the Constitution. The City and shelter were interdicted from enforcing the rules against the applicants.

When the matter came to the CC leave to appeal was granted and the appeal uphold. It was held that the rules infringed the applicants' rights to dignity, freedom, security of person and privacy. Once again the City and shelter were interdicted from enforcing the rules and were directed to permit those
of the applicants who wished to do so, to live together with their partners of the opposite sex in communal rooms at the shelter. The City was ordered to pay the costs.

Reading the main judgment Mkhwanazi J held that the temporary accommodation given by the City implicated the rights to dignity, freedom, security of person and privacy. The applicants were thus entitled to the protection of their constitutional rights. The lockdown and family separation rules limited the applicants’ right to dignity. They forced the applicants out onto the street during the day with no place whatsoever to call their own and to rest. As a result the applicants sought refuge on the street while waiting for their turn. The lockdown rule disproportionately affected people who worked the night shift and slept during the day as they had nowhere to rest and get ready for the next shift. For them in particular the shelter was no shelter at all.

The family separation rule created a vast chasm between parents and children, between partners and between siblings. It eroded the basic associative privileges that exists in and forms the basis of the family. Therefore, in so many ways the two rules limited the dignity of the applicants. The fact that the applicants were forced out onto the street during the day meant that they did not have privacy for the duration thereof and were exposed to the vagaries of street life both during the day and at night.

Absent that law of general application, the City could not invoke s 36 of the Constitution in an attempt to justify the limitations created by the rules. Consequently the City had failed to show that the limitations flowing from the application of the impugned rules were reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by s 36(1).

In a concurring judgment Cameron J held that s 26 of the Constitution found no application in the instant case as accommodation provided to the applicants was not as a result of a ‘measure’ to realise the right of access to adequate housing, but merely in fulfillment of the court eviction order.

• See ‘Fundamental rights’ 2016 (Jan/Feb) DR 52.

Immigration
Reasonable opportunity for illegal foreigners to apply for asylum: The facts in the case of Kumah and Others v Minister of Home Affairs and Others 2018 (2) SA 510 (GJ); [2016] 4 All SA 96 (GJ), were that the applicant, Kumah and others, were illegal foreigners who had been arrested and were detained at the Lindela detention facility pending their deportation to various countries of origin. The applicants were arrested and detained after having been in the country illegally for a period ranging from four to nine months, during which some did not apply for asylum permit at all, while others unsuccessfully did so.

The present applications were for their release so that they could apply for asylum permits. The applications were dismissed. The question of costs was postponed to afford the respondents, the Minister of Home Affairs, the Director-General, other senior officials and responsible employees, the opportunity to show cause why they should not be ordered to pay costs out of their pockets for failure to file the required affidavits and heads of argument.

Satchwell J held that in the cases of Bula and Others v Minister of Home Affairs and Others 2012 (4) SA 581 (SCA) and Ersumo v Minister of Home Affairs and Others 2014 (2) SA 581 (SCA) the SCA made it clear that the factual basis justifying and entitling resort to the provisions of the Refugees Act 130 of 1998 (the Act) had to be placed before the court. Absent fundamental the necessary affidavit, it would be difficult to know the basis on which any court could rely on the Act for determination of the application and the dispute before it. In the present applications before the court there was an absence of disclosure on the part of the applicants. The court was not provided with even a foretaste of such information as was made available to the SCA in the Bula and Ersumo matters. None of the applicants indicated that he held a well-founded fear of being performed by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group and was unable to avail himself of the protection of the country of his nationality. Nor had any applicant indicated that there were events seriously disturbing or disrupting public order in either part or the whole of his country of origin to compel him to leave his place of residence to seek refuge in this country. None of the applicants had given any indication that the possibility of persecution extended to them within the whole of their country of origin or nationality and that there was no place for them.

In the Bula and Ersumo cases the SCA did not interpret the Act or regulations made thereunder so as to allow an indefinite and unlimited period for an illegal foreigner to seek to invoke the protection of the Act until it finally suited him to do so. In the present case the applicants had been in the country for lengthy periods ranging from four to nine months. It could not be said that the applicants had not had every reasonable opportunity to make any application which they could genuinely wish to make.

Unreasonable delay in applying for asylum: In Minister of Home Affairs v Ruta 2018 (2) SA 450 (SCA); [2018] 1 All SA 682 (SCA) the respondent, Ruta, was a Rwandan national who entered the country illegally in December 2014 and subsequently obtained a fraudulent asylum permit. In March 2016 he was arrested and charged with driving without a valid driver’s licence, possession of a fraudulent temporary asylum permit and being an illegal foreigner. He was found guilty of driving without a valid driver’s licence and being in possession of a fraudulent temporary asylum permit and sentenced accordingly. While serving his sentence, he was apparently at the Lindela holding facility and repatriation centre awaiting to be deported to his country of origin, his legal representatives approached the High Court for an order directing the respondent to issue his release from detention so that he could be given the opportunity to apply for asylum in terms of the Refugee Act 130 of 1998 (the Act) and the regulations made thereunder. The GP, per Tuchten J granted the order sought, further directing the appellant Minister of Home Affairs to renew the respondent’s temporary asylum seeker permit. An appeal against the order was upheld by the SCA with no order as to costs.

Seriti JA (Bosielo, Willis JJA, Schippers AJA concurring and Mucumie JA dissenting) held that asylum seekers who entered the country illegally were merely given a reasonable opportunity but not an indefinite or unlimited period in which to apply for asylum. In the instant case it was plain that apart from any other considerations the respondent delayed unreasonably, for some 15 months, in applying for asylum. On the facts of the case there was no indication that the respondent had any intention of applying prior to his arrest. The idea of applying for asylum came to his mind when he was detained and the appellant was in the process of arranging for his deportation. The behaviour of the respondent was inconsistent with that of a person who wanted to apply for asylum.

In a dissenting judgment Mucumie JA held that once a refugee had evinced an inten-
Land

Liability of the registrar of deeds for negligent transfer of immovable property: The facts of the case of Stirling v Fairgrove (Pty) Ltd and Others 2018 (2) SA 469 (GJ); [2018] 2 All SA 290 (GJ) were that in 2015 the applicant Stirling, an owner of immovable property, found out that it had been sold and transferred, without her knowledge, to the third respondent, Alvares, who shortly thereafter sold it to the first respondent Fairgrove. Alvares allegedly paid some R 2,79 million for the property while he sold it to Fairgrove for R 3,65 million. As the applicant had not sold the property she approached the High Court for an order declaring that she was still the owner of the property and expungement of the two deeds of transfer, the first one to Alvares and the second to Fairgrove. In a counter-application Fairgrove sought damages against the second respondent, the registrar of deeds, for her role in allowing a blatantly fraudulent transfer to take place, as well as against Alvares for his fraudulent activities. The claims were meant to recover the purchase price and transfer duty it had paid. For his part Alvares instituted separate application proceedings against the estate agents, Phungula-Nkosi Properties, who sold the property to him, alleging that he was a victim of their fraudulent activities. He also contended that the registrar of deeds was to blame for allowing the fraud to take place.

The applications were consolidated and dealt together. The application of Alvares against the estate agents was dismissed with no order as to costs as it was not opposed. The dismissal was due to the fact that it did not appear that Alvares ever bought the property as it was fraudulently transferred to him free of charge. Regarding the counterclaim of Fairgrove it was held that the registrar of deeds and Alvares were jointly and severally liable to pay the purchase price and transfer duty incurred by it. The two were also held jointly and severally liable for the costs of the counter-application. Regarding the main application of Stirling, an order was granted in terms of which it was declared that she was the lawful owner of the property. To that end, the registrar of deeds was ordered to cancel and remove from her records the title deeds issued, one in favour of Alvares and the other in favour of Fairgrove.

Senyatsi AJ held that if the agreement was tainted with fraud or obtained by some other means that vitiated consent, ownership of the property would not pass despite registration in the deeds registry. The registrar and those employed in her office were responsible for ensuring that all the legal requirements for registration were heeded. The Deeds Registries Act 47 of 1937 (the Act) conferred on the registrar of deeds significant powers and responsibilities to ensure the proper administration of land registration system in the country. The registrar held an important oversight role that required she and the officials in her employment scrutinise documents placed before them. In the present case when consideration was given to a host of deficiencies in respect of transfer of the property to Alvares, it was clear that they were significant and should have been identified by the registrar as a reason for rejecting the deed of transfer. As that did not happen the registrar failed to discharge her statutory duty fairly and negligently. Section 99 of the Act subject the registrar and her staff to normal standards of reasonable care and diligence and imposed liability for deviating from same.

Road Accident Fund claims

Road Accident Fund Appeal Tribunal does not have final say on causation: In the case of Road Accident Appeal Tribunal and Others v Gouws and Others [2018] 1 All SA 701 (SCA) the first respondent, Gouws, was injured in a motor vehicle collision in which he sustained injuries. Before lodging a claim for compensation with the Road Accident Fund (the Fund) he was assessed by an orthopaedic surgeon who reported that the injuries suffered were serious. However, the Fund rejected Gouws’ claim for general damages on the ground that the injuries suffered were not serious. That being the case Gouws referred the dispute to the first appellant Road Accident Fund Appeal Tribunal (the tribunal) for recalculation, which held that the injuries suffered were not caused by the motor vehicle collision and were therefore not serious. In other words the ruling of the tribunal was not so much about the seriousness of the injuries sustained, but their cause. As a result Gouws approached the High Court for an order reviewing and setting aside the ruling of the tribunal. The GP per Tuchten J granted the order sought and remitted the matter to the tribunal for reconsideration by a different panel. The present appeal was against the High Court order and was dismissed with costs.

Nvasa ADP (Saldulker, Mucumie JJA, Tsoka and Makgoka AJJA concurring) held that in the ordinary course causation was an issue that was ultimately decided by courts. A dispute between the Fund and a claimant in relation to causation had to be referred to a court for adjudication. When that issue was decided by a court, it did not follow that medical practitioners were necessarily the only experts on whom reliance could be placed. Courts were not bound by the view of any expert, but made the ultimate decision on issues on which experts provided an opinion.

The contestation before the tribunal could only be in relation to the assessment by the medical practitioner of the seriousness of the injury and the finality of its decision was in relation to that aspect. The effect of the tribunal ruling was that the jurisdiction of the court was ousted. However, the tribunal could not have the final say in relation to causation as that power was not provided for in the Road Accident Fund Act 56 of 1996 or the regulations made thereunder. If the approach of the tribunal were accepted, it would deny claimants access to courts on an issue traditionally reserved for adjudication by them. The Fund retained the right to challenge or concede causation. If the approach of the tribunal were to be accepted the result would be that the Fund itself would be stripped of its power to decide the issue of causation in the event of an appeal tribunal deciding causation against it.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Action in rem against an associated ship, application for recusal of judge in criminal case, commission of robbery by theft of incorporeal thing through violence or force, conversion of business rescue into liquidation, delay in bringing review application, doctrine of common purpose, liability of financial services provider to a client, post-commencement finance in business rescue, proceedings before Equal- ity Court bringing less formal, Public Protector directing the President to appoint commission of inquiry, setting aside of conviction and sentence if there was failure of justice, undue delay in bringing application for common law review and whether rebate paid to motor manufacturer to encourage rationalisation of models was capital or revenue receipt.
The Universal Church of the Kingdom of God (the appellant), appointed Mr Myeni (the third respondent) as a pastor. Consequently, the third respondent signed two documents titled ‘Regulations for Pastors’, and the ‘Declaration of Voluntary Service’. While executing his duties for some time, Mr Myeni, was subsequently terminated for alleged misconduct. He approached the Commission for Conciliation, Mediation and Arbitration (CCMA), claiming that he was dismissed unfairly.

The appellant, averred in rebuttal, that the documents explicitly stated, *inter alia*, that Mr Myeni, ‘is not an employee of the church but renders his voluntary service according to his Christian convictions’, and thus, was not an employee, as defined by the Labour Relations Act 66 of 1995 (LRA). The third respondent, *in cassu*, claimed, *inter alia*, that he was paid a stipend by the church in the sum of R 1 875 per week, of which both the Unemployment Insurance Fund, and Pay-As-You-Earn deductions, were made from this stipend, which should be inferred, by way of operation, as being that of an employee.

After determining the jurisdictional issue of the CCMA, in favour of Mr Myeni, the Labour Court (LC), on review, upheld the commissioner’s finding, in that Mr Myeni was indeed an employee of the church, on the basis of the fact that the church failed to rebut the s 200A presumptions of the LRA. The case was subsequently, taken on appeal, with leave of the court *a quo*. The Labour Appeal Court (LAC), on review, upheld the appellant’s finding, in that the church had no jurisdiction on the matter, and provisions of the LRA (s 200A), did not accordingly, apply.

Discussion

The existence of an employment relationship is the starting point in determining whether protection can be afforded by the LRA (W Germishuys ‘Religion above the law?’ Universal Church of the Kingdom of God v Myeni and Others’ 2016 SA Merc LJ 360). In this regard, s 23(1) of the Constitution states that: ‘Everyone has the right to fair labour practices’. Section 180(1) of the LRA, states that every ‘employee’ has the right not to be unfairly dismissed. The LRA in s 213 defines an ‘employee’ as –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on, or conducting the business of an employer.’

Furthermore, the interpretation of the phrase ‘regardless of the form of the contract’ as contained in s 200A of the LRA, has broadened the scope in order to enhance inclusion, under the term ‘employee’ as envisaged in the Act. I submit that the two documents signed, namely, the ‘Regulations of Pastors’, and the ‘Declaration of Voluntary Service’ between the appellant, and third respondent, is indeed a form of contract. Thus the statutory presumptions of s 200A, should apply, forming part of the preferred generous and purposive interpretation (M McGregor and A Dekker (eds) Labour Law Rules! 3ed (Cape Town: Siber Ink 2017) at 25). In this regard, without individually applying the tests developed by the courts, in determining who is an employee – such as, the control, organisational, dominant impression, economic capacity, and reality test – the codification of the tests, have culminated in the enacting of the statutory presumptions of s 200A of the LRA. As thus, based on the merits of the case, it is necessary to determine which of the presumptions hold true, until the contrary is proved.

The s 200A (a) - (e) presumptions of the LRA, include, *inter alia* –

(a) the manner in which the person works is subject to control or direction of another person;

(b) the person’s hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; [and]

(e) the person is economically dependent on the other person, for whom he or she works or renders services.

Consequently, *in cassu*, the CCMA, and court *a quo*, it was submitted that, the third respondent at para 20:

• executed his work, subject to the control, or direction of the church;

• work hours were subject to the control, or direction of the church;

• worked at least 40 hours per month; and

• was economically dependent on the church and earned no other income.

Although the existing facts in dispute, satisfies one or more of the factors in s 200A, it is trite that it does not automatically mean that the person is in fact, an employee (Code of Good Practice: Who is an employee Item 17). The substance of the employment relationship, opposed to the legal form, is determinative of the rights and remedies that ensue (Germishuys *op cit*). This determination, is thus made on a case-by-case basis. The reverse onus is thus placed on the church to prove that the third respondent was not an employee. From the onset, albeit the fact that Ndlovu JA at para 46, in *in cassu*, determined that the church ‘never intended to enter into any contract whatsoever’. I submit that such finding relates only to an employer/employee contract or relationship, as there was indeed a notion of a contractual agreement (see para 45), which was brought about, though intended – on the basis of voluntary services – to be outside the ambit of the LRA. I thus submit, that the clause within the contract (‘Declaration of Voluntary Service’ at clause 2) be treated strictly, in terms of contract law.
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As a result, the aim of the interpretation of a contract is to give to the intentions of the parties, or the purpose of the contract (D Hutchison and C Pretorius (eds) *The Law of Contract in South Africa 3ed* (Cape Town: Oxford University Press 2017) at 267). Interpretation in this manner, is based on the common intentions of the parties, and is thus not based on subjective, but rather objective intentions (Hutchison and Pretorius (op cit) at 269). To this end, the LC, questioned the third respondent, upon which, by the commissioner’s own admission, stated at para 19 that, ‘Mr Myeni did not render his service to the church, as envisaged in terms of s 200A of the LRA, but he was doing the work of God’. This satisfies the parol evidence rule (discussed in Hutchinson and Pretorius (op cit) at 271) as Mr Myeni testified in support of the averment above (see para 45 where the following exchange appeared under cross-examination: ‘Do you understand … that you are not an employee and you receive a subsistence allowance to keep you do [sic] your job working for God? [Mr Myeni] … Yes’). Furthermore, at para 19 the commissioner failed to take into account the true intention of the parties, in terms of the contract entered thereto.

Although the constitutional right to fair labour practices, is afforded to ‘everyone’, no right is absolute, similarly as the rights envisaged, *inter alia*, in s 28 or s 35 of the Constitution – known as the children’s clause, and the clause relating to arrested, detained, and accused persons, respectfully - apply only to the said class of persons. The documentary clauses that established contractual obligation between the appellant, and third respondent, are not found to be contrary to any public policy, or provision of the Constitution. It is however, noteworthy, that the procedure of the church, or lack thereof, in relation to the finding of the alleged misconduct, do not conform to the *audi alteram partem* rule – meaning ‘to hear the other side’ – and thus, in this instance only, seems *prima facie*, to violate the third respondent’s right to administrative justice, as envisaged in the Bill of Rights (s 33(1) and (2) of the Constitution).

**Conclusion**

Albeit the fact that Ndlovu JA (Waglay JP, and Davis JA concurring) held at para 57, the view that: ‘The CCMA does not have the requisite jurisdiction to entertain this dispute, by virtue of the absence of employer and employee relationship between the parties’, is, I submit supported, but with the following *caveat*. Interpretation of the phrase ‘regardless of the form of the contract’ as contained in s 200A of the LRA, has broadened the scope in order to enhance inclusion, under the term ‘employee’. The CCMA, as envisaged within the legislative framework of the LRA, provides for juristic competence on such matters. Furthermore, persons outside the ambit of the LRA, should be given a means of protection, in order to advance their constitutional right to fair labour practices, as afforded to ‘everyone’, which in addition, should form part of the preferred generous, and purposive interpretation (McGregor and Dekker (op cit) at 25). It is further trite in law that the court thus, has a duty to ascribe the meaning to legislative text, that best promotes at least one identifiable value enshrined in the Bill of Rights (WB Le Roux, I Moodley and IL Nkuna *Interpretation of Statutes* (Pretoria: Unisa Press 2009) at 411 with the objective of developing the common, and customary law to promote the spirit, and purport of the Bill of Rights (see s 39(2) of the Constitution). Consequently, the purposive approach identifies that the judiciary has an inherent law-making function during statutory interpretation (C Botha *Statutory Interpretation: An Introduction for Students* (Cape Town: Juta 2014) at 99). Although it was correctly held that the ‘requisite’ jurisdiction of the CCMA was found to be absent, I submit that this determination, was established both, *ex post facto*, and on the *facta probanda*. I thus, am of the view that the CCMA, does have a prerequisite jurisdiction, at the very least, as an independent juristic body (in terms of s 112, of the LRA) of first instance. It is only at a later stage, that jurisdiction may become determinative, based on the facts in dispute.

Had the s 200A presumptions applied – I further submit that the appellant, would have dissolved the s 200A presumptions of the LRA to the court’s satisfaction, on the bases of the provisions of the two documents signed, and testimony of Mr Myeni, that on the balance of probabilities, Mr Myeni, was not an employee of the church, and as thus, there existed no employer/employee relationship. The only relationship that came into existence, is one that gave rise to contractual obligation only, as thus, the principles relating to the law of contract, apply exclusively, against that of labour law. It is on this prong furthermore, that there was a meeting of the minds, and in addition, both parties where *ad idem* to the material aspects thereof. Consequently, the appeal was rightfully upheld, and the third respondent, Mr Myeni, to pay for the costs of review.
New legislation

Legislation published from 29 March - 24 April 2018

Draft delegated legislation


Bills


Commencement of Acts


Selected list of delegated legislation


Financial Sector Regulation Act 9 of 2017 Regulations. GN R405 GG41550/29-3-2018 (also available in Sesotho).

Magistrates’ Courts Act 32 of 1944 Creation of Magisterial Districts and establishment of District Courts in respect of the Northern Cape Province (with effect from 1 May 2018). GN409 GG41552/29-3-2018.
NEW LEGISLATION

New legislation
Legislation published from 29 March – 24 April 2018

Bills


Prevention and Combatting of Hate Crimes and Hate Speech Bill B9 of 2018.


Commencement of Acts


Selected list of delegated legislation

Council for Medical Schemes Levies Act 58 of 2000
Levies on medical schemes. GenN183 GG41573/13-4-2018.
Debt Collectors Act 114 of 1998
Availability of register for inspection in terms of s 12(1)(a), BN48 and BN50 GG41571/13-4-2018 and BN52 GG41581/20-4-2018.
Engineering Profession Act 46 of 2000
Engineering Council of South Africa: Fees and charges. BN44 GG41561/6-4-2018.
Financial Sector Regulation Act 9 of 2017
Regulations. GN R405 GG41550/29-3-2018 (also available in Sesotho).

Magistrates’ Courts Act 32 of 1944
Creation of Magisterial Districts and establishment of District Courts in respect of the Northern Cape Province (with effect from 1 May 2018). GN409 GG41552/29-3-2018.

Mine Health and Safety Act 29 of 1996
Guidelines for the compilation of a mandatory code of practice for an occupational health program (occupational hygiene and medical surveillance) on personal exposure to airborne pollutants. GN419 GG41561/6-4-2018.
Amendment of the Policy and Criteria for Recognition of Professional Bodies and Registration of Professional Designations. GN416 GG41557/3-4-2018.
National Student Financial Aid Scheme Act 56 of 1999
Regulations on additional functions assigned to the National Student Financial Aid Scheme. GN413 GG41554/3-4-2018.
Perishable Products Export Control Act 9 of 1983
Prescribed Rate of Interest Act 55 of 1975
Publication of a rate of interest for purposes of s 101; 10% per annum from 1 May 2018. GN435 GG41581/20-4-2018 (also available in Afrikaans).
Public Finance Management Act 1 of 1999
Amendment of sch 3: Listing and delisting of public entities. GN388 GG41534/29-3-2018.
Superior Courts Act 10 of 2013
Determination of the area under jurisdiction of the Gauteng and North West Division of the High Court of South Africa. GN408 GG41552/29-3-2018.

Draft Bills


Draft delegated legislation

Intention to create magisterial districts and establish courts in respect of the KwaZulu-Natal Province in terms of the Magistrates’ Courts Act 32 of 1944 for comment. GN407 GG41552/29-3-2018.

Intention to create magisterial districts and establish courts in respect of the Eastern Cape Province in terms of the Magistrates’ Courts Act 32 of 1944 for comment. GN406 GG41552/29-3-2018.


Rules relating to the payment of fees for accreditation of education and training offered by education and training institutions in terms of the Health Professions Act 56 of 1974 for comment. BN49 GG41571/13-4-2018.


Proposed amendment to the National Policy for determining school calendars for public schools in terms of the National Education Policy Act 26 of 1996. GN432 GG41578/19-4-2018.

Proposed prohibition notice regarding the use of colistin as farm feeds or stock remedies in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. GN433 GG41581/20-4-2018.

National Road Traffic Regulations in terms of the National Road Traffic Act 93 of 1996 for comment. GN453 GG41586/20-4-2018 and GN435 GG41590/24-4-2018 (also available in Afrikaans).


Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R454 GG41589/24-4-2018.

Philip Stoop BCom LLM (UP) LLD (Unisa) is an associate professor in the department of mercantile law at Unisa.
Automatically unfair dismissal for having made a protected disclosure

In *John v Afrox Oxygen Ltd* [2018] 5 BLLR 476 (LAC), the employee was dissatisfied with the employer’s re-grading process and referred the matter to the employer’s internal audit department. She did not receive any feedback on the matter and shortly thereafter was approached with an offer to terminate her services. When she did not agree to the termination of her services, she was summarily dismissed. The employer alleged that she was dismissed on the basis of incompatibility with her colleagues following alleged negative feedback from her subordinates.

The employee challenged her dismissal alleging that the dismissal was automatically unfair as it had been on account of her having made a protected disclosure in terms of the Protected Disclosures Act 26 of 2000 (the PDA). The Labour Court (LC) found that in order to constitute a protected disclosure the disclosure must have been made in compliance with s 9 of the PDA. This requires, *inter alia*, that the employee reasonably believes that the information disclosed is substantially true. According to the employee, she had made the disclosure as she had concerns that the re-grading process had taken place in the absence of consultation with the employees in circumstances where the re-grading had a negative effect on the future salary increases of the employees. Furthermore, she was of the view that the re-grading distorted the accuracy of the employer’s employment equity report in relation to wage differentials. The LC found that the employee had not made a protected disclosure as she had not shown that she had a reasonable belief that the information disclosed was true. Furthermore, it was found that the information was not serious enough to elevate the information disclosed to the overriding importance of public interest.

The employee took the matter on appeal to the Labour Appeal Court (LAC) and alleged that the LC erred in finding that the disclosure was required to be made in compliance with s 9 of the PDA. In this regard, she alleged that s 9 of the PDA applied to disclosures made to a party, other than an employer, and in such circumstances it needed to be considered whether it was reasonable for the employee to make the disclosure. In circumstances where the disclosure was only made to the employer then the employee only needs to comply with s 6 of the PDA. In this case, the employee made the disclosure only to her employer and the LAC (per Waglay JP, Ndlolu JA and Coppin JA) found that only s 6 of the PDA was relevant. In this regard, in terms of s 6 of the PDA the employee was required to prove that:

(a) She had reason to believe that the information she disclosed tended to show that a criminal offence had been committed, is being committed or may be committed in the future, or that the employer failed, is failing or may in the future fail to comply with a legal obligation;

(b) the disclosure was made in good faith; and

(c) the procedure prescribed or authorised by the employer was followed when making the disclosure’ (my italics).

It was held that the LC’s approach was misconceived in that the inquiry is not about the reasonableness of the information disclosed, but rather about the reasonableness of the belief. Reference was made to case law in which it was held that the requirement of a reasonable belief cannot be equated to personal knowledge of the information disclosed and thus a belief can be reasonable even if the information is incorrect. Thus, a mistaken belief can be reasonable and the standard set by the LC in requiring the employee to prove the correctness of the facts was too high.

In conclusion, all that is required for a disclosure to an employer to be a protected disclosure is for the employee to reasonably believe that the conduct complained about is unlawful. It was held that the employee acted in good faith and reasonably believed that the re-grading process had been conducted in a manner that violated the employer’s legal obligations, that is, without following a consultation process. It was held that the only probability was that the employee’s dismissal was in retaliation for having made a disclosure about irregularities in the re-grading process. Thus, the employee was dismissed for having made a protected disclosure and accordingly suffered an occupational detriment. Her dismissal was found to be automatically unfair and compensation equal to 18 months’ remuneration was ordered. The employee also sought notice pay in that she had been summarily dismissed, but the court found that there was no reason to order the payment of notice pay in addition to the compensation order. The appeal was upheld with costs.

Reasonable expectation of extension of fixed term contracts

In *Smith and Another v Office of the Chief Justice and Others* [2018] 5 BLLR 523 (LC), the applicants were employed as ‘pool secretaries’ in terms of a fixed term contract of employment that had been renewed for a period of 12 months. Prior to the expiry of the 12-month fixed term period, the applicants received an e-mail inviting them to collect their extension letters. In terms of the extension letters, their employment was extended for a further three months as opposed to the usual 12 months. They were informed that previously their contracts were automatically extended without following any recruitment process, but that going forward there would need to be a proper recruitment process, in accordance with a recommendation by the office of the Auditor-General. The contracts were extended for a period of three months to allow for the completion...
The southern coast of South Africa is home to the Garden Route National Park and its jewel, the Tsitsikamma Section (proclaimed in 1954) – one of the world’s most spectacular biodiverse protected areas. It comprises of irreplaceable rain forests that harbour 110 types of trees such as the giant Gnarledyka yellowwood (some estimated to between 600 and 609 years old) and fynbos (which covers around 30% of the park). Tsitsikamma is also the country’s largest marine reserve and the oldest in Africa. One of the highlights is the 77 metre-long suspension bridge which spans the width of the Storm River Mouth. The bridge tamps just seven metres above the churning waters of the river as it enters the sea. SANParks, established in terms of the National Environmental Management: Protected Areas Act, 2003, has the primary mandate to oversee the conservation of this sensitive and valuable biodiversity, landscape and associated heritage asset.
Moksha Naidoo BA (Wits) LLB (UKZN) is an advocate at the Johannesburg Bar.

‘Hopeless’ cases to the Labour Court could cause you to forfeit your fees

Mashishi v Madlala and Others (LC) (unreported case no JR2644/11, 15-3-2018) (Van Niekerk J)

One of the primary objectives of the Labour Relations Act 66 of 1995 (LRA) is to create an expeditious dispute resolution system. However, the vast number of cases being referred to the Labour Court puts pressure on the court to the extent that a backlog ensues, which in turn defeats this objective. Matters where applicants have no real prospects of success unduly contribute to this backlog and the court, in this judgment sought to put a stop to this growing and burdensome trend.

The court was faced with a condonation application where the applicant was five years late in lodging his review application. While the reasons for the applicant’s delay and merits of his review application are not material for the purpose of this article, the court found that the applicant did not have a plausible reason for his delay. Consequently, the issue of prospects of success became irrelevant, suffice to say the applicant challenged the fly ‘gag’ that he was guilty of seven counts of misconduct, which counts he pleaded guilty to at his internal hearing.

Normally a matter of this nature would have been dealt with by way of an ex tempore judgment, however, to address the disturbing tendency referred to above, Van Niekerk J held: ‘The only reason that I have prepared a written judgment is to draw the attention of practitioners and others with right of appearance in this court to the abuse of this court’s process that continues, notwithstanding prior indications from the Bench that given the court’s limited resources and the backlogs that have built up (especially in relation to the motion rolls), consideration would be given to making punitive costs orders and orders to the effect that practitioners forfeit their fees where that is appropriate.’

Elaborating on the principle that as an officer of the court, a legal representative’s duty and responsibility is first and foremost to the court and the interest of justice, the court stated:

‘Judge Owen Rogers recently suggested that it is improper for counsel to act for a client in respect of [a] claim or defence which is hopeless in law or on the facts. … By this he means that counsel must be able to formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail. But counsel acts improperly when she is “quite satisfied” that one or more of them will fail. In particular, there is an ethical obligation on counsel, to ensure that only “genuine and arguable” cases are ventilated, and that this be achieved without delay.

What is significant about Judge Rogers’ argument is his acknowledgement that there is no express or even implied prohibition against pursuing the hopeless case to be found in the General Council of the Bar’s Uniform Rules of Professional Conduct. The obligation not to accept or pursue a hopeless case is located outside of the formal rules of professional conduct, in sources that include the court’s power to stay those proceedings that amount to an abuse of process, the court’s right to mulct a practitioner in costs (something that necessarily implies impropriety), and the founding values of the Constitution; in particular, effective, efficient and expeditious adjudication.’

The court went on to say:

‘In the Labour Court, the right of appearance extends beyond advocates and attorneys to officials of trade unions and employers’ organisations. In my view, in respect of all those who enjoy right of appearance in the Labour Court, the same obligation (i.e. to refrain from pursuing a hopeless case) applies. The same penalties, in the form of punitive costs orders and orders that practitioners forfeit their fees) ought also to apply. The obligation owed by those who have the privilege of right of appearance in this court requires them in return to respect this institution and the statutory purposes of expeditious dispute resolution
that it is statutorily mandated to uphold. Section 162, which regulates orders for costs in this court, confers a discretion to make orders for costs, based on the requirements of the law and fairness. Those requirements, as I have stated above, compel practitioners and other representatives to refrain from referring hopeless cases to this court, and to place the interests of justice and of the court before the parochial interests of their clients and what might be seen to be a principle of partisanship that requires representatives to advance their clients' partisan interests with the maximum zeal permitted by law; and the principle of non-accountability, which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends.'

Returning to the matter at hand, Van Niekerk J found that the application before court was a hopeless one where the representative was, in terms of his professional ethics and conduct, obliged not to file the review application irrespective of the client's instructions.

However, in the absence of affording the representative an opportunity to offer reasons why he should not forfeit his fees in this case, the court did not pursue with such an order.

Yet, in closing the court did sound the following warning: 'Those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences.'

By
Meryl Federl

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