THE RISKY BUSINESS OF A BUSINESS RESCUE PRACTITIONER

Amendments of rules in line with constitutional rights to adequate housing

Some red flag risk areas to keep a look out for in clients

Is cultural male circumcision compatible with international children’s rights?

Deepening constitutional democracy discussed at NADEL AGM

Is South Africa’s anti-money laundering and counter terrorism financing regime effective?

Income tax understatement penalties: A different view?

Search warrants: What do the courts require?
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22 The risky business of a business rescue practitioner

The business rescue practitioner, by virtue of their position, incurs certain expenses in the execution of their duties and is specifically required in terms of s 141(2)(a)(ii) of the Companies Act to apply to court to discontinue the business rescue proceedings and to place such company into liquidation in the event that the business rescue practitioner determines that the company in business rescue cannot be rescued. Rico van der Merwe and Melandie Buitendag write that the peremptory obligation to apply for the liquidation of the company in business rescue, entails that the business rescue practitioner is obliged ex lege to incur expenses in respect of such litigation. In this article, the risks facing business rescue practitioner’s in respect of expenses incurred in applying to court in terms of s 141(2)(a)(ii) of the Companies Act will be highlighted.

26 Is cultural male circumcision compatible with international children’s rights?

The matter of male circumcision has become a contentious issue within the international community insofar as it involves the circumcision of minors. Considering South Africa is one of the countries where the practice of cultural male circumcision occurs as a necessary prerequisite to becoming a man in certain African cultures, is cultural circumcision compatible with international children’s rights? De Niro Koffman discusses the United Nation’s Convention on the Rights of the Child, which came into effect in 1990 and the African Union’s African Charter on the Rights and Welfare of the Child.

28 Is South Africa’s anti-money laundering and counter terrorism financing regime effective?

The Financial Action Task Force’s International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (FATF Recommendations) have been constantly evolving to keep up with anti-money laundering and counter terrorism financing (AML/CFT) threats, trends and typologies. This evolutionary process has also taken place with respect to how it carries out its mutual evaluation exercises through its various methodologies. Of much relevance for present purposes is the 2013 FATF Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems which, in part, introduced or sought to encourage member jurisdictions to try and ascertain the ‘effectiveness’ of their AML/CFT regimes. Key to note is that it also defines the concept of ‘effectiveness’ within the context of AML/CFT. Nkateko Nkhwashu states that the question then remains is what is ‘effectiveness’ or what does it entail?

30 Amendments of rules in line with constitutional rights to adequate housing

The right to adequate housing and the protection thereof as set out in ss 25 and 26 of the Constitution and is in Michael Lombard’s view the stepping stone to all the other fundamental rights available to South African citizens. The problem, however, is that the intention of these fundamental rights are subject to the development and acceptance thereof by our jurisprudence. The promulgation of the Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (GN R1272 GG41257/17-11-2017) (the new rules), is an illustration of how well the designed machinery of jurisprudence works, in order to give effect to our fundamental rights.
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The decision on whether to publish a particular submission is that of the De Rebus Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the ‘Guidelines for articles in De Rebus’ on our website (www.derebus.org.za).

• Please note that the word limit is 2000 words.
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DE REBUS – MAY 2018

EDITOR’S NOTE

DE REBUS

– MAY 2018

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Spare a thought for Turkey

During the National Association of Democratic Lawyers annual general meeting and conference, Gauteng Regional Director of Turquoise Harmony Institute, Atilla Dag, made a presentation on the atrocities being experienced by Turkish citizens, including legal professionals.

After a failed coup attempt in July 2016 many lawyers have been arrested because their clients were people who had links to the Gülen movement, which has been accused by the Turkish government of masterminding a failed coup in 2016. The movement has denied any involvement. Some lawyers were arrested for representing their detained colleagues. After the failed coup, Turkey was under a state of emergency.

According to official reports, 1 525 lawyers have been prosecuted, of which, 578 were arrested and currently being held in pre-trial detention, while 99 lawyers have been sentenced. Mr Dag noted that legal professionals have been subjected to ill treatment, torture and excessive solitary confinement. State officials have been granted immunity for acts of ill treatment and torture committed during their scope of duties under state of emergency decrees.

Mr Dag’s presentation goes on further to state that receiving legal assistance in Turkey is near impossible. President of the Jurists Association (Hukukcüler Derneği), a pro-government group, Mehmet Sari, publicly said that the thousands of people who have been accused of coup plotting by the government, do not have the right to a defence. Previous President of the Istanbul Bar Association, Umit Kocasakal, has also exhibited a similar attitude.

The torture cases in Turkey’s detention centers cited in a New York-based Human Rights Watch (HRW) report titled ‘A Blank Check: Turkey’s Post-Coup Suspension of Safeguards against Torture’, include several incidents in which lawyers were prevented from stopping the torture of their clients while in police custody.

Lawyers are also not exempt from torture while in police custody. The cases of lawyers, who have been physically assaulted by the police, are another part of an intimidation campaign conducted by the Turkish government against lawyers and human rights defenders.

Lawyers who are members of the Contemporary Jurists Association ( Çağdaş Hukukcüler Derneği, or ÇHD) wanted to make a public statement in front of the Istanbul Courthouse ahead of a criminal case in which some lawyers were tried. The police attacked the lawyers who were determined to make a statement.

Mr Dag also reported that many judges have been arrested because of their rulings. 4 463 judges have been prosecuted and suspended. Over 2 400 judges are currently being held in pre-trial detention, including High Court judges and two Constitutional Court judges.

President of Turkey, Recep Tayyip Erdoğan who has ruled since 2003, has called for early elections in June, which is seen as a tactic to hold on to power a year earlier than scheduled. The elections, which were originally set to take place in November 2019 will be held on 24 June.

See p 5 for a full report on the National Association of Democratic Lawyers annual general meeting.
LETTERS TO THE EDITOR

Costs and SC status
The situation of costs of senior attorneys who appear in matters in the High Court without using counsel, needs to be addressed.

When I appear, I usually ask the court to order that my fees be taxed 'on the same rate as would be awarded to counsel of senior status', and have been granted many such orders. This is as a result of a line of judgments who have held that attorneys who appear in the High Court should be treated no differently to counsel. I was, however, recently refused this order on the basis that the judge felt that he was not competent to make any order, which prescribed the level or rate at which my fees were to be taxed, as the judge was of the opinion that the level or rate of taxation is a matter in the discretion of the Taxing Master, and it was up to the Taxing Master to inquire as to whether an attorney would so qualify. All the judge could order was 'the costs of counsel/costs of two counsel'.

This at first glance may seem fair, but practically it has difficulties. The difference lies in the title of the Senior Counsel (SC). As soon as a judge awards 'costs of counsel', and the SC submits their bill, there is no inquiry at the taxation as to whether they are indeed entitled to have their bill taxed at a higher rate or not. The SC is automatically given the benefit of the doubt by virtue of their title, and is not questioned. Why should an attorney then have to prove to the Taxing Master that they were of equivalent experience as the silk? I ask the opinion of our colleagues – is a court not entitled to include in its order, the prayer requested by me?

This leads to the second issue. As the entitlement to use the title of SC emanates from the President of South Africa 'confering honours' on advocates in terms of s 84(k) of the Constitution, is it not long overdue that the attorneys profession start facilitating the conferring of such status on attorneys of senior status? After all, as the courts have held, why should attorneys be treated any different to advocates?

Gary Austin, attorney, Johannesburg

Do you have something that you would like to share with the readers of *De Rebus*?

*De Rebus* welcomes letters of 500 words or less. Letters that are considered by the Editorial Committee deal with topical and relevant issues that have a direct impact on the profession and on the public.

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Deepening constitutional democracy discussed at NADEL AGM

The National Association of Democratic Lawyers (NADEL) held its annual general meeting (AGM) and annual conference in East London from 15 to 17 March under the theme: 'The Role of Progressive Lawyers in Deepening Constitutional Democracy'.

On the first day of the conference, the evening of 15 March, a panel discussion was held titled: 'Corruption in the public and private sector. Our views on state capture investigations and terms of reference'. Panelists included former Member of Parliament, Vytjie Mentor; Professor at the University of Cape Town, Dr Lwazi Lushaba; and Honorary Professor at the University of South Africa (Unisa), Dr Somadoda Fikeni.

Speaking about state capture, Ms Mentor asked what NADEL has done, as an organisation, about corruption in the country and challenged the organisation to take responsibility and do what is needed to be done to ensure that corruption does not overtake the country. She added: 'It is organisations such as NADEL and progressive lawyers that can hold the democratic state accountable for corruption in the country.'

Prof Lushaba began his address by asking why the Gupta family chose South Africa (SA) as a destination for state capture. 'The Guptas could have gone to a country such as Japan. In the hierarchy of races, it is possible that the Guptas thought that the black South African government was inferior, therefore, it would be easy to capture the state,' he added.

Another question Prof Lushaba posed was: What is law? He said using the state capture situation as an example, it is clear that the law is not the final arbiter of truth. He added: 'There is no causal relationship between the law and morality. ... Power and not truth makes the law.'

Prof Fikeni noted that the presidency of former President Jacob Zuma was not all bad, as he hired former Public Protector Thuli Madonsela and Chief Justice Mogoeng Mogoeng. 'Because prior to their appointment Ms Madonsela and Chief Justice Mogoeng kept a low profile, the president hired them thinking that they were going to work for the master. They became the last line of defence and defended democracy in the country.'

Prof Fikeni noted that liberation movements do not do well when they get into power. 'When they are in power, they have influence and have access to money, whereas when they were in the bush there was little to steal,' he added.

Prof Fikeni said that there have always been different levels of state capture and there has always been elements of state capture in SA's history. He pointed out that the country must be mindful of the fact that it is not only the government that is corruptible; the private sector can also be corruptible.

NADEL's role in upholding the rule of law

On the second day of the conference, Judge President of the Eastern Cape Division of the High Court, Selby Mfanelo Mbenenge, was the first guest speaker to deliver an address. Judge President Mbenenge said that the topics that will be covered at the conference reaffirms NADEL’s role of upholding the rule of law in the country. He added that the topics demonstrate that NADEL seeks to promote the constitutional order and socio-economic rights.

Judge President Mbenenge noted that NADEL is committed to the transformation of the judiciary in training lawyers with judicial skills and seeks to establish a relationship with the judiciary. He added that the judiciary and lawyers need one another to enhance the rule of law in the country. He added that the topics demonstrate that NADEL seeks to promote the constitutional order and socio-economic rights.

Re-elected President of NADEL, Mvuzo Notyesi, delivered the Presidential Report. In the report, Mr Notyesi said that the resolutions taken at the 2017 conference and AGM were inspired by NADEL’s commitment to building a just society free from exploitation that is based on the values of the Constitution and adheres to the advancement of human
rights. He added that the resolutions also reaffirmed NADEL’s commitment to the promotion of an independent judiciary as this was the core principle of the existence of NADEL.

Mr Notyesi noted that public office bearers should be held accountable for their wrongdoings and their involvement in corruption as this has devastating consequences to the poor people of the country. ‘In the country we still have high levels of poverty, inequality and unemployment,’ he added.

Speaking about the life after the full enactment of the Legal Practice Act 28 of 2014 (the LPA), Mr Notyesi said that NADEL has advocated strongly for the formation of the successor of the Law Society of South Africa (LSSA). He added that the Legal Practice Council (LPC) will place both attorneys and advocates under one regulatory body and only perform regulatory duties, which will be geared towards the protection of the public. ‘We are a step closer to a unified body that we have advocated for, a body that will look after the interest of the profession. … That body will not be a replacement for NADEL,’ he said.

Messages of support
Ambassador of Cuba, Rodolfo Benitez Verson, thanked NADEL for the role it played in the release of the Cuban Five. Speaking about the Cuban government, Mr Verson said that more than half of the Cuban Parliament consists of women. He added that Cubans receive free high quality education for all levels and that Cuba has the highest share of its budget dedicated to education. ‘Cuba has the highest number of doctors ratio per capita, Cubans have a life expectancy of 80 years,’ he said.

Mr Verson noted that the Cuban revolution inspired all and that the country is proud of its African roots. He commended NADEL for its efforts aimed at healing the wounds inflicted by Apartheid and...
its commitment to the betterment of the lives of South Africans.

Incoming Co-chairperson of the LSSA, Ettienne Barnard, noted that listening to NADEL’s president report it is clear that the organisation is serious about adhering to constitutional values. Ambassador of the Bolivarian Republic of Venezuela, Mairin Josefina Moreno-Merida, also delivered an address in support of NADEL and its efforts.

Legal education

Member of the LSSA’s Standing Committee on Legal Education, Zaahira Tiry, said that professional vocational training (PVT) is an essential paramount part of legal education. ‘What we need to decide upon is what model this important part of legal education should take. ... We cannot leave the conference without deliberating this issue’ she added.

Ms Tiry noted that the role of a progressive lawyer is to deepen the nation’s democracy. She added: ‘If we are going to give South Africa the best legal practitioners, we can only achieve this by giving proper training. The present system has failed. ... We fought for freedom and we stand for justice and we are inclined to support the adoption of a sincere recommendation for the benefit of future generations.’

Speaking about the issues the LPA is trying to solve, Ms Tiry said access to legal services is not a reality for most South Africans. ‘Many people have legal problems and are in dire need for legal representation. The legal profession is not broadly representative of the demographics of the country. Opportunities for entry into the profession are restricted in terms of the current legal framework. We have reached the end of the struggle and now is the time we transform the profession,’ she added.

Ms Tiry noted that in the future there must be quality uniform legal training for all legal practitioners. ‘The training must not discriminate, which will include proper compensation for all candidate legal practitioners. The training must strengthen the independence of the profession,’ she added.

Head of the Law Clinic at the University of Fort Hare, Nasholan Chetty, noted that many LLB graduates lack a number of skills such as the ability to draft and understand ethics and, as always, universities are blamed for this reality.

Mr Chetty stated that university law clinics could provide assistance in ensuring that candidate legal practitioners know and understand the ethical standard they have to adhere to in order to be lawyers that the community needs.

Discussion on the future of the profession

Member of Advocates for Transformation, Dali Mpofu SC, noted that in the 80s and 90s the distinction between advocate and attorney was irrelevant that is why he was part of the NADEL delegation that negotiated during the formation of as Johannesburg and that they should be taught to rather work for communities in rural areas and have an interest in promoting human rights.

Mr Chetty noted that the legal profession should discuss the future model of the LLB, as they owe this to the future generation of lawyers. He added that many students who qualify for their LLB want to work in major cities such
the LSSA. ‘No one found that to be an issue because our approach was never about us and them, unlike now, we are trapped in colonial divisions,’ he added.

Mr Mpofu said that the preamble of the LPA clearly states what the Act is trying to achieve. He said that the first piece of the preamble is about transformation as it states that the profession needs to be broadly representative of the demographics of the country. ‘We as the profession, particularly the organised profession, need to start asking deep questions. It does not mean that we will have the same view; there are political ideological questions that need to be answered,’ he said.

Touching on the topic of a progressive lawyer, Mr Mpofu said that progressive lawyers fight for human rights and that one does not need to be a formal member of a political organisation to achieve this. ‘Money is not everything, winning is not everything. Some cases need to be argued. Money should not guide you, it will come, winning should not drive you, it will come … As a progressive lawyer you should ask yourself: What is it that I have done to lessen the gap of inequality?’ he added.

Member of the National Forum on the Legal Profession (NF), Krish Govender, noted that it took 20 years for the LPA to be enacted because some lawyers are only interested in stopping progress. ‘At the National Forum we are still fighting with lawyers who do not want to see change. The whole issue of PVT is being fought over at the National Forum,’ he added.

Mr Govender then went on to unpack the chapters of the LPA and gave ‘the lazy lawyers’ guide to the Act’, he said:

- Chapter 1 deals with the definitions, the administration of the Act and the preamble.
- Chapter 2 deals with the LPC, which will be a regulatory body much like the Health Professions Council of South Africa. The LPC will comprise of 23 members, 16 of which will be from the profession, that is ten attorneys and six advocates. The right people will have to be elected to fill those positions. The LPC will be purely regulatory, look after the interest of the public and ensure that lawyers do not break the rules. The LPC will not hold any AGM and will be nothing like the LSSA.
- Chapter 2 part 2 deals with how the LPC will operate.
- Chapter 3 deals with the regulation of legal practitioners and candidate legal practitioners.
- Chapter 4 deals with the codes of conduct.
- Chapter 5 speaks about the envisaged legal ombudsman, which the LPA will introduce.
- Chapter 6 deals with the Fidelity Fund.
- Chapter 7 is about handling trust money.
- Chapter 8 deals with the general provisions and tying up loose ends.
- Chapter 9 is about the rules that have already been gazetted.
- Chapter 10 deals with provincial law societies.

Deputy Chairperson of the NF, Max Boqwana, said that when one looks at the LPA in its current form, they might ask what happened to the issue of fusion between the advocates and attorneys profession. Deputy Chairperson of the NF, Max Boqwana, said that when one looks at the LPA in its current form, they might ask what happened to the issue of fusion between the advocates and attorneys profession.
fession. ‘Even the issue of unity within the profession is not really covered by the Act. South Africa is thirsty for a different type of lawyer. The greatest tragedy of our country is the fact that there is so much inequality. So the country needs a lawyer who will be able to address this issue,’ he added.

Decolonisation
Chairperson of the Justice Portfolio Committee and Member of Parliament, Dr Mathole Motshekga said the South African Constitution is hailed among the best in the world and it has earned that position. Dr Motshekga noted that any truthful decolonisation would deepen human rights.

Dr Motshekga said that colonisation led the Europeans to believe that Africans were sub-human. ‘Colonisation was the genesis for the ideology for the Apartheid system. It also aided the white settlers to enslave the Africans. ... When religion was brought to Africans, the Africans were told that they could not be ordained because they cannot communicate with God directly,’ he added.

Dr Motshekga went on further to state: ‘When we talk about the decolonisation of the entire legal system and the country we need to start in the minds of its citizens otherwise we will not go anywhere. ... Today we are told that African customary law has the same status under the Constitution, this is not true. We do not teach African customary law at universities. If students have a choice between customary law and Roman Dutch law, they will choose Roman Dutch law.’

Corruption as a conduct that undermines democracy and the rule of law
Associate Professor at the University of Johannesburg, Mcebisi Ndletyana began his address by saying there is a ‘toxic problem’ that has emerged because of colonisation. ‘Land was taken by force and the perpetrators were protected. The natives were forced to live in the Bantustans and were migrant temporary contract workers. The natives did not have rights and the owners of the mines they worked for could make maximum profit because they did not have to provide for proper housing,’ he added.

Prof Ndletyana noted that when the Commission for Rugby Affairs subpoenaed former President Nelson Mandela to court, he went. ‘Madiba did not have to appear in court because he was the president, but he went because he understood what protecting the rule of law entailed,’ he added.

Prof Ndletyana said that the Zuma Presidency did not have respect for the rule of law and this can be seen by the firing of competent individuals and the public lynching of the former Public Protector, Thuli Madonsela.

Challenges facing women and young practitioners
Judge President of the Bloemfontein Division of the High Court, Mahube Molemela, said that women constitute 35% of the number of judges in the country. Quoting Justice Mokgoro, Judge President Molemela said: ‘Having women in law with positions of power should not be underestimated as this could bring enormous returns.’

Judge President Molemela added that patriarchy is one of the major reasons why female legal practitioners face chal-
Challenges in the profession. Patriarchy is the number one challenge for women in the profession. We need to face it head on because it has devastating consequences for women. We must inculcate steps to root it out,' she added.

Judge President Molemela noted, however, that not all is bleak when it comes to gender transformation of the profession and that there is hope for change.

Judge President Molemela said that another issue the profession needs to have a closer look at is the fact that female practitioners do not stay in the profession and this can be seen by the number of female senior attorneys and advocates. 'Most women do not practice law, they work at corporate organisations,' she added.

Judge President Molemela conducted anecdotal research with female legal practitioners she encountered and said she was shocked to realise the challenges she faced as a legal practitioner were still prevalent. 'The glass ceiling that I experienced was still in place. There are still law firms that use female legal practitioners to get good BEE scores and females are still used for window dressing. ... Law firms hire female practitioners as a ticking box exercise and do not make sure they retain them,' she noted.

Judge President Molemela added that during her anecdotal research, she also found that black advocates were mostly given unopposed divorce work. She added: 'The women also highlighted sexual harassment as an obstacle in advancing their careers. They said it is difficult to gain knowledge from senior male practitioners because they keep asking for sexual favours. The women are taken advantage of. The women also mentioned that there is no promotion of wellness at law firms and they are not given coping skills, which may lead to misconduct or even substance abuse.'

Another issue Judge President Molemela's research highlighted was that black female legal practitioners are presumed incompetent until they prove otherwise. 'They are constantly micromanaged, they have to prove themselves in every role while their white counterparts are trusted with the work.'

In conclusion, Judge President Molemela said that the issues raised by her research need to be addressed and that the profession needs to be a better place for female legal practitioners.

Progress in the implementation of the LPA
On the third day of the conference (17 May), Minister of Justice and Constitutional Development, Michael Masutha, delivered an address. Mr Masutha spoke on the progress of the LPA and transformation of the profession in general.

Mr Masutha said he was disappointed at the pace at which the profession has not been able to transform. He added: 'I received proposals for silks from the Cape and Pretoria Bar and the composition was almost entirely white male. This should not be the case 25 years after democracy. ... How best do we turn this situation around?'

Mr Masutha noted that it lies in the hands of the profession to make transformation a reality. 'The profession has to make sure that it is representative of the population. The profession also has to make sure that the rule of law is upheld in the country.'

Speaking about the LPA, Mr Masutha said that part 1 and 2 of the Act came into operation in 2015, which mainly deals with the workings of the NF, which is put in place to deal with unresolved issues within the LPA.

For more on the LPA see:
- LSSA information session roadshows kick-start dialogue on a new representa-
The Free State Law Society (FSLS) held its annual general meeting (AGM) on 27 October 2017 in Bloemfontein and the council elected is as follows:

**Back from left:** Henri van Rooyen; Tsiu Vincent Matsepe; Johannes Fouché; Jan Maree; and Etienne Horn.

**Middle from left:** Dumisani Qwelane; Cuma Siyo; Deidré Milton; and Mzwekhaya Arnold Mohobo.

**Front from left:** Noxolo Maduba; President of the FSLS, Vuyo Morobane; Vice President of the FSLS, David Bekker; and Acting Director of the FSLS, Tumelo Leope.

*For the full article about the AGM see ‘National unified body for the Legal Profession discussed at FSLS AGM’ 2017 (Dec) DR 13.*
Prevention and combating of Hate Crimes and Hate Speech Bill approved

The Department of Justice and Constitutional Development announced that on 14 March Cabinet approved the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Bill). In a statement released by the Department of Justice and Constitutional Development, Deputy Minister, John Jeffery, said ‘There is no question that incidents of racism and radical discrimination are all too frequent in our society and we are confident that the Bill, once passed, will contribute to eradicating not only racism, but all forms of discrimination, in our country.’

The statement added that the department wanted to respond to the allegations made, among others, by the Hate Crimes Working Group, that the Bill was sensitive in nature, requiring careful considerations made, among others, by the Hate Crimes Working Group, that the Bill was sensitive in nature, requiring careful consideration, which took time.

The department noted that the Bill was published in the Government Gazette, which took time.

The department said that government wanted to respond to the allegations made, among others, by the Hate Crimes Working Group, that the Bill was being delayed. The department said the Bill was not delayed and there can be no dispute that the Bill is complex and sensitive in nature, requiring careful consideration, which took time.

The department noted that the Bill was published in the Government Gazette for comment, it had received 75 854 submissions from institutions and individuals. According to the statement many submissions were received after the deadline, however, even those views and concerns expressed were submitted, considered and have, in many instances, been addressed in the revised Bill.

The statement added that while the submission of the Bill to Cabinet might not have happened within the expected timelines, it should be borne in mind the dialogue arising from the public discourse on the Bill had implications of its own and further research was required following the extensive comments received. This research was undertaken and there were further engagements with certain stakeholders.

The department said that government takes the views and opinions of the public and civil society very seriously as it prepares new legislation and, as the case with any Bill being submitted to Parliament, it underwent various internal processes, one which was the Socio-economic Impact Assessment System. A copy of this assessment, which is a public document and available for scrutiny, indicates the circumspection with which the department dealt with the various aspects of this piece of draft legislation, all the more so as the subject matter of the Bill is sensitive and contentious in nature.

The department added that it must be noted that most of the concerns around the previous draft of the Bill, have indeed been addressed in the revised Bill and the Bill that was approved was considerably different from the earlier Bill that was made available for public comment. The provisions dealing with, in particular hate speech, have been significantly changed.

The department pointed out that the qualifying criteria for hate speech is a clear intention to be harmful or to incite harm or promote or propagate hatred on the basis of –

- age;
- albinism;
- birth;
- colour;
- culture;
- disability;
- cultural or social origin;
- gender or gender identity;
- HIV status;
- language;
- nationality;
- migrant or refugee status;
- race;
- religion;
- sex, which includes intersex or sexual orientation.

The department noted that the revised Bill specifically excludes anything done in good faith in the course of –

- engagement in any bona fide artistic creativity;
- performance or other form of expression;
- academic or scientific inquiry; and
- fair and accurate reporting or commentary in the public interest, insofar as it does not advocate hatred that constitutes incitement to cause harm, from the ambit of hate speech.

It also excludes the bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, from the ambit of hate speech.

The department noted that the exclusions also find resonance with s 16 of the Constitution. The Bill, which criminalises both hate crimes and hate speech, will be introduced into Parliament shortly, whereafter it will go through the normal parliamentary legislative process.

De Rebus editorial committee bids farewell to Lutendo Sigogo

After serving for three years on the De Rebus Editorial Committee (EC), Black Lawyers Association President, Lutendo Sigogo’s term has come to an end. Mr Sigogo’s last meeting at the EC was on 27 March.

EC member, Peter Horn, said it was an absolute pleasure serving with Mr Sigogo. He added that Mr Sigogo brought a different dimension to the EC. The chairperson of the EC, Guii Harper, noted that the EC was grateful for Mr Sigogo’s work, dedication and input and that he will be missed.

Another EC member and former chairperson, Mohamed Randera said Mr Sigogo’s contribution was superbly valuable as he gave different and new directions when he needed it.

In his goodbye speech Mr Sigogo thanked the EC and the De Rebus staff. He said he felt welcomed from the very first day he arrived at the EC and worked well with everyone. He added that he was thankful to the staff for always being kind and assisting him when he needed it.

Mr Sigogo will be replaced by Ma-boku Mangena in the EC.
Traditional Courts Bill raises concerns

The Portfolio Committee on Justice and Correctional Services (the committee) expressed concerns regarding the time it took to draft the current version of the Traditional Courts Bill B1 of 2017 (the Bill) taking into consideration that there are serious gaps in the Bill. In a statement released on behalf of the committee by the Parliamentary Communication Services it stated that the committee had raised concerns at the public hearings held on 13 and 14 March.

The statement stated that the Chairperson of the committee, Dr Mathole Motshekga, said the committee was disappointed that it took more than ten years to produce the Bill. The statement added that Dr Motshekga said the Bill did not seem to do what the people of South Africa had concerns about years ago and did not address the matters of concern raised during the previous time the Bill was before Parliament.

The statement noted that the committee heard a presentation from the Kwa-Zulu-Natal Provincial Efficiency Enhancement Committee and the Alliance for Rural Democracy. The presenters raised concerns that the Bill indicated that the review of traditional courts would be handled by the High Parliament. The committee heard that the process could be cumbersome and unaffordable, as litigation in the High Court was costly. Another concern was of the references to the role of women’s participation in traditional courts, were also highlighted by some as problematic.

The statement highlighted the other concerns, namely the lack of:

- enforcement against those who breached the code of conduct and also of sanctions against presiding officers who abused power; and
- recourse to legal representations for complaints.

The statement pointed out that the purpose of the Bill was to provide a uniform legislative framework for the structure and functioning of traditional courts in line with constitutional imperatives and values. The Bill aims to provide inhabitants of traditional communities with the option to either submit themselves to the traditional courts system or opt out by using the conventional system.

The statement stated that the committee heard the views that an opt out clause could bring disorder to the system, with some saying that it could render the traditional court system obsolete. The statement noted that questions were raised about how an opt out system would work and the legal status of traditional courts. The question of introducing legal representation into the system was widely debated, with concerns expressed that this would change the tone of the system.

The statement said that the committee also heard from the Centre for Child Law with regard to matters such as abuse and domestic violence, which should be referred to magistrates’ courts and that it should be made mandatory. Mr Motshekga emphasised the importance of a home grown, legal system that represents the values of the people. "The purpose of all legal systems, irrespective of whether it is a court or a tribunal is to get the truth," Dr Motshekga said. The statement added that Dr Motshekga assured the public that the committee will take all submissions into account when it debated the matter in order to draft legislation that protects and respects customs, culture and human rights.

University of Johannesburg (UJ) graduate and candidate legal practitioner, Tsatseng Rantsho’s dream came true when he was awarded a bursary to study law after he matriculated. He told De Rebus that life as a tertiary student was tough and he could not make ends meet during his first year at university. Mr Rantsho said he discovered that he wanted to study law after receiving second place for an oral history competition in grade 11. He added that he was a troublesome student, but later changed his ways and put his potential to good use to realise his dream of studying law.

Mr Rantsho said that even after receiving a bursary, he still could not make ends meet. He then decided to get a job. He added that he was fortunate to get a job as a petrol attendant and was able to survive while pursuing his studies, as well as help his family. He said his peers were inspired by him and encouraged him to do what he could to complete his law degree. He noted that he also had a strong support system in his family, friends and partner. He said that while he was working as a petrol attendant some of the customers he served made him feel inferior, but he persevered by reminding himself that he was a legal practitioner in the making.

Candidate Legal Practitioner, Tsatseng Rantsho, worked as a petrol attendant to make ends meet while studying law.

Mr Rantsho admitted that certain situations and reasons can lead to some students dropping out of tertiary institutions and pointed out that not being able to make ends meet is one of them. However, he said this should not be a reason to drop out of university. He added that students who struggle should find meaning in the struggle and face the challenge head on. Mr Rantsho said despite his challenges he grew as a leader and became the chairperson on the house committee of his residence for two years.

Mr Rantsho who is now serving his articles at Legal Aid South Africa noted that he has started a non-profit organisation (NPO) called Sgela 1st (School First). He said his NPO aims to encourage townships to take education seriously and consider tertiary education. He added that his work at Sgela 1st is done through motivational talks he gives at schools and one on one engagements with students. He said he is currently studying a postgraduate diploma in compliance at UJ and added that his plan is to be admitted as a legal practitioner and become a compliance officer at one of South Africa’s leading banks and also to grow his NPO.
Notyesi and Barnard elected Co-chairpersons to lead LSSA in year of critical change for the legal profession

Mthatha attorney, Mvuzo Notyesi, and Somerset West attorney, Ettienne Barnard, were elected Co-chairpersons of the Law Society of South Africa (LSSA) at its annual general meeting held in Cape Town on 23 March. Both Mr Notyesi and Mr Barnard bring with them the experience gained from having served as LSSA Co-chairpersons previously; Mr Notyesi in 2016 and Mr Barnard in 2014.

According to a press release issued by the LSSA in March, Mr Barnard and Mr Notyesi’s experience will be invaluable during this year, which will see fundamental changes in the governance of the legal profession when the Legal Practice Act 28 of 2014 is expected to be fully implemented towards the end of this year. The Legal Practice Council will take over the regulation of all legal practitioners – attorneys and advocates – and the four statutory, provincial law societies will fall away. The four provincial law societies make up four of the six constituent members of the LSSA, the other two being the National Association of Democratic Lawyers (NADEL) and the Black Lawyers Association.

The Co-chairpersons will need to steer the attorneys’ profession through fundamental changes, which includes transforming the LSSA into a new, representative body for legal practitioners that will represent, promote and protect legal practitioners, while the Legal Practice Council will be their regulator.

In the press release, the Co-chairpersons said: ‘Thank you to the profession for having confidence in electing us. This promises to be an exciting year of hard work and new challenges and we call on members of the profession and public to take our hands and provide input on how we can best improve the organisation and image of the profession.’

About the Co-chairpersons

Human rights lawyer and activist, Mvuzo Notyesi, was recently re-elected President of NADEL. He holds the BProc and LLB degrees from the University of Transkei, was admitted as an attorney in 1999 after completing his articles and attending the LSSA’s School for Legal Practice in East London. He has practised as director at Mvuzo Notyesi Inc since 1999.

Mr Notyesi has been a council member and a member of the Management Committee of the LSSA for a number of years. He represents the LSSA on the Judicial Service Commission. He has previously been a council member and acting President of the Cape Law Society, and a member of the Board of Legal Aid South Africa. Mr Notyesi has a passion for education and has been a part-time lecturer at the University of Transkei and an instructor at the LSSA’s School for Legal Practice in East London. He is also an examiner for the Attorneys Admission Examination. Mr Notyesi is Chairperson of the Notyesi Foundation, which awards bursaries to disadvantaged students to attend university.

Ettienne Barnard is currently the Vice President of the Cape Law Society where he performs duties on its council, magistrates’ court and other committees. He holds the BA LLB degree from Stellenbosch University and was admitted as an attorney and conveyancer in 1993. He is a director of the community-based commercial and litigation firm, Ettienne Barnard Attorneys in Somerset West. The firm also represents clients in human rights issues on a pro bono basis and has successfully defended pro bono clients’ rights to housing in the High Court and Supreme Court of Appeal.

He serves the public as a commissioner of the small claims court and has assisted in the development of free manuals, on-line resources and an app on the small claims court. He serves the profession as a Council and Management Committee member of the LSSA, and as a member of its Small Claims Courts Committee. Mr Barnard also contributed to the Small Claims Court Joint Venture Committee with the Department of Justice and Constitutional Development and Western Cape universities, and as a member of the Western Cape Advisory Committee to Sheriffs’ Board and Justice Minister regarding the appointment of Sheriffs.

In the field of skills development, Mr Barnard is a mentor of young legal practitioners and has participated as a moot court judge in local and international moot court competitions. He is an educator at heart and in addition to presenting practical training, drafts and lectures in court practice, commercial subjects and practice management for the LSSA Legal Education and Development (LEAD) division, he has chaired and held executive or other positions on the governing bodies of local and regional community organisations.
Income tax understatement penalties: A different view?

By Alan Lewis

In the recent matter of Mr A and XYZ CC v The Commissioner of the South African Revenue Service (KZD)(unreported case no IT13725 and VAT1426, and IT13727 and VAT1096, 8-2-2018) (Olsen J), the KwaZulu-Natal Tax Court was asked to decide, among other matters, whether or not the Commissioner for the South African Revenue Service (respondent) was entitled to levy an understatement penalty, in terms of s 222 of the Tax Administration Act 28 of 2011 (the Act).

The appellants contended that the respondent had failed to discharge the onus, which he bore, to prove that neither SARS, nor the fiscus, had suffered any prejudice, as a result of their failure to submit their returns, which would entitle the respondent to levy the penalty.

In dismissing this argument, the Chair- man of the Tax Court, Olsen J, expressed at para 43 as follows:

‘Turning to the question of proof of prejudice, I take the view that, save in regard to the second appellant’s income tax return for the 2012 tax year, prejudice to SARS [South African Revenue Service] and the fiscus is implicit in the failure of the appellants to render returns, and the consequent failure of the appellants to pay the tax due under those returns at the time when it was supposed to be paid’ (my italics).

The law

In terms of r 34 of the rules, prescribing the procedures to be followed in lodging an objection and appeal against an assessment (rules) – the issues in an appeal to the tax court will be those contained in the respondent’s statement on the grounds of assessment and opposing the appeal – read with the taxpayer’s statement of the grounds of appeal and, if any, the respondent’s reply to the statement of grounds of appeal.

An ‘understatement’, ‘means any prejudice to SARS, or the fiscus as a result of -

(a) a default in rendering a return’ (s 221 of the Act).

In the the event of an understatement by a taxpayer, a taxpayer must pay the understatement penalty, as determined by s 222(2) of the Act.

‘In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the Tax Court must decide the matter on the basis that the burden of proof is upon SARS’ (s 129(3) of the Act).

In the matter of The Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Another (2007) 69 SATC 25, the respondents attempted to advance two arguments before that court, on matters, which were not set out in their statement of grounds of appeal.

In terms of the previous r 12 (which has since been replaced by a similar r 34), the court refused to receive such arguments, on the basis that the particular allegations, on which their arguments were based, had not been raised in their statement of grounds of appeal.

Conclusion

I submit that the same reasoning should apply to the present rules, and in particular r 34. Consequently, our Tax Courts, are obliged to consider respondent’s statement of the grounds of assessment and opposing the appeal, read with the taxpayer’s statement of the grounds of appeal, to determine the issues in dispute, and adjudicate them accordingly.

It should follow then, that, where a respondent has not alleged any prejudice, either to SARS, or the fiscus, in his statement of grounds of assessment and opposing the appeal, he should not be allowed to present such evidence at the trial, with the result that he will not be able to discharge the onus, which he bears in this regard. In such a case, the Tax Court should not consider the question of prejudice either.

There is no finding in the judgment of the KwaZulu-Natal Tax Court, that respondent had made the necessary allegations, regarding prejudice, in his statement of grounds of assessment and opposing appeal.

Consequently, I submit that, in the light of r 34, and the approach of the Supreme Court of Appeal, in the Brummeria matter, the court erred to find that prejudice is implicit, in the failure of a taxpayer to render a return, and that therefore, the respondent had proved that the appellants had committed an understatement, which is subject to an understatement penalty.

Instead, the Tax Court should have found that the respondent had failed to make the necessary allegations, in his statement of grounds of assessment and opposing appeal, and also failed to lead the necessary evidence on this point, and that consequently, he had failed to prove that he was entitled to levy an understatement penalty.

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The powers with regard to the entering and searching of a premises and the seizure and forfeiture of property are mainly dealt with in s 21 of the Criminal Procedure Act 51 of 1977 (the CPA), as well as the National Prosecuting Authority Act 32 of 1998 (the NPA).

Applying for a search warrant

If and when circumstances arise and law enforcement officers find themselves in the position where they have reasonable suspicion that a crime of substance was committed, they may apply, by way of an affidavit, to the Office of the Chief Magistrate of the district – where the crime was allegedly committed – for the issue of a search warrant. The affidavit has to be completed by the specific officer who suspects the crime to have been committed, and the application may be lodged to a magistrate (not a regional magistrate) in chambers. Policemen are normally the applicants who apply for search warrants, but other properly qualified officials, for example, certain environmental management inspectors may also apply for the issuing of search warrants. The application has to meet the requirements as set out below.

Applicant requirements

The citation of ‘regional magistrate’ needs clarification. Search warrants may in actual fact not be issued by a regional magistrate in chambers if the application is brought in terms of s 21(1)(a) of the CPA, because a ‘regional magistrate’ is not a ‘magistrate’ in terms of the Magistrates’ Courts Act 32 of 1944. However, a regional magistrate may issue a ‘Bench’ search warrant in terms of s 21(1)(b) of the CPA, because they are classified as a ‘judicial officer’. In practice the corollary is that a regional magistrate may not issue such warrant if it is applied for before court proceedings start, but the magistrate may issue it during the course of court proceedings.

Although the warrant is issued by a magistrate (as opposed to a court) in their chambers, it is in fact an ex parte court order issued with the same authority as an order made by the magistrate in court. The fact that it is an ex parte order, implicates that the very strict law principle of audi alteram partem is deviated from, and this has certain far reaching consequences, for example:

- The affidavit in question has to be meticulously drawn up and has to meet all the necessary legal requirements. Moreover, the attestation of the said affidavit has to be done correctly.
- The attesting officer should, ideally, not be actively involved in the investigation of the case.
- Ex parte applications, such as an application for a search warrant, must be lodged in utmost good faith. All the material facts should be objectively and fully disclosed to the judicial officer concerned.

More than 95% of all search warrants are issued by magistrates in chambers. A judicial officer needs to exercise discretion on whether to authorise a search warrant or not. Accordingly judicial officers may have differing views. Refusal does not, however, warrant a ‘forum shopping’ expedition in support of an unsuccessful applicant. Judicial officers exercise their discretion judicially and their ruling should be acknowledged.

What do the courts require?

What powers are granted to an official applying for a search warrant?

This is to be understood in its ordinary dictionary connotation. A search warrant grants a properly identified person the power to execute the actions described in the said warrant.

Section 29 of the NPA reads as follows: ‘The Investigating Director or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an investigation at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that investigation is or is suspected to be, and may –

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary.’

The acquiring of a search warrant may be dispensed if the applicant is – on reasonable grounds – convinced that an object, book or document, which is the subject of the search, may be destroyed, tampered with or disposed of if a search warrant is first applied for.

Entry to the premises shall be executed during the day, unless execution at night is justifiable. The authorising judicial officer has to be satisfied that the resort to these extreme powers would be rational in all the circumstances. Search warrants are intended to ensure that the privacy of the subject’s home is not invaded at unreasonable hours. This does not signify, however, that a search, which commenced during daytime, becomes unlawful at sunset. The fact that the applicant of the search warrant left the premises during daytime to fetch certain equipment required in the search, and only returns after nightfall, does not constitute a second or unauthorised search.

If the wording of the warrant is too broad, or if its terms go beyond those that the authorising statute permits, a court of appeal will set it aside. So called ‘catch-all’ paragraphs in a warrant that refer to anything that might have a bearing on the investigation will render the warrant invalid. A ‘one size fits all’ warrant is also not acceptable. A warrant should reflect the merit of each occasion, not simply be taken from a template. An overbroad warrant cannot be saved by saying that the individual subject to the search knew or ought to have known what was being looked for. The specific objects being searched for, should be itemised.

The specific applicant has to be identified by name in the search warrant. The search warrant cannot simply be issued to ‘the station commander’. This amounts to the same as ‘to whom it may concern’. More than one person may be named, but it is of paramount importance to note that a ‘team’ of persons – whose individual names are not mentioned on the search warrant – may not simply be sent into premises to do a search.

Conducting searches

Any person who acts on the authority of executing the search warrant ‘may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.’

A executing searcher may dispense with the issue of a search warrant –

- if the person who is competent to do so consents to the search and entry; or
- if the searcher believes on reasonable grounds that the required warrant will be issued to them if they were to apply for such warrant (see s 29(4) of the NPA),
and the delay caused by the obtaining of such warrant would defeat the object of the search.

A warrant stating that the subject of the search should know what was being looked for, will not be acceptable. The warrant must specify its object, and must do so intelligibly within the bounds of the empowering statute.

- Conducting searches on individuals

Any person executing a search warrant must, before commencing with the execution thereof, identify themselves to the person in control of the premises, if such person is present and to hand over a copy of the search warrant. If such person is not present, affix a copy of the search warrant to a prominent place on the premises.

The court will examine search warrants with a jealous regard for the liberty of the subject and their rights to privacy. Resultantly the courts are inflexible in their approach that the privacy of the subject’s homes are not invaded at unreasonable hours.

The person executing the search warrant must supply the person in charge of premises – at their request – with particulars regarding their authority to execute a warrant.

Any person who obstructs the executing searcher in the performance of their functions, shall be guilty of an offence. In a similar vein the subject of a search who is asked for information relating to matters within their knowledge, and who refuses to co-operate, shall be guilty of an offence.

- Conducting searches at locations

The executing searcher enumerated in the warrant must identify themselves at the request of the owner or the person in control of the premises. This may be a person other than the person subjected to the search.

A search warrant must convey intelligibly to both searcher and searched the ambit of the search. There should be no ambiguity or vagueness.

- Conducting searches on vehicles

The executing searcher must satisfy the judicial officer with the necessary information that there is reasonable suspicion that, for example, the subject vehicle was used in the commission of an identifiable offence. For example, the vehicle, which was used to convey a person or persons to the place where an offence was subsequently committed, cannot necessarily be said to have been used in the commission of the offence. An example of where a vehicle was used in the commission of an offence would be when it is alleged that the vehicle itself was used to haul out an illegal gill net from the water.

Confiscating evidence

If someone claims that any item discovered contains privileged information and for that reason refuses the seizure of such item, the executing searcher must request the registrar of the High Court to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

A judicial officer should not refuse to issue a warrant merely because they are of the view that such material is not necessary for the investigation of the matter.

A fortiori a magistrate cannot refuse an application for a search warrant, because they consider that the required evidence can be attained by invoking the less rigorous measures provided for in s 28 of the NPA, in terms of which, the investigating director may hold an inquiry on the matter in question.

By Thapelo Kharametsane

Is it lawful for an employer to institute two or more disciplinary inquiries against an employee that run parallel to each other?

Our law seems to be silent on whether or not an employer can lawfully and/or fairly institute two or more disciplinary inquiries against an employee that run parallel to each other. The disciplinary codes and policies of most employers in the private and public sector are also silent on this issue. This article will focus on whether or not it is lawful (and not whether it is fair) for the employer to institute parallel disciplinary inquiries against an employee.

This issue was recently addressed in the case of Rabie v Department of Trade and Industry and Another (LC) (unreported case no J515/18, 5-3-2018) (Nkutha-Nkontwana J), where Nkutha-Nkontwana J held that pending the finalisation of the ongoing pre-dismissal arbitration proceedings between the parties, the Department of Trade and Industry (the DTI) is divested of its power and prerogative to institute any inhouse disciplinary inquiry against Virgil Rabie (Mr Rabie), including dismissing him consequent to such proceedings.

The facts in the aforementioned matter are briefly as follows: During December 2016, the DTI instituted four charges of misconduct against Mr Rabie. The parties agreed to refer the matter for pre-dismissal arbitration to the General Public Service Sector Bargaining Council (GPSSBC) in terms of s 188A of the Labour Relations Act 66 of 1995 (the LRA). Subsequent to a number of postponements, the matter proceeded on 11 December 2017 with the DTI leading its first witness, Mr Abrahams of Ubuntu Business Advisory and Consulting (Pty) Ltd. During the cross-examination of Mr Abrahams, a version of Mr Rabie’s defence was presented to the effect that he had untruthfully informed his subordinate, Ms Kornizer that the DTI’s service provider had instituted civil action against the DTI as a ploy to put pressure on her to perform as she appeared to be indifferent about her responsibilities in as far as the contract between the DTI and the service provider in question were concerned. Emanating from the abovementioned version put to Mr Abrahams, on or about 30 January 2018, Mr Rabie was served with another notice of disciplinary inquiry to be held in-house, where he was charged with dishonesty and misrepresentation. Mr Rabie attended this disciplinary inquiry on 13 February 2018 and raised a preliminary point to the effect that there was a pending pre-dismissal arbitration, which pertains to the same subject matter, which ought to run its course, as he could not be subjected to two parallel processes. The Chairperson dismissed Mr Rabie’s preliminary point and ruled that the inquiry should proceed. Consequently on the Chairperson’s ruling, Mr Rabie lodged an urgent application in the Labour Court seeking an order staying the disciplinary inquiry against him, pending the finalisation and outcome of the pre-dismissal arbitration proceedings, as agreed to by the parties and interdicting the DTI from instituting any further disciplinary proceedings.
against him pending the finalisation and outcome of the predismissal arbitration proceedings held at the GPSSBC.

In granting the relief sought by Mr Rabie, the court held as follows:

‘Pending the finalisation of the pre-dismissal arbitration, the DTI is divested of its power and prerogative to institute any in-house disciplinary inquiry against Mr Rabie, including dismissing him consequent to those proceedings, in terms of section 188A agreement; alternatively, in terms of the doctrine of election. Likewise, in the absence of any right by the DTI to unilaterally institute the in-house disciplinary inquiry, Mr Rabie is entitled to the relief he seeks.’

In reaching the above decision, the court relied on SA Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others (2013) 34 IJ 706 (LC). The court as per Van Niekerk J, held at para 11 as follows:

‘Section 188A (despite its unfortunate title which on the face of it, assumes the outcome of the arbitration hearing) has as its purpose a means of expediting dispute resolution by avoiding duplication between internal and external hearings. In effect, in terms of a tripartite agreement between internal and external hearings, an arbitrator steps into the shoes of the employer and assumes the right normally considered a sacrosanct element of the managerial prerogative – the right to exercise discipline, including the right to dismiss. The benefit for all is the elimination of the duplication that inevitably occurs when court-like in-house hearings are inevitably followed by an arbitration hearing conducted on a de novo basis.’

Van Niekerk J, further held at para 15 as follows:

‘It seems to me from the wording of s 188A that once an employer and an employee consent to refer the determination of allegations of misconduct or incapacity to an arbitration hearing in terms of s 188A, and once the CCMA accedes to the request, the employer effectively agrees to bypass the application of its internal disciplinary procedures and to accelerate the disciplinary process to the stage of the arbitration hearing ordinarily applicable in a post-dismissal phase. That being so, and since the consent of the affected employee and the CCMA is necessarily to achieve that result, it is not open to the employer to abandon the process on a unilateral basis.’

The court also relied on Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2008) 29 IJ 2507 (CC) at para 54, where the Constitutional Court referred with approval to Chamber of Mines of South Africa v National Union of Mineworkers and Another 1987 (1) SA 608 (A) where it was stated that:

‘One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant’s dismissal. The position in which the master then finds himself is thus described by Bristowe J in Anghern and Piell v Federal Cold Storage Co 1908 TS 761 at 786:

“It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant. He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. Quod semel placuit in electionibus amplius displicere non potest (see Coke Litt 146, and Dig 30.1.84.9; 18.3.4.2; 45.1.112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place.”

The above statement of the principle may require amplification in the following respect indicated by Spencer Bower Estoppel by Representation (1923) para 244 at 224 – 5:

“It is not ... quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke’s phraseology: Quod semel placuit in electionibus amplius displicere non potest, as if mere mutability were for its own sake alone banned and penalised by the law as public offence, irrespective of the question whether any individual has been injured by the volte-face. It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none’.

From the above, it is clear that once an employer has agreed and/or elected to follow the pre-dismissal arbitration route, it may not subsequently institute a parallel disciplinary inquiry against the same employee, pending the finalisation of the said pre-dismissal arbitration. Albeit not declared unlawful by the court, it however, can be accepted that the DTI’s conduct in Rabie’s matter was unlawful (and Rabie satisfied the requirements for an urgent relief), hence the court interfered. As stated above, the facts in this matter concern a situation where the employer and the employee have agreed to a pre-dismissal arbitration process. Thus, it is still not clear whether the same principles will apply in a situation where no pre-dismissal arbitration was agreed on. For instance, what would the position be if during an ongoing in-house disciplinary inquiry, the employer becomes aware of further charges that they could institute against the employee, and instead of adding same to an existing inquiry, decides to institute a second in-house disciplinary inquiry that would run parallel to the ongoing process.

From the face of it, the employer’s aforementioned conduct may appear unlawful. However, on which basis would it be unlawful if the employee’s contract of employment and all the relevant prescripts incorporated in same are silent on the issue? From the looks of things, the employee who finds themselves in this kind of situation may not be assisted by the court in the same manner as Mr Rabie, as the court will most likely be of the view that such an employee’s case is one of procedural unfairness and should be challenged in the relevant bargaining council.

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Some red flag risk areas to keep a look out for in clients

A lot of focus is, correctly, placed on the internal processes that law firms can implement in order to avoid or mitigate risks. The legal services rendered are aimed at carrying out mandates given by clients to the firm. The focus of this article will be on the areas legal practitioners should consider when deciding whether to accept an instruction from a client. It is prudent to carefully consider each new instruction received from a client. The considerations to be taken into account will depend on the unique circumstances of each firm, client and instruction. This process will also mitigate the risk of a breakdown in the relationship at a later stage and the consequences of such a breakdown in the relationship, which may include dissatisfaction from the client, a resultant professional indemnity (PI) claim or even a complaint to the provincial law society.

Some of the considerations practitioners may consider applying are:

• Has the client previously instructed any other legal practitioner in respect of the same matter? Where the client has instructed and terminated (or seeks to terminate) the mandate of more than one legal practitioner in respect of the same matter that should be a red flag. Any inquiry should be made into the reasons for the termination of the mandate of the previous legal practitioner. The reality is that there are some clients who are perpetually unhappy with the service they receive. The breakdown in the relationship with the previous legal practitioner may be as a result of something to do with the client. Ask yourself whether the client had reasonable grounds for terminating the relationship with the previous legal practitioner. A perpetually unhappy client may be reluctant to pay your fee at the end of the day.

• Does the client have reasonable expectations? Establish what the client’s expectations are at an early stage. The client’s expectations should be managed both in terms of the outcome of the mandate and also in terms of the length of time it will take for the mandate to be carried out. In litigious matters, the fact that the court process can take several years to be finalised in some matters, must be expressly explained at an early stage. Issues with regard to fee payment terms must also be discussed upfront. Take note of the provisions of subss 35(7) to (12) of the Legal Practice Act 28 of 2014. Some clients may expect that the legal practitioner can perform miracles. Where, as part of the mandate, the legal practitioner is expected to sign undertakings, consideration must be given to whether or not the performance of the undertaking is within the control of the legal practitioner. It is important to establish whether what the client requires the legal practitioner to do, falls within the conduct of the profession. Legal practitioners should, as far as possible, avoid taking new instructions where prescription or a court date are looming.

• In what capacity is the client instructing the legal practitioner? Establish whether the client is acting in a personal or representative capacity. Where the client acts in a representative capacity, seek written proof of the authority and the ambit of such authority. Do not assume that the authority is wide and open ended. If necessary, try to verify the mandate with another party within the entity.

• Does the legal practitioner have the capacity and appetite to carry out this instruction? Where, due to work pressure or other reasons, the legal practitioner will not be in a position to attend to the instruction immediately or within a reasonable time, it may be best to refuse the instruction or to direct the client to another legal practitioner within the firm. You may feel that the instruction will be lucrative financially, but if you cannot give the matter the required attention it may turn out to have negative consequences for you in the long run and cost you money and time in the event of a dispute. Where the parties have difficulty reaching agreement on the terms of engagement, the practitioner would be well advised to consider refusing the instruction. Ask yourself whether the relationship as a legal practitioner and client will work out when you and the client cannot agree on the terms on which your relationship is to be based. Also, if you are unable to find mutual grounds of trust at an early stage, it would probably be best that the relationship not start in the first place.

• Conflict of interest? Gather as much information as possible on the matter at an early stage. Identify all the other parties involved in the matter and assess whether the practitioner or could be involved in a potential conflict of interest. Under no circumstances should practitioners compromise themselves and act in matters where there is a conflict of interest. All staff in the firm (professional and administrative) must be educated on the ethical rules applicable to legal practitioners and the professional standards that must be met. Some of the larger law firms have a documented conflict of interest policy and committees to assess and deal with conflicts.

• Financial Intelligence Centre Act 38 of 2001 (FICA) – always ensure that proper FICA verification is carried out on each new client. A FICA checklist can be compiled and used by all parties in the firm. Be cautious of clients who are unwilling or reluctant to undergo a FICA verification process or who promise to submit the relevant documents at a later stage, but never do so.

• Can we agree on the terms of engagement? It is important that the terms of the engagement between the practitioner and the client are agreed upfront. These can be recorded in a letter of engagement. Some of the areas that can be covered in the letter of engagement, which includes payment terms, the scope of the mandate and the expectations and obligations of the parties (the legal practitioner and the client). All the parties must sign the letter of engagement and the client should be supplied with a copy for their own records. This document will assist either party later in the event of a dispute. Where the parties have difficulty reaching agreement on the terms of engagement, the practitioner would be well advised to consider refusing the instruction. Ask yourself whether the relationship as a legal practitioner and client will work out when you and the client cannot agree on the terms on which your relationship is to be based. Also, if you are unable to find mutual grounds of trust at an early stage, it would probably be best that the relationship not start in the first place.

• Failure to give all instructions – another red flag will be a client who is not available to give instructions in respect of the matter. At the end of the day, a legal practitioner can only act on the instructions of the client. Where the latter is not forthcoming with instructions, it may be best to consider withdrawing from a matter. In the event that the legal practitioner withdraws from the matter, it is important that the client and all other parties in the matter are timeously informed. The following passage from S v Ndima 1977 (3) SA 1095 (N) (at p 1097) is instructive:

By Thomas Harban

PRACTICE MANAGEMENT – LEGAL PRACTICE

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It is quite plain that an attorney must, if he is going to withdraw from a case, withdraw from it timeously and inform his client that he is withdrawing so that the client can make other arrangements or, if there are none which he can make and if he wishes to do so, so that he may appear in person to argue his appeal. If an attorney wishes to carry on hoping that at the last minute he will be given funds and does not wish to withdraw at an earlier stage of the case because he will jeopardise his chance of being paid, then he must be willing to take the risk that he will find himself financing the appeal and go on with it. In other words, he either withdraws at an appropriate stage or he takes the risk and carries on and does the work. Prima facie, and I emphasise those words because I do not have the attorneys’ explanation before me ... the attorneys in this case are guilty of gross discourtesy and a neglect of their duty as officers of the Court.”

Similar sentiments were expressed by the court in Kara NO and Others v Department of Land Affairs 2005 (6) SA 563 (LCC). The Land Claims Court in Kloof Gold Mining Limited v Leedoodoon Gold Mine v Mnengele and Another (LCC) (un-reported case no LCC 62/01, 10-2-2003) (Gildenhuys J) labelled the last minute withdrawal of the respondents’ legal practitioners objectionable.

Legal practitioners must thus guard against conduct, which will expose them to sanction by the courts. Some courts may even refer the conduct of the legal practitioner to the provincial law society for investigation.

It is hoped that the red flag areas listed above will be borne in mind by legal practitioners when approached by clients with new instructions.

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Are you building a law firm for the future?

The Americans have need of the telephone, but we do not. We have plenty of messenger boys’ is a supposed 1879 quotation from Sir William Preece, Chief Engineer of the British Post Office. It is normal for institutions to want to resist change if all seems to be going well and all is under control during a specific moment in time. However, innovation never stops and changes eventually become inevitable and the ‘new normal’.

Most current law firms are based on strong traditions and hierarchies, stemming from history and professional ethics, the legal sector is generally notorious for playing catch up with technological changes or following sharp business trends.

The purpose of this article is to make legal practitioners aware of some external variables affecting local law firms, which are likely to impose changes to continue growing as a law firm in the future.

Are you ready for the fourth industrial revolution?

If you started your law career writing cheques, posting letters and sending faxes, you probably experienced the third industrial revolution during the course of your legal career. According to the article ‘The third industrial revolution’ (www.economist.com, accessed 24-2-2018), the first industrial revolution began in Britain in the late 18th century with the mechanisation of the textile industry. The second industrial revolution came in the early 20th century, when Henry Ford mastered the moving assembly line and ushered in the age of mass production.

According to a timeline published on www.timetoast.com (accessed 24-2-2018), the third industrial revolution, which primarily relates to the digitisation of documents and use of personal computers, started with the Internet, which became available in 1991 and the commercial use of e-mails in 1993. 1 January 2018 marked the 27th anniversary of the Internet. With virtual reality becoming a focus point in 2017, the fourth industrial revolution is under way.

According to Klaus Schwab ‘The fourth industrial revolution: What it means, how to respond’ (www.weforum.org, accessed 25-2-2018), the fourth industrial revolution is building on the third industrial revolution and will be characterised by a fusion of technologies that will blur the lines between the physical, digital and biological spheres. The fourth industrial revolution differs from the third industrial revolution in the sense that it will deal with big data, robotics and artificial intelligence (AI). It is generally expected that by 2020 technologies could be dominated by AI.

What is AI and why are you reading about it in a publication for legal practitioners? Let us first qualify what is meant by AI. According to an article published by software engineer, RL Adams ‘10 Powerful examples of Artificial Intelligence in use today’ (www.forbes.com, accessed on 25-2-2018), any piece of software is developed with some form of AI due to an algorithm that responds based on pre-defined multi-faceted input or user behaviour. However, true AI systems are systems that can learn on their own. The most famous true AI systems currently in use, include:

- Apple’s personal female assistant ‘Siri’ who has a friendly voice and assists with finding information or giving directions on a daily basis. Siri uses machine-technology and gets smarter and better at understanding and predicting language used by users.
- Amazon.com is a retail website where algorithms are more refined and improved on year-on-year, which helps the business accurately predict what users are interested in buying based on their online shopping behaviours.
- Netflix is a platform where one selects and watches movies. This platform uses AI to suggest movies to users based on user reactions and behaviours relating to the movies they have watched.

Industries that may be most affected by AI, include social media platforms, financial institutions and telecommunication service providers, as these industries deal in comprising data of consumers. Law firms will have to keep up with technological changes and AI will be important for law firms to adopt and implement in the future, to stay relevant and competitive.

Law firms have been digitally collecting, managing and storing data relating to clients, which include resources and standardisation of documents, from the time of the third industrial revolution. New tools and opportunities will arise in the fourth industrial revolution to, inter alia, do legal research faster, prepare documents, automate communication, etc.
with clients, and manage and use data more effectively.

Opinions on the impact of AI on the legal industry are diverse. Generally, benefits discussed include, the automation of documents, delegating routine tasks to computers, and developing processes, which will save time and cost for legal practitioners and clients. Could you imagine how the judicial system in South Africa (SA) could improve and operate, in the interest of clients, if more processes in the Registrars’ offices can be digitalised and automated?

The timeline on the impact of the fourth industrial revolution on law firms also varies. A very conservative school of thought estimates that the implementation of true AI solutions in law firms will only take place in the next 15 years. Although it is reported that international law firms appear to picking up the pace in adopting AI. Apparently only a few law firms in SA are pro-actively pursuing only opportunities in this space.

Is your firm investigating and planning adoption of technologies with AI capabilities?

Is your firm uberised?

What does it mean to be uberised? According to the online dictionary (www.collinsdictionary.com, accessed 24-2-2018) the term ‘uberised’ means ‘to subject (an industry) to a business model in which services are offered on demand through direct contact between a customer and a supplier, usually via mobile technology’. The term is derived from the Uber business model, which changed the taxi industry in many countries.

Some business experts suggest the ‘uberisation’ of the whole economy – as the result of this trend – is that the cost of services decreases and services become conveniently available and accessible to all who own cell phones. The question then arises, how can law firms be uberised? Is the legal profession ready to offer legal services to all clients based on a ‘legal practitioner on demand’ model at lower rates?

A spin-off of uberisation is that it creates a climate for shared economies. What does this mean? According to Bernard Marr (‘The sharing economy – what it is, examples, and how big data, platforms and algorithms fuel it’ www.forbes.com, accessed 25-2-2018) while Baby Boomers and Generation Xers probably, for instance, had shelves of favourite books, music and DVDs, Generation Y, (who is expected to be 50% of the South African work force in 2020), is likely to strive for a more ‘minimalistic’ style and install their favourite music, movies and books for example, only on their mobile devices. Based on these trends, and other economic pressures, it has become popular to share, for instance, motor rides and apartments, like with the examples of Uber and Airbnb.

Many new and small businesses embrace this trend of ‘shared economies’, which allow them to pop-up easily by using technology (in particular cell phones), and survive financially by sharing, for example, platforms, tools, or other infrastructure. As law firms are businesses who market, sell and deliver professional services to businesses and consumers, will these trends not also impact on operations of law firms?

Many local law firms already embrace the concept of ‘shared economies’ to lower overheads and cut costs, but not necessarily to offer uberised services. In this regard, if you are a small law firm:

• Do you perhaps share office space or facilities with another firm?
• Do you share a driver with other law firms?
• Do you share a receptionist?
• Do you use a virtual assistant?
• Do you share the use and cost of a printing-copy machine?
• What resources can your firm share with other legal practitioners?
• Are you a member of an association of firms, which could share precedents and resources?
• Do you have a network of expert attorneys?
• How can mentors be helpful to more firms?

These are steps in the right direction, but how can law firms fully embrace uberisation? Cell phones make it easy and instant to access businesses, which means that communication and transactions can happen faster. The availability of cell phone technology, could raise the expectations and demands of clients. Is your firm accessible via a cell phone? Is your firm accessible via a website adapted for cell phone use, or a downloadable application? What services could your firm potentially offer via a cell phone?

Richard Susskind and Daniel Susskind (‘The future of the professions: How Technology will transform the work of Human Experts (Oxford University Press 2015)), inter alia, predict that professions will evolve in the era of AI, and in particular, that more communities of professionals will form in the future to share expertise, even on an open source basis.

If ‘shared economies’ could lower overheads and costs, how can law firms go further to deliver some legal services faster, online, and against lower rates?

Are you embracing globalisation?

According to an article by Prachi Juneja ‘What is globalisation? – Meaning and its importance’ (www.managementstudyguide.com, accessed 25-2-2018), ‘globalisation' has many meanings, depending on the context, but can simply also be defined as 'the free movement of goods, services and people across the world in a seamless and integrated manner'. Globalisation is not a new term, but it becomes increasingly relevant based on threats and opportunities of international trade that arise due to the nature of current technologies.

Local law firms are exposed and impacted by globalisation on different levels. Some local law firms offer legal services to foreign attorneys and clients, while some also represent clients with foreign interests. Firms involved in international legal work are likely to have existing working relationships with foreign law firms. During the course of these business relationships and transactions, services are offered across the world, and knowledge and resources are often shared. Are you connected with foreign attorneys on social media?

Could globalisation for instance create opportunities for local law firms to form communities with foreign law firms to share technologies, systems, resources, tools, experiences and best practices relating to practice management aspects?

Conclusions

Although legal practitioners may feel content with the status quo of operating law firms, changes are coming. Local law firms are subject to worldwide economical, technological and social trends, which will bring about changes in most professions. These trends may not discriminate between small, medium or large law firms. These trends are driven by the advancement of technology and convenience for clients.

It is to be understood that changes relating to the above trends will impact gradually and could create lots of benefits, but also fear and resistance. It is further widely accepted that fear can either paralyse progress, or be reduced by making plans and taking action.

Strong leadership is required to lead the legal professions to and through these industry changes. The fourth industrial revolution, uberisation, shared economies and globalisation, should present fantastic new opportunities for law firms. What opportunities and benefits may it present to your law firm?

Is your firm making plans to benefit from the future?

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The concept of business rescue was introduced into South African corporate law through the enactment of ch 6 of the Companies Act 71 of 2008 (the Companies Act) and is similar to judicial management contained in the old Companies Act 61 of 1973. Business rescue proceedings are aimed at the rescue of financially distressed companies. The person tasked to oversee the business rescue process is the business rescue practitioner.

The business rescue practitioner, by virtue of their position, incurs certain expenses in the execution of their duties and is specifically required in terms of s 141(2)(a)(ii) of the Companies Act to apply to court to discontinue the business rescue proceedings and to place such company into liquidation in the event that the business rescue practitioner determines that the company in business rescue cannot be rescued. The peremptory obligation to apply for the liquidation of the company in business rescue, entails that the business rescue practitioner is obliged *ex lege* to incur expenses in respect of such litigation.

For purposes of this article,
a distinction must be drawn between the business rescue practitioner’s fees, the business rescue practitioner’s expenses incurred during business rescue and the business rescue practitioner’s expenses incurred in applying to court in terms of s 141(2)(a)(ii) of the Companies Act. In this article, the risks facing business rescue practitioners in respect of the latter expense will be highlighted.

In the event that the business rescue practitioner is successful with the application in terms of s 141(2)(a)(ii) of the Companies Act, the expenses incurred by the business rescue practitioner in lodging the application would normally form part of the liquidation costs and the business rescue practitioner would be able to recover such expenses. In recent decisions by our courts, it has been illustrated that there may be certain instances where a business rescue practitioner is at risk in respect of such expenses and that the business rescue practitioner may be unable to recover any of the litigation expenses, which the business rescue practitioner is required to incur ex lege.

Applicable statutory provisions

The business rescue practitioner’s fees and expenses incurred during business rescue (not expenses incurred in lodging an application in terms of s 141(2)(a)(ii) of the Companies Act) are expressly dealt with in ss 135 and 143 of the Companies Act. Section 135 in essence provides that the fees and expenses incurred by the business rescue practitioner during business rescue will have preference in the order in which they were incurred over all unsecured claims against the company. The provisions of s 135(4) confirm that the aforementioned ranking continues to be of force and effect, where business rescue proceedings are discontinued and the company is placed into liquidation. Once the business rescue proceedings are discontinued and the company is placed into liquidation in terms of s 141(2)(a)(ii) of the Companies Act, the Insolvency Act 24 of 1936 (the Insolvency Act) becomes applicable. Section 135 of the Companies Act, however, does not specifically differentiate between the business rescue practitioner’s expenses incurred during business rescue and the business rescue practitioner’s expenses incurred in lodging the peremptory liquidation application in terms of s 141(2)(a)(ii) of the Companies Act.

SCA’s recent interpretation

The Supreme Court of Appeal’s (SCA) recent interpretation of the applicable statutory provisions in the matter of Diener NO v Minister of Justice and Others (South African Restructuring and Insolvency Practitioners Association (SARIPA) and Others as amici curiae) [2018] 1 All SA 317 (SCA), specifically dealt with and found that s 143(5) of the Companies Act has not elevated the business rescue practitioner’s claim for fees and expenses incurred in business rescue to enjoy “super-preference” in liquidation proceedings. This case specifically dealt with the ranking of a business rescue practitioner’s fees and expenses incurred in business rescue in the event of business rescue proceedings being discontinued and where the company is placed in liquidation in terms of s 141(2)(a)(ii) of the Companies Act.

In a nutshell, the SCA confirmed the ranking of claims against the insolvent estate in liquidation proceedings as follows: Secured claims, liquidation costs and only then business rescue practitioner’s fees and expenses incurred in business rescue, in accordance with the Insolvency Act and Companies Act. The SCA did not expressly deal with the question of whether legal fees incurred by the business rescue practitioner in applying to court in terms of s 141(2)(a)(ii) of the Companies Act constitute expenses, which should form part of the costs of liquidation, alternatively should be regarded as post-commencement finance, alternatively constitutes a concurrent claim in the liquidation (at para 15 read with para 63 of the Diener case). The expenses incurred in lodging the peremptory liquidation application in terms of s 141(2)(a)(ii) of the Companies Act in the Diener case were proven by the attorneys concerned in the liquidation - in terms of s 44 of the Insolvency Act - and dealt with by the liquidators as a concurrent claim, creating the impression that the SCA has stated that such a claim should normally be dealt with as a concurrent claim in terms of which, the business rescue practitioner would -

• be at risk of not recovering their fees incurred in applying to court in terms of s 141(2)(a)(ii) of the Companies Act, thereby being out of pocket in respect of such expenses; and
• be at risk of having to pay a contribution in the liquidation.

The fact that the SCA did not expressly deal with the ranking of the business rescue practitioner’s expenses incurred in terms of s 141(2)(a)(ii) of the Companies Act and the fact that such expenses were dealt with in the Diener case as a concurrent claim in the liquidation. This may be interpreted at face value to indicate that regardless of a business rescue practitioner launching a successful or unsuccessful application in terms of s 141(2)(a)(ii) of the Companies Act, the business rescue practitioner’s expenses in lodging the application in terms of the aforementioned section rank as a concurrent claim in liquidation.

In addition to the uncertainty created by the decision in the Diener case as referred to above, the risk of the business rescue practitioner is further increased in the instance where the business rescue practitioner applies in terms of s 141(2)(a)(ii) of the Companies Act, the business rescue practitioner’s application is frustrated and/or protracted for whatever reason and the court grants leave to another creditor in terms of s 131 of the Companies Act to apply or proceed with liquidation proceedings against the company, resulting therein that the company is liquidated in different proceedings than those brought by the business rescue practitioner as will be illustrated hereunder.

Case illustration

In the judgment of Van Jaarsveld NO v Q-Civils (Pty) Ltd and Another (FB) (unreported case no 675/2017, 30-3-2017) (Mbhele J) the facts are briefly as follows: Razzmatazz was then placed under business rescue in terms of s 129 of the Companies Act. The appointed business rescue practitioner concluded that there was no prospect of rescuing Q-Civils and applied to court in terms of s 141(2)(a)(ii) of the Companies Act. The sole director of Q-Civils resolved to oppose the liquidation application brought by the business rescue practitioner. The business rescue practitioner raised a point in limine in which it was argued that the sole director did not have the authority to resolve that a company in business rescue oppose the liquidation application brought by the business rescue practitioner. Mbhele J found in favour of the business rescue practitioner on the point in limine. Q-Civils thereupon applied for leave to appeal against the decision of Mbhele J and leave was granted to the SCA. The pending appeal created a situation where the liquidation application would not be finalised within the foreseeable future.

Unaware that Q-Civils had been placed under business rescue, another creditor of Q-Civils applied for its liquidation while Q-Civils was under business rescue (see Razzmatazz Trading Investments 19 (Pty) Ltd v Q-Civils (Pty) Ltd and Another (FB) (unreported case no 6115/2016, 7-12-2017) (Jordaan ADJP). Taking into account, inter alia, the fact that the business rescue practitioner’s liquidation application would not be finalised within the foreseeable future, Jordaan ADJP granted leave to the creditor, namely Razzmatazz, in terms of s 131 of the Companies Act to proceed with its liquidation application. Q-Civils was then provisionally and finally liquidated with Razzmatazz as the liquidating creditor and not the business rescue practitioner.

The business rescue practitioner incurred expenses in the litigation by vir-
tue of the fact that the business rescue practitioner was required in terms of the peremptory provisions of s 141(2)(a)(ii) of the Companies Act to lodge the application for liquidation once the business rescue practitioner had concluded that Q-Civils could not be rescued. Taking cognisance of the scope of this matter and the possibility of exorbitant legal fees and expenses in the liquidation, a real risk exists that the business rescue practitioner may not recover their expenses from the free residue. In fact, the obfuscating possibility exists that, if the business rescue practitioner’s expenses incurred in lodging the peremptory liquidation application in terms of s 141(2)(a)(ii) of the Companies Act are not regarded as costs in the liquidation that the business rescue practitioner, as a concurrent creditor, will be liable to pay a contribution in the insolvent estate.

Conclusion
As stated above, in terms of the SCA’s decision in the Diener case, the business rescue practitioner’s fees and expenses in business rescue rank after liquidation costs, but before claims of employees for post commencement wages. Section 97 of the Insolvency Act stipulates that liquidation costs includes the costs of persons who render services in connection with the sequestration proceedings and the administration of the insolvent estate. They are identified as the Sheriff, the Master, a debtor who has voluntarily surrendered their estate, a creditor who has applied for the sequestration of an estate, a curator bonis, a trustee, persons employed by a curator bonis or a trustee to administer an insolvent estate and a presiding officer. We submit that the classification of ‘a creditor who has applied for the sequestration of an estate’ should include, at the very least, the claim of the business rescue practitioner for the expenses incurred by the business rescue practitioner in lodging the application in terms of s 141(2)(a)(ii) of the Companies Act. If this interpretation is to be applied, the expenses so incurred by the business rescue practitioner will form part of the costs of liquidation and will not merely be a concurrent claim in the liquidation (as these expenses were dealt with in the Diener case).

It is vital for the successful implementation and continuance of business rescue proceedings that the courts clarify the current position and provide directions to all stakeholders as to the ranking of a business rescue practitioner’s expenses incurred in lodging the application in terms of s 141(2)(a)(ii) of the Companies Act. We further submit that the courts should in so doing, consider instances such as in the Q-Civils cases where the business rescue practitioner incurred expenses ex lege, but by no fault of their own, was not the liquidating creditor.

It is unfathomable that the legislature could have intended that a business rescue practitioner be compelled ex lege to be exposed to the risk of having to incur the expenses of applying for the liquidation of a company and then not being able (under certain circumstances) to recover such expenses. The inevitable result will most certainly be that no person would be willing to assume the risk associated with being appointed as a business rescue practitioner.

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Mr van der Merwe acted on behalf of the applicant in the Q-Civils matter referred to in the article.
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The matter of male circumcision has become a contentious issue within the international community insofar as it involves the circumcision of minors. Considering South Africa (SA) is one of the countries where the practice of cultural male circumcision occurs as a necessary prerequisite to becoming a man in certain African cultures, is cultural male circumcision compatible with international children's rights? When the United Nation's Convention on the Rights of the Child (CRC) came into effect in 1990, pressure was placed on those countries who were parties to the Convention to implement their provisions in an effort to promote children's rights on an international scale. As this article deals with the circumcision of minors, it is important to note that everyone under the age of 18 years old is classified as a child in terms of the CRC. Another relevant legal instrument in the South African context is the African Union's African Charter on the Rights and Welfare of the Child (African Charter). The African Charter is a regional instrument, which seeks to regulate children's rights within Africa and its enactment was sparked by, among others, a lack of representation of African culture within the CRC.

The CRC on male circumcision

The CRC does not include any provisions that deal with male circumcision per se, but it does provide a standard against which the act of circumcision can be measured. The drafters of the CRC clearly envisaged its international application with it being an instrument binding on all State Parties (including SA) who have ratified the Convention. In light of this, the CRC gives due regard to traditional and cultural practices and in fact highlights the importance of these two principles within its preamble. This is the background against which circumcision - as an initiation process for boys belonging to certain tribes in SA - will be discussed. It must be noted that in terms of the CRC, the 'best interests of the child' is an important consideration and the Constitution contains a similar provision. One can argue that infant circumcision is a violation of the rights of a child since he cannot consent to anything, nor is he likely to engage in sexual activity at that stage of his life. The correct position would be to allow a boy to reach such an age so as to be able to validly provide consent to undergo circumcision. Following this logic, cultural male circumcision is arguably more in line with children's rights since it usually occurs in a boy's teenage years when he has likely gained the maturity to consent to the procedure. Article 12 of the CRC provides that:

'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

Accordingly a boy who has reached an appropriate age and level of maturity, should be afforded the right to express his view to undergo cultural male circumcision and this expression should not be undermined. The Xhosa tribe - as a matter of tradition - practises cultural male circumcision at the age of 15 years old (Julia Sloth-Nielsen 'A foreskin too far? Religious, "medical" and customary circumcision and the Children's Act 38 of 2005 in the context of HIV/AIDS' (2012) 16 Law Democracy and Development at 86). Although one is still legally considered to be a child at this age, the CRC does not provide an age at which a child may acquire the maturity mentioned in art 12. I, therefore, submit that subject to the mental development of the child, he may possess the maturity to make the decision to undergo cultural male circumcision at the age of 15. This right can be viewed in connection with art 31 of the CRC, which holds that:

'States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

For present purposes, the emphasis on this Article is placed on 'the right of the child to participate fully in cultural life. As will be seen when dealing particularly with cultural male circumcision in SA, there are legislative provisions in place for the enjoyment of the right of boys to participate in the initiation process.

A more cultural approach in the African Charter

As mentioned above, the African Charter was implemented to fill the gap between children's rights in relation to African culture. In this respect there are certain notable differences between...
the CRC and the African Charter that need to be highlighted, the first difference being the implementation provision within the African Charter, which mentions that states must discourage ‘[a]ny custom, tradition, cultural or religious practice’, which is inconsistent with the African Charter and this is not found as such in the CRC. Given the cultural practices unique to Africa, the drafters of the African Charter included a general age of 18 without making explicit exceptions to this age. I submit that this was done to combat practices such as female genital mutilation and child marriage, which occur in certain African countries. My submission is based on the fact that these two practices are generally accepted as violations of not only children’s rights, but also of human rights, which have no beneficial purpose for its recipients (Guinea 2016 Human Rights Report at 19 – 22). There is, however, no general consensus within the international community that circumcision of boys constitutes a violation of children’s rights and it remains a subject of debate.

The African Charter goes on to mention the duty of African states, which are party to the African Charter, to protect children from harmful cultural practices, which may negatively impact their health or lives. This should not apply to cultural male circumcision where, for example, a South African Xhosa boy at the age of 15 years decides to undergo circumcision as a cultural practice and, in effect, to decrease his chances of contracting HIV (Julia Sloth-Nielsen (op cit 86)). The reasoning behind this is that as opposed to being prejudicial to his health it can in fact be beneficial to it especially in a country, such as SA where a large number of the population is infected with the disease. It ultimately becomes necessary to focus on the national legislation of SA to understand how the CRC and African Charter have been interpreted and implemented within its domestic territory.

The South African position
South Africa is a constitutional democracy and in this regard the Constitution reigns supreme. Section 28(2) of the Constitution, found in its Bill of Rights emphasises the best interests of the child and accordingly legislation regulating the rights of children in SA must have this interest as its cornerstone. The Constitution further goes on to mention that international law must be considered when interpreting the Bill of Rights, which places an obligation for South African legislation on children’s rights to be in line with the CRC and the African Charter. Article 14(3) of the CRC provides that:

‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.’

Against this background, the relevant provisions of South African legislation must be reviewed to determine whether the cultural belief of male circumcision has been limited. In SA children’s matters of this nature are regulated by the Children’s Act 38 of 2005, which applies to everyone under the age of 18. Section 128(8) of the Children’s Act deals with the circumcision of boys under the age of 16 and it provides that:

'(8) Circumcision of male children under the age of 16 is prohibited, except when –
(a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or
(b) circumcision is performed for medical reasons on the recommendation of a medical practitioner."

Cultural male circumcision would not be classified underneath circumcision for religious purposes. Accordingly it must be dealt with as a procedure performed for medical reasons and, as such, it would be necessary to consult a medical practitioner to authorise the procedure for boys under the age of 16. The South African legislators have also enacted provincial legislation in order to better regulate cultural male circumcision so as to be more aligned with international children’s rights and more specifically to ensure the protection of children’s lives and health. There are different dynamics and challenges across the country and, therefore, it is strategic to cater to these issues at a provincial level. The implementation of both the Children’s Act, as well as the provincial Acts can be seen to be in line with articles 24(3) of the CRC and similarly with article 21(1) of the African Charter.

Regulation of cultural male circumcision is a method of combating practices - that are contrary to international children’s rights - and is necessary to prevent the creation of bogus initiation schools, which exploit traditional communities. It is important to note that cultural male circumcision, being an integral step into manhood for many South African boys, is an area, which is constantly being developed and improved on. Accordingly, there is a Draft Customary Initiation Bill (the Bill), which has been published in the Government Gazette for comment (see GenN528 GG40978/14-7-2017).

Conclusion
From the outset it is not clear whether male circumcision is a violation of children’s rights since the CRC does not explicitly deal with the subject matter. One would expect the African Charter to crystallise this position by specifically mentioning cultural male circumcision, yet it fails to do so. It appears as though these international instruments have remained silent on the matter so as to allow the State Parties discretion in deciding whether male circumcision constitutes a violation of children’s rights in their respective territories. Therefore, cultural male circumcision cannot be found to be in violation of international children’s rights. South African legislation deals with this phenomenon nationally, as well as provincially, and although the Children’s Act suggests that circumcision should occur above the age of 16, it makes exceptions for circumcisions below the age of 16. Provincial Acts such as the Free State Initiation School Health Act 1 of 2004 also made provision for cultural male circumcision for boys under the age of 18, provided parental consent was received. It must be noted, however, that national legislation such as the Children’s Act, which was enacted after this provincial Act, will take precedence. The South African legislators realise that a balance must be struck between cultural practice and children’s rights and accordingly has put forth the Bill that will hopefully lead to a piece of legislation, which will eradicate certain abuses of the cultural male circumcision procedure. The Bill proposes -

- a uniform legislation, which will govern national and provincial initiation processes;
- the establishment of national and provincial bodies, which will regulate and monitor initiation processes;
- the registration of initiation schools, which will improve the regulation of its activities and minimise harm to initiates;
- comprehensive procedures and role players to ensure the rights guaranteed in the Constitution and the Children’s Act;
- criminal sanctions against non-registered initiation schools and other offences committed in contravention of the Bill;
- that the initiate must be provided with a medical certificate before undergoing circumcision at an initiation school;
- that children between the ages of 16 and 18 must obtain written consent from their parents or guardians, which excludes children under the age of 16 as this would be contrary to s 128(8)(a) and (b) of the Children’s Act; and
- that the circumcision must be conducted by a registered traditional or medical surgeon.

However, this Bill has not yet been enacted and a parliamentary debate may subject its contents to an alteration.

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Is South Africa’s anti-money laundering and counter terrorism financing regime effective?

The Financial Action Task Force’s (FATF) International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (FATF Recommendations) (www.fatf-gafi.org, accessed 9-4-2018) have been constantly evolving to keep up with anti-money laundering and counter terrorism financing (AML/CFT) threats, trends and typologies. This evolutionary process has also taken place with respect to how it carries out its mutual evaluation exercises through its various methodologies. Of much relevance for present purposes is the 2013 FATF Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems which, in part, introduced or sought to encourage member jurisdictions to try and ascertain the ‘effectiveness’ of their AML/CFT regimes. Key to note is that it also defines the concept of ‘effectiveness’ within the context of AML/CFT. This has led to debates and discussions on how ‘effectiveness’ is or can be determined in practice by FATF’s appointed assessor. These debates have been interesting in that even now with the current round of mutual evaluations the same challenges still manifest themselves.

The developments taking place at the FATF level have a direct impact on a global level. Thus, even the debates around ‘effectiveness’ are also carried forth on a domestic level. South Africa (SA), for instance, has recently amended the Financial Intelligence Centre Act 38 of 2001 (FICA) in order to take into account some of the new and mandatory requirements of the revised 2012 FATF Recommendations. This is sought to be achieved by the recently promulgated Financial Intelligence Centre Amendment Act 1 of 2017 (FIC Amendment Act). The Amendment Act has been a conversation piece for quite some time during its promulgation stages and, as a result, it has also been a subject of various articles and scholarly writings.

What has emerged from some of these articles is that there is clearly some understanding, as well as huge misunderstanding as to what the new provisions of the FIC Amendment Act represent or entail, especially when attempts are made to contextualise it within the ‘effectiveness’ discourse. For example, there are those who understand that the amendments ‘comply with the global standards set by [FATF]’ and this ‘aligns South African legislative AML framework with [that of] FATF’ (see W Jansen van Rensburg ‘Anti-money laundering is now focused on effectiveness: Does your system work?’ www.cliffeedekkerhofmeyr.com, accessed 9-4-2018).

Some of these articles simply list all the new provisions of the FIC Amendment Act, while regarding the same as representing an effective AML/CFT regime. More often than not, this is being done without first giving a definition of the ‘effectiveness’ concept or what it entails or who determines it as such. As a result of the noted misunderstanding of the ‘effectiveness’ concept, particularly within the context of the FIC Amendment Act (as evidenced by certain published articles), the main objective of this article is to try to unpack it within the South African context. Prior to this, how-
ever, it is important to take note of the fact that the effectiveness of SA’s regime is yet to be determined since the new requirements have recently been incorporated into law (FIC Amendment Act). Presumably, such a determination is going to be made in 2019 during the country’s second mutual evaluation exercise. Relevant to this, I submit that it is doubtful whether SA is going to score well during the evaluation. The promulgation of the FIC Amendment Act, as well as the now initiated processes on the amendments to the schedules of the Act are but some of the steps, which are going to take us where we need to be. Lastly, we need also to be mindful of the fact that all the gaps, which were noted in the 2009 mutual evaluation exercise, have not all been addressed by the current amendments to the Act. There is still much ground to cover in this regard.

Conclusion

In a nutshell, an effective system or regime means more than having the right tools or requirements in place. It goes further, as the adequacy of the implementation of those tools have to be assessed. Furthermore, the extent to which defined outcomes are achieved is central to a robust AML/CFT system. Finally, it is all good and well to have all the technicalities in place, but as long as they are not achieving any practical outcomes (results), then such a system cannot be said to be effective as yet. The developments within the SA’s AML/CFT regime is a step in the right direction, but more still needs to be done before we can start claiming to have an effective system in place.

Effectiveness defined

Prior to defining what an effective AML/CFT system or regime entails, it is prudent to take a step back and look at some of the developments within FATF, which preceded the 2013 methodology (which in part, looks at assessing effectiveness). Before the 2013 methodology came into being, the FATF’s mutual evaluation exercises and methodologies were largely pre-occupied in assessing countries’ technical compliance with its standards. In short, technical compliance is largely pre-occupied in ensuring that the ‘fundamental building blocks’ are in place, for example, legal, institutional frameworks and powers and procedures of competent authorities. It was more like checking whether the FATF requirements were in place or not, without probing to see whether the requirements work in practice or not. Arguably, it can be said that the previous methodology was more like a ‘tick-box’ exercise.

In February 2013 the FATF adopted a complementary approach regarding its new methodology. The new methodology assessed both technical compliance and the effectiveness of an AML/CFT system. It succinctly defined ‘effectiveness’ as ‘[t]he extent to which the defined outcomes are achieved’, thus it is outcomes-based as ‘[i]t does not involve checking whether specific requirements are met, or that all elements of a given recommendation are in place’. Instead, it requires a judgment as to whether, or to what extent defined outcomes are being achieved, i.e. whether the key objectives of an AML/CFT system, in line with the FATF standards, are being effectively met in practice.’

On proper interpretation of the 2013 methodology, especially as it relates to how the concept of ‘effectiveness’ is defined, one can justifiably come to a conclusion that, although very informative and relevant within the AML/CFT space, some of the recent articles barely addressed the concept of ‘effectiveness’ as they fail to take into account or check whether ‘desired outcomes’ are met. What is usually addressed in actual fact is the ‘technical compliance-bit’ of the 2013 methodology as these articles merely lists all the new features of the FIC Amendment Act. Just to reiterate, the ‘effectiveness’ of SA’s financial regulatory framework is yet to be tested practically. This will take place in 2019 when SA undergoes it mutual evaluation exercise.

As already referred to in this article, assessing effectiveness is not a simple task to undertake practically. It is even harder to do under the mandatory risk-based regulatory framework, which was ushered in by the revised 2012 FATF Recommendations. This new framework entailed a demonstrable assessment, understanding and documentation of AML/CFT risks faced by a particular country or individual financial institution. Even FATF trained assessors have found it very difficult. Risk-based decisions, here-in, have to be documented and substantiated by whoever is being assessed at a particular point in time.

As already stated even scholars and academia have written on this concept. Some of them (scholars) interrogate this concept as against some of the work, which has already been undertaken by FATF. Professor Louis de Koker, for instance, argues that the reason it is sometimes difficult and as difficult to unpack this concept within the 2013 methodology is because there are divergent views on what constitutes ‘defined outcomes’ of an AML/CFT system (Louis de Koker South African Money Laundering and Terrorist Financing Law (Durban: LexisNexis 2016). Some of the pertinent questions asked in this regard is whether an effective system is one which is pre-occupied with ensuring that ‘dirty-money’ does not enter the formal financial system where it can be monitored and as a result those responsible are punished, or is it one which allows such to enter the system and thus can be easily detected and acted on. Regardless of which argument is carried, the debate is likely to continue for quite some time, as there are lots of factors to consider when trying to ascertain effectiveness. Lastly, an effective system or regime should be viewed in totality as opposed to separate individual components, for example, the mere filing of suspicious transaction reports, etcetera.

In an effective system or regime, suspicious transaction reports filed should translate into results, for example, prosecutions, forfeitures and convictions.
Amendments of rules in line with constitutional rights to adequate housing

The right to adequate housing and the protection thereof as set out in ss 25 and 26 of the Constitution, is in my view the stepping stone to all the other fundamental rights available to South African citizens. The problem, however, is that the noble intention of these fundamental rights are subject to the development and acceptance thereof by our jurisprudence. The promulgation of the Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (GN R1272 GG 41257/17-11-2017) (the new rules), is an illustration of how well the designed machinery of jurisprudence works, in order to give effect to our fundamental rights.

The development of the new rules was initiated by jurisprudence when the right to adequate housing (s 26 of the Constitution) was acknowledged in the Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) case. The dicta of this ground breaking case was then developed and applied in 2011, in the Gundwana v Steko Develop-

ment and Others 2011 (3) SA 608 (CC) case, which formed the precedent of the then amended r 46 of the Supreme Court Act 59 of 1959. In that case the Constitutional Court (CC) confirmed that the former court process had been unconstitutional, the amended rules affected peremptory judicial oversight in all sale-in-executions of property.

On 17 November 2017, jurisprudence furthermore developed the process of execution of immovable residential property by introducing rr 46, 46A, 43 and 43A of the Uniform Rules of Court and the Rules regulating the conduct of the proceedings of the magistrates’ courts of South Africa. For purposes of this article the discussion regarding the new rules will be limited to r 46A and r 43A, with its identical subs 2(a) – (c), 5(a) – (f), 8(a) – (b) and 9(a) – (e).

Summary of the subsections

The following is of utmost importance:

- The court must establish whether the property subject to execution is the primary residence of the execution debtor.
- The court has to consider alternative means and all relevant factors applicable to the judgment debtor, prior to the authorising of the execution of the subject primary residence.
- The Registrar shall not authorise execution against the immovable property, which is the primary residence of the execution debtor unless the court has warranted it.
- Every application must be supported by documents indicating –
  - the market value of the property;
  - the local authority valuation;
  - the amount owing to mortgage bonds;
  - the amount owing to local authority for rates and taxes; and/or
  - the amounts owing to the body corporate for levies.
- The court may on its own accord or on application by any affected party set a reserve price as a condition of sale for the subject primary residence.
- The court, in deciding whether to set a reserve price and the amount thereof, has to take into account all the factors mentioned in point four above, as well as whether any equity may realise between the reserve price and the market value at the auction sale.
The likelihood of the reserve price not being realised and the property not being sold at the auction sale.

The procedures, should the reserve price not be realised at the auction sale.

Rule 46A and r 43A – calibrate with s 25(1) of the Constitution

The above summary of the new rules are indicative of the judgment in the Jaftha case, (paras 20 and 22) thereof, which formed the foundation of the Gundwa case, the CC held: 'The structure of s 25(1) and its protection of ownership, as well as the uncertainty about the scope of the negative obligation in terms of s 26, mean that s 25(1) could add a new dimension to this case.'

Section 25 of the Constitution states: '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application —

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including —

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

Deprivation of one's property can be defined as any uncompensated, regulatory restriction on the use, enjoyment and exploitation of the property (AJ van der Walt Constitutional Property Law (Cape Town: Juta 2011) at 106). It is, therefore, clear and logical that a sale in execution will qualify as a deprivation, since an execution of one's property does in fact result in a total loss of such property that includes a sale to which the owner has not agreed and the subsequent transfer of the property.

It is currently trite law, as set out in First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Westbank v Minister of Finance 2002 (4) SA 768 (CC), that as soon as it is established that there is a material interference with property (in this case the execution thereof) the requirements as set out in s 25(1) of the Constitution are applicable. The property is thus sold not by the will of the mortgagee, but in accordance with the strict provisions set by the Rules of Court, hence the 'law of general application allows the deprivation of the property'.

I submit that when the sale in execution leaves the owner with a shortfall, the shortfall per se amounts to an infringement of property in that the property was not sold for value. The new rules will, in these instances, now become the law of general application, which — in my opinion — provides the cure for the short-fall issue as far as s 25 provides for such a remedy.

When one compares the contents of the new rules with s 25(3)(a), (b), (c) and (e) of the Constitution, it reflects how the machinery of jurisprudence so spontaneously and scientifically calibrate all the relevant factors with each other. The new rules, inter alia, adhere to the limitation clause of the Constitution s 36, s 25(3), as well as with s 3(4)(d) of the National Credit Act 34 of 2005 (the NCA), which are to promote and enhance the welfare of South African citizens.

The new rules further conform to the new dispensation within the definition of property, ownership and the protection thereof. Ownership of property is the most complete right in a thing. Broadly speaking, it entitles the owner to use this right in any way they wish, contrary to what the rest of the world may wish, but subject to limitations imposed by public and private law (CG van der Merwe Sakereg 2ed (Durban: Butterworths 1989) at 108 - 120). Section 25 protects these rights, and provides that these rights are not limited to land (s 25(4)(b)). Section 25 of the Constitution must, however, be interpreted with due consideration of the values of individuals, which includes objective and subjective factors. The definition and interpretation of property became more advanced due to the increased need among citizens to voice their fundamental rights. It is now accepted that property includes rights based on social, economic and moral rights, as set out in the Constitution. The interpretation of property is, therefore, not limited to the previously accepted norm of a real right, but s 25 led to the emergence of other rights relating to property.

The reformed property dispensation must thus include all individuals' property rights by both the state and private persons, see Port Elizabeth Municipal v Various Occupiers 2005 (1) SA 217 (CC). The jurisprudence supports the view that the core purpose of the constitutional protection of property is not only 'economic, but is personal and moral' (GS Alexander Property as a Fundamental Constitutional Right - The German Example 2003 Cornell Law Review 733 at 746). Property rights also include other rights, categorised as corporeal and incorporeal rights (MD Southwood The Compulsory Acquisition of Rights: By expropriation, ways of necessity, prescription, labour tenancy and restitution (Cape Town: Juta 2002) at 1).

According to Van der Merwe (op cit) at 175 ff, the right of ownership is the most important right in respect of property. This right was known as a real right and its application was unlimited in the broadest sense. It is currently trite law and it is accepted by the jurisprudence that the existence, nature and scope of property rights depend on social, political and legal rules (Van der Walt (op cit) at 147).

Richard Zwisser in S Scott and J van Wyk (eds) Property Law Under Scrutiny (Cape Town: Juta 2015) at 94 maintains that in Europe the evolution of property law is referred to as the 'social dimension of ownership'. Property rights can no longer be interpreted without taking cognisance of the constitutionality of fundamental rights. The existence of 'new property interests are recognised and protected when and insofar as it is necessary to establish and uphold an equitable balance between individual property interests and the public interest, with due regard for the historical context within which property holdings were established and the constitutional context within which they are protected' (Van der Walt (op cit) at 189).

I submit that property — as we know it — contains a bouquet of rights, which as seen above, includes, inter alia, various categories of rights. It is, therefore, a logical conclusion that value in property per se constitutes property. That said, jurisprudence is once again faced with the task of interpreting and developing the new rules and, inter alia, the term 'market value'. Section 25 provides for the market value remedy in the environment of deprivation, which is the pivotal factor for the execution debtor to achieve in the execution sale, when faced with the deprivation of their property.

Market value

The property industry accepts the following definition of 'market value', as provided by the International Valuation Standards Council:

'Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing where the parties had each acted knowledgeable, prudently and without compulsion.'

Market value is directly dependent on existing factors and the element of supply and demand, applies to all commodities in the free and open market. The credit system supports this free and open market and even though it is regulated by the NCA, the credit system

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assists consumers in achieving the demand factor, which is stimulated by the desire for a particular commodity (s 3 of the NCA).

The residential property industry in South Africa is the largest of most commodities and banks hold approximately R 923 billion of residential mortgage loans and approximately R 274 billion of commercial mortgage loans (SA Reserve Bank ‘Selected South African banking sector trends’ January 2017).

The banks apply the loan to value (restricting the loan to value percentage) method, a barometer tool to determine the value of a property and the extent to which a property may be discounted at a sale in execution. Despite these strict assessment and valuation methods that banks use, the outcome will not suffice when a mortgage debt is not speedily and sufficiently converted to cash. (A Wight and V Ghyoot The Property Finance Business in South Africa (Unisa Press: 2005) at 133 – 160, 145 – 146, 176). The dilemma for banks is that the new rules inevitably prolong the execution process.

Conclusion
The new rules amplify the voice of our citizens in reflecting an equitable balance of the rights applicable to all role players in the execution process of residential properties. The long term effect of the new rules will be that a mortgagor in a mortgage loan agreement, will in future be ensured that their right as contemplated in ss 25 and 26 of the Constitution, will be sustained.

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THE LAW REPORTS


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In its plea, the respondent averred that the applicant failed to comply with the requirements of the Act. The Act provides that condonation had to be sought as soon as one becomes aware of the need for it, the present application was filed more than two years late – and only a month before the trial was due to start.

Before the trial could proceed, two issues had to be decided. The first was whether an agreement was reached (in a letter between the parties) that the respondent would not oppose the condonation application, and if so, whether the respondent was entitled to resile from its undertaking, and accordingly whether the condonation application should be heard on an unopposed basis. If the court found that the respondent was entitled to oppose the application, the second question was whether the applicant had made out a case for condonation.

First, Murray AJ held that the letter relied on by the applicant did not create an agreement from which the respondent could not resile. The respondent had thus the right to oppose the application, and such opposition was not unreasonable.

Secondly, in respect of the condonation application, the court held that before a creditor can institute an action to recover a debt from an organ of state a notice of its intention to do so within six months from the date on which the debt became due. Section 3(4)(a) of the Act requires such creditor to serve on such organ of state a notice of its intention to do so that the respondent failed to comply with the requirements of the Act.

In a concurring minority judgment Ponnan JA noted that there was uncertainty as to whether the actio de feris was part of South African law; and endorsed the academic view, that it might be time for a statute to be passed, to govern this area of law.

• See Morgan Riley ‘Don’t tease the ostrich: Considering the actio de feris and the defence of provocation in modern South Africa’ 2018 (April) DR 38.

Civil procedure

Condonation of non-compliance with statutory notice: In HL v MEC for Health of the Free State Provincial Government [2018] 1 All SA 522 (FB) the court was asked to pronounced on the question whether a court may grant condonation of the non-compliance with the statutory notice, which a creditor must serve on the state before the later may institute an action to recover a debt from an organ of state. Section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act) requires such creditor to serve on such organ of state a notice of its intention to do so within six months from the date on which the debt became due. Section 3(4)(a) of the Act gives a creditor the right to apply to court to have its non-compliance with s 3(2)(a) condoned.

The applicant (in the present proceedings for condonation) alleges that her son suffered permanent severe brain damage, because of her alleged prolonged labour, and as a result of the alleged negligence of the respondent’s employees in a state hospital in Harrismith. The applicant, in her capacity as the mother and natural guardian of her minor son, had instituted action against the respondent.

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Abbreviations
CC: Constitutional Court
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Animals

Actio de feris – defence of provocation: The facts, which led to the claim in Van der Westhuizen v Burger 2018 (2) SA 87 (SCA), were simple. The respondent plaintiff, Burger, was a farmer, member of the public have access, was prohibited. The victim is accorded with the part of the owner, which

was at the mercy of the ostrich, the latter’s farm. One of the defendant’s ostriches chased the plaintiff. The plaintiff alleged that in an attempt to escape from the ostrich he tripped over a piece of wood, tore his Achilles tendon and as a result, suffered damage in the amount of R 6,75 million.

The cause of action pleaded by the plaintiff was the actio de feris in terms of which the bringing of wild or dangerous animals on or into a public place, or a place to which members of the public have access, was prohibited. The cause of action is based on ownership and strict liability is imposed on the owner of the animal, for the consequence of the animal’s behaviour. The victim is accordingly absolved from alleging and proving negligence on the part of the owner, which is presumed.

In the High Court the parties agreed to separate the issues of merit and quantum. The High Court dismissed the defendant’s defence of provocation. He alleged that the plaintiff teases and provoked the ostrich, inter alia, by grabbing it at the neck and throwing a stone at it.

On appeal to the SCA, the court was asked to decide the following three questions. First, whether provocation should be recognised as a defence to the actio de feris? Secondly, whether the plaintiff had provoked the ostrich into chasing him? Thirdly, whether the pursuit was the cause of the injury?

Swain JA held that provocation is indeed a defence and that the plaintiff had provoked the animal: He had thrown a stone at it. Finally, the court held that the pursuit was not the cause of the action. The plaintiff’s flight had been interrupted by his falling to the ground. After the plaintiff had fallen and was at the mercy of the ostrich, it did not attack him. The ostrich merely stood looking at him while he was lying on the ground and when he stood up to run into the house he stepped awkwardly, and injured his tendon.

The appeal was thus allowed with costs.

The court’s discretion to...
grant condonation is not un-fettered. Section 3(4)(b) per-mits the court to do so only once it is satisfied that the applicant has established that the debt has not been extin-guished by prescription; good cause exists for the failure by the creditor; and the organ of state was not unreasonably prejudiced by the failure. All of these factors were satisfied in the present case.

The prejudice suffered by the respondent was not so un-reasonable that the applicant and her minor child should be penalised for that by depriving them of the opportunity to state their case in court. The applicant played a role in the court reaching its deci-sion. In this regard the court referred with approval to the finding quoted by Cloete JA in Premier, Western Cape Pro vincial Government NO v BL [2012] 1 All SA 465 (SCA) in para 19, where the court held that ‘given the applicant’s socio-economic background and the difficulties she faced in ascertaining the facts on which her cause of action is based, her explanation for her failure to give the notice to respondent within the requisite six month period, is in my view acceptable’.

The court concluded that it was thus fair and in the interests of justice for the court to exercise its discretion to grant condonation for the applicant’s non-compliance with the statutory notice period.

Constitutional law

Powers of Public Protector:

In President of the Republic of South Africa v Public Pro- tector and Others 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP), the former State Presi dent (the President) sought the review and setting aside of the remedial action of the former Public Protector (PP). In terms of the PP’s report the President was instructed to appoint, within 30 days, a commission of inquiry, headed by a judge appointed by the Chief Justice, into the allegations of corruption outlined in her report No 6 of 2016/17, titled ‘State of Cap-ture’ (the Report).

The Report was the result of the PP’s investigation of complaints that the President had improperly allowed the Gupta family to be involved in the removal and appointment of cabinet ministers (including the Minister of Finance in December 2015) and directors of state-owned entities (SOEs) (including the board of Eskom). The alleged conduct by the President was contrary to the provisions of the Execu-tive Members’ Ethics Act 82 of 1998 (the Ethics Act) and the Executive Ethics Code (the Code).

In his notice of motion the President sought an order that the matter be remitted to the office of the PP for further investigation on the basis that the PP lacked the power to delegate her functions to a commission of inquiry.

The present review was directed at the lawfulness and rationality of the remedial action. In short, the question was whether the President’s constitutional power to ap-point a commission of inquiry could be limited by remedial action taken by the PP.

In a joint judgment the court held that the Presi-dent’s power (under s 84(2)(f) of the Constitution) to appoint a commission of in-quiry was curtailed where his conduct was in conflict with his constitutional obligations and the principle of legality.

The PP’s investigative powers (under s 182(1)(c) of the Constitution) encompassed the power to direct members of the executive, including the President, to exercise powers entrusted to them under the Constitution.

In order to fulfil their constitutional mandate PP’s had power, in appropriate circumstances, to direct the President to appoint commissions of inquiry and to direct the manner of their implementa-tion. For these reasons the first ground of review, namely that it was unlawful for the PP to instruct the President to appoint a commission of in-quiry, was without merit.

Nor was there anything in the prohibited grounds. The crisp issue before the court was whether the President’s power, in appropriate circumstances, to direct the President to appoint commissions of inquiry and to direct the manner of their implementa-tion, could be limited by remedial action taken by the PP. The court did not make findings of misconduct and impropriety, had to be rejected.

The court thus declared the PP’s Report to be binding and directed the President to appoint a commission of inquiry within 30 days, to be headed by a judge selected by the Chief Justice.

Right to freedom of expres-sion:

In South African Hu-man Rights Commission v Qwelane 2018 (2) SA 149 (GJ); [2017] 4 All SA 234 (GJ), the proceedings dealt with two consolidated applications. In the first, the South African Human Rights Commission (SAHRC) brought proceed-ings in a magistrates’ court – sitting as an Equality Court – against the respondent, Qwelane, under s 10(1)(c) of the Promotion of Equality and Prevention of Unfair Discrimi-nation Act 4 of 2000. In the second, Qwelane applied in a High Court for a stay of the Equality Court proceedings.

Qwelane is a regular and well-known newspaper column-ist. On 20 July 2008 the Sunday Sun newspaper published a column by Qwelane under the heading: ‘Call Me Names – But Gay is not Okay’. In it he called homosexuality ‘wrong’ and suggested remov-ing from the Constitution ‘those sections which give licence to men “marrying” other men, and ditto women’ before ‘some idiot demands to “marry” an animal, and argues that this Constitution “allows” it’. The article was accompanied by a cartoon of a man and a goat kneeling before a priest, captioned ‘When human rights meet animal rights’ and ‘I now pronounce you man and goat’.

The crisp issue before the court was whether a state-ment that compared homo-sexuality with bestiality, con-struted hate speech.

Moshidi J held that as an Equality Court, the court had to determine whether the complainant (the SAHRC) had made out a prima facie case of discrimination (here: Hate speech). Qwelane contended that either that there was actu-ally no such discrimination or that the conduct complained of was not based on one of the prohibited grounds.

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In terms of s 16(2) of the Constitution hate speech is excluded from the scope of constitutional protection that was otherwise given to expressive conduct: It was not an absolute right. In applying s 10(1) of the Equality Act, the court had to strike the correct balance between freedom of speech, on the one hand, and dignity and equality, on the other hand. To promote hatred was to instill detestation, enmity, ill will and malevolence in another. The offending statements unacceptably equated human beings to animals, suggesting that gay and lesbian people were ‘other’ or ‘unnatural’. They showed hatred of, and were deeply hurtful and harmful to, the lesbian, gay, bisexual, transgender and intersex (LGBTI) community.

The court accordingly dismissed Ovelane’s constitutional challenges, declared the offending statements, which were published in his column to be hate speech, and ordered him to tender an unconditional apology to the LGBTI community.

Right to housing: The judgment in Fischer v Unlawful Occupiers and Others 2018 (2) SA 228 (WCC) concerned three applications for similar relief arising from the unlawful occupation of land owned by the first applicant in each application (Fischer, Stock and Coppermoon), and a counter-application by the unlawful occupants, the first respondent in each application. In all three instances, the applicants were the owners of private property in the City of Cape Town (the City) municipality. There were different first and second respondents in each of the three cases. In the Fischer case, the second respondent was the City.

For space considerations the present discussion will focus on the Fischer case. The order by the court in respect of the other two applications was, in essence, similar to the one given in the Fischer case.

In the Fischer case a private individual had to put up with 60 000 unlawful occupiers on land used for private purposes – the local authority claimed that they could not accommodate the occupiers should they be evicted. In the other two cases, the land was used for commercial purposes.

The legislation framework when dealing with the present applications are ss 25, 26 and 38 of the Constitution; s 9(3) of the Housing Act 107 of 1997; ch 13 of the Housing Code; and ch 12 of the National Housing Programme. The Housing Act sets out the functions of municipalities, which include the power to expropriate land for purpose of housing development if unable to negotiate the purchase of the land from the landowner. The Housing Code deals with housing grants that are provided to municipalities for upgrading settlements, while ch 12 of the National Housing Programme deals with housing assistance in emergency housing situations, which makes it easier for municipalities to acquire land and grants to provide for emergency housing.

The question before the court was whether the applicants’ rights in terms of s 25, and the occupiers’ rights in terms of s 26 of the Constitution were being violated by the state.

Fortuin J held that the City has a positive obligation to provide access to housing, and as such the state breached its duty in terms of ss 25, 26 and 38 of the Constitution, which means that the court must order appropriate relief.

If the occupiers stay, the applicants’ rights in terms of s 25 will be infringed, while the s 26 rights of the occupiers will be respected. The court, however, needs to provide relief to the applicants by ordering the state to do something, which is acceptable in the sphere of separation of powers because it balances the rights of two parties. All the court has to determine is whether the City is taking reasonable action, and what reasonable action is.

In the present case, the reasonable action would include acquiring the applicants’ properties. Even if the land is not suitable for permanent housing, in emergency situations no permanent housing is required.

The court considered the contention in the Republic of South Africa v Madderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) 2004 (6) BCLR 387 (CC), that ordering expropriation may violate the principle of the separation of powers. In this case the land is available for emergency housing, in which case the purchase of land is allowed if there is no alternative land. This is a duty that rests on all the spheres of government, and in light of the legislative scheme and the guidelines laid down in Madderklip, the City has a direct obligation to the occupiers.

The City has a duty to give effect to the constitutional rights of the applicants and the occupiers by using the provisions in its policies.

The court issued a lengthy and detailed declaratory order. The gist of the court's declaration entailed that the City’s and the unlawful occupants infringed Fischer’s constitutional right to property in terms of s 25 of the Constitution.

The court further ordered that in order to give effect to Fischer’s rights in terms of s 25, and the rights of the unlawful occupiers in terms of s 26 of the Constitution, the City was ordered to enter into good-faith negotiations with Fischer in order to purchase the property within one month of the court’s order. Failing agreement between Fischer and the City, the City was ordered to report back to the present court within one month of the order on the progress of these negotiations. The eviction application by Fischer was dismissed.

A costs order was given against the City.

Delict

Unlawful failure to secure pool gate: The appeal in Stedall and Another v Aspeling and Another 2018 (2) SA 75 (SCA) had its origin in a swimming-pool accident in 2004 at the appellants’ (the Stedalls’) home in Constantia, Cape Town. On a visit to the Stedalls’ home with her two and a half year-old daughter C, the plaintiff in the court a quo (Aspeling) briefly left the child unattended. In that time C made her way to the pool, where some time later she was discovered floating face down. Although she did not drown, she suffered severe brain damage. The Aspelings sued the Stedalls for the damages C’s damages. In a pre-trial conference the parties agreed ‘to separate the merits and the quantum’.

The High Court found the parties jointly negligent: The Stedalls, for failing to secure the pool’s gates; and Mrs Aspeling, for failing to keep C under constant watch. It ordered that the damages should be apportioned.

The Stedalls, with the High Court’s leave, appealed to the SCA. They disputed their liability for all of the claims. The crisp issues were whether the failure to secure the gates, was, in the circumstances, wrongful. The circumstances were of a parent bringing its child to a home on a visit; being aware there was a pool on the premises; supervising the child; but becoming momentarily distracted; and during that time the child wandering off, falling into the pool, and being injured.

Leach JA held that it was not wrongful. As to the negligence of the Stedalls the court held that they were not: A reasonable person in their position would know Mrs Aspeling was a careful parent who had kept C under observation on previous visits, and who was aware the pool gate was always locked. Given this, a reasonable person would assume that on this occasion she would likewise, not leave C unattended.

The appeal was accordingly upheld. The High Court’s order was set aside and substituted with an order dismissing the Aspelings’ claims.

Education

University’s language policy: In AfriForum and Another v University of the Free State 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC), the crisp question was whether the University of the Free State (the University) took a valid decision in replacing its dual Afrikaans/English language pol-
icity with a new policy in terms of which the use of Afrikaans would be discontinued, leaving English as the sole primary medium of instruction. The University decided on the new policy after it found that the dual-racialism policy had (unintentionally) resulted in racial segregation and tension.

AfriForum and the Solidarity trade union (the appellants), successfully applied in the FB for a review of the University’s new language policy. The University, in turn, successfully appealed to the SCA. The appellants sought leave to appeal to the CC. The CC had to determine four issues:

• standing;
• whether the University’s determination of the language issue was administrative action;
• whether the University’s conduct was consistent with its obligations under s 29(2) of the Constitution; and
• whether the University determined and adopted its new language policy ‘subject to’ the ministerial policy.

The majority, per Mogoeng CJ held that while AfriForum had standing because it was acting in the furtherance of its members’ right to have their children instructed in Afrikaans, the same could not be said of Solidarity, whose members had no such right.

The University’s decision was a policy decision taken in the exercise of a public power. Although the language policy decision was not an administrative action reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), it was nevertheless subject to a legality review.

As to s 29(2) of the Constitution and the meaning of ‘reasonably practicable’, the court held that it would be unreasonable to retain a language policy that had proved to be the antithesis of fairness, feasibility, inclusivity, and the remedial action necessary to confront racism. Constitutional values like equality, responsiveness and non-racialism, and the constitutional obligation to make education accessible to all, ought to be central to any language policy.

Since s 29(2) demanded equitability, practicability and the undoing of the damage caused by racial discrimination, inequitable access or the enforcement or fueling of racial disharmony would justify the withdrawal or curtailment of the right to be taught in one’s mother tongue.

Because the use of Afrikaans had unintentionally become a facilitator of dual-ethnic or cultural separation and racial tension, a revision of the language policy had become necessary. While it might be practicable to retain Afrikaans as a major medium of instruction, it was not ‘reasonably practical’ when race relations were poisoned thereby.

The new language policy was determined ‘subject to’, and consistent with, the ministerial policy and the Constitution, its adoption was thus legal and valid.

Leave to appeal was accordingly refused.

In a minority judgment, Proneman J, held that the court should have granted leave to appeal on the ground that appellants’ case had prospects of success and concerned ‘unfinished business’ under the Constitution. The majority judgment sanctioned an approach that deprived Afrikaans-speakers of the constitutional right to receive education in the language of their choice, a matter that the court had never authoritatively dealt with before.

• See law reports ‘Administrative law’ 2017 (Sept) DR 40 for the SCA judgment.

**Insolvency**

**Ranking of business rescue practitioner’s claim in insolvency proceedings: The facts in Diener NO v Minister of Justice and Others (South African Restructuring and Insolvency Practitioners Association (SARIPA) and Others as amici curiae) [2018] 1 All SA 317 (SCA) were as follows:**

The appellant, Diener, was appointed as business rescue practitioner to oversee the business rescue of a close corporation, JD Bester. On 13 June 2012, the members of JD Bester passed a resolution placing it voluntarily in business rescue, in terms of s 129(1) of the Companies Act 71 of 2008. Diener was subsequently appointed as business rescue practitioner.

In August 2012, he decided that JD Bester could not be revived and instructed attorneys to bring an application in terms of s 1412(2)(a), to convert the business rescue proceedings into liquidation proceedings. A dispute arose as to how the fees and expenses of Diener and the attorneys should be dealt with.

The third respondent, Murray, was one of the joint liquidators of JD Bester. Murray was of the view that Diener had failed to prove a claim in terms of s 44 of the Insolvency Act 24 of 1936 and that the attorneys were an unsecured creditor who, ultimately, was required to make a contribution in terms of s 106 of the Insolvency Act. The Master upheld the position adopted by Murray.

Diener applied unsuccessfully to the High Court for an order reviewing and setting aside the first and final liquidation, distribution and contribution account in respect of JD Bester. The dismissal of his application led to the present appeal. Murray opposed the relief sought in the High Court and also opposed the appeal.

Plasket AJA pointed out that the issues to be decided were the order of preference of the business rescue practitioner’s claim for remuneration and expenses on the liquidation of JD Bester; a determination of the date of liquidation, when business rescue proceedings are converted into liquidation proceedings; and whether the business rescue practitioner is required to prove his claim in terms of s 44 of the Insolvency Act, and the effect of Diener not having proved his claim in this case.

Having regard to Ch 6 of the Companies Act, the court held that a business rescue practitioner’s claim for remuneration ranked after the costs of liquidation, but before those of post-commencement claims for wages by employees and secured and unsecured post-commencement finance, and was payable from the free residue of the insolvent estate. On the second question, the court held that the effective date of liquidation was the date on which an application for liquidation was filed. Finally, any creditor who wishes to share in the distribution of an insolvent estate is required to prove his claim.

The appeal was accordingly dismissed with costs.

**Lease**

No obligation to renew lease: In Roazer CC v The Falls Supermarket CC [2018] 1 All SA 438 (SCA) the respondent, Falls Supermarket, was a retailer that leased the premises on which it operated from the appellant, Roazer. Apart from the lease agreement, there were two other agreements between the parties. In terms of those agreements, Falls Supermarket had agreed to pay additional money in cash and off the record to the individual members of Roazer. These additional agreements were void due to illegality as they had an illegal purpose, namely to avoid income tax.

The lease agreement made provision for the renewal of the lease by Falls Supermarket for an additional period of five years to be negotiated by the parties before the expiration of the original lease. The agreement made no provision for a deadlock-breaking mechanism if the parties could not reach agreement.

Roazer refused to negotiate the new lease unless the amounts in terms of the additional (illegal) agreements were paid by Falls Supermarket.

Tshiq JA held that non-performance under the additional agreements was no bar to the exercise by Falls Supermarket of its entitlement to renew the main lease agreement as these agreements were illegal and, therefore, void and unenforceable.

The real issue in Roazer was whether an agreement to negotiate in good faith is enforceable in the absence of a deadlock-breaking mechanism. It is trite that negotiations are enforceable if the agreement provides for an effective deadlock-breaking
row, Groep was injured when the bus pulled away before he had fully embarked. He suffered extensive orthopaedic injuries and he sought to claim damages for it. The particulars of claim stated that Groep, Golden Arrow, and a fare-paying passenger on a Golden Arrow bus, that his statutory claim against the Road Accident Fund (the RAF) was limited to R 2 500,000, that he had received that amount from the RAF and that Golden Arrow was, therefore, liable to Groep for damages in the sum of R 855,000. The claim comprised general damages in the sum of R 500,000 with the balance claimed in respect of special damages (past and future medical expenses, and past and future loss of income).

Golden Arrow defended the claim and raised a special plea of prescription. It said that by no later than 2 September 2002, Groep was aware of both the identity of the debtor, which had caused him to suffer damages and the facts from which that debt arose. It alleged that, in the circumstances, Groep’s debt had prescribed in terms of the Prescription Act 68 of 1969 by no later than 3 September 2005.

Groep filed a replication to the plea, stating that he only acquired knowledge of the identity of his debtor and facts giving rise to his claim against Golden Arrow on 20 June 2006.

Gamble J pointed out that the crisp question was whether Golden Arrow had undertaken to abandon the special plea of prescription. The facts showed that Golden Arrow’s undertaking not to rely on the special plea of prescription came at a relatively early stage of negotiations, all of which were classified throughout by the parties as being ‘without prejudice’. That formed the basis of Golden Arrow’s offer to settle. Consequently, the court was not persuaded that the letter relied on by Groep was admissible in evidence against Golden Arrow, and the conclusion was that the special plea of prescription has not been abandoned by Golden Arrow.

The separate matter of prescription was thus determined in favour of Golden Arrow.

Revenue
Interpretation of ‘gross sales’ in respect of an unrefined mineral resource: The facts in United Manganese of Kalahari (Pty) Ltd v Commissioner, South African Revenue Service 2018 (2) SA 275 (GP) were as follows: The applicant, United Manganese of Kalahari (UMK), was a manganese miner and an ‘extractor’ of an ‘unrefined mineral resource’ in terms of the Mineral and Petroleum Resources Royalties Act 28 of 2008 (the Act). As such, UMK was liable for the payment of a royalty on the transfer of the manganese, based on its ‘gross sales’.

In calculating its resources royalty liability in terms of the Act, UMK deducted from gross sales the cost of transport, insurance, and handling it incurred in order to bring the manganese to the condition set-out in sch 2 of the Act. Further, UMK deducted from gross sales, the cost of transport, insurance, and handling it incurred in disposing of the manganese.

A dispute arose between UMK and the South African Revenue Service (SARS) on the interpretation of s 6(3)(b) of the Act and the determination of gross sales for purposes of calculating the royalty liability. SARS argued that the cost of transport, insurance, and handling post extraction could not be deducted from gross sales.

UMK applied for a declaratory order that s 6(3)(b) of the Act is clear and unambiguous. ‘Gross sales’ in respect of an unrefined mineral resource transferred is, in terms of s 6(2), ‘the amount of the manganese transferred by it deducting any expenditure incurred in respect of transport, insurance, and handling of the manganese after the manganese had been brought to the condition specified in sch 2 of the Act. It may further deduct any expenditure it incurred in respect of transport, insurance and handling to effect the disposal of the manganese. Such deduction will be allowed irrespective whether any such expenditure was of a capital nature.

The declaratory order was accordingly given with costs.

Other cases
Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, criminal law, sentencing, demand guarantees, defence force, environmental law, fiduciary duties of directors, immigration, international law, land reform, lease, loss of support, mining and minerals, media, National Director of Prosecutions, road accident claims and validity of legislation.
New legislation

Legislation published from 1 – 29 March 2018

The limit on a defined benefit asset, minimum funding requirements and their interaction under IFRS in the South African pension fund environment. GN236 GG41503/16-3-2018.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Rules, forms and particulars: Amendment of the return of earnings form. GN379 GG41520/27-3-2018 (also available in Afrikaans).

Dental Technicians Act 19 of 1979
Amendment of regulations relating to the registration of dental laboratories and related matters. GN217 GG41498/16-3-2018.

Division of Revenue Act 3 of 2017
Stopping and reallocation of funds to municipalities and technical adjustments to conditional allocations to municipalities. GN356 GG41519/23-3-2018.

Conversion of education and disaster benefits. GN227 GG41498/16-3-2018.

Electronic Communications Act 36 of 2005
Number Portability Regulations. GN392 GG41538/28-3-2018.

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

Health Professions Act 36 of 1974
Amendment of regulations relating to specialties and subspecialities in medicine and dentistry. GN216 GG41498/16-3-2018.

Higher Education Act 101 of 1997
Minimum admission requirements for the higher certificate, diploma and bachelor's degree programmes for holders of a Senior Certificate and the revocation of designated list of subjects. GN165 GG41473/2-3-2018.

Income Tax Act 58 of 1962
Date by which employers must render returns. GN168 GG41473/2-3-2018 (also available in Afrikaans, isiZulu and Sesotho).

Liquor Products Act 60 of 1989
Amendment of regulations. GN212 GG41498/16-3-2018 (also available in Afrikaans).

Magistrates’ Courts Act 32 of 1944
Appointment of places within Mitchells Plain for the holding of a court. GN393 GG41539/28-3-2018.

Medical Schemes Act 131 of 1998

National Environmental Management Act 107 of 1998
Approval of fees for application registration, lodging of appeals and annual fees for registered candidate environmental assessment practitioners and registered environmental assessment practitioners. GN R196 GG41485/7-3-2018.

National Health Act 61 of 2003
Policy guidelines for licensing of residential and/or day care facilities for persons with mental illness and/or severe or profound intellectual disability. GN218 GG41498/16-3-2018.

Regulations regarding the rendering of forensic pathology service. GN R359 GG41524/23-3-2018.

National Nuclear Regulator Act 47 of 1999

Occupational Diseases in Mines and Works Act 78 of 1973
Amendment of amounts to increase benefits. GN227 GG41500/15-3-2018 (also available in Afrikaans).

Promotion of National Unity and Reconciliation Act 34 of 1995
Regulations relating to assistance to victims in respect of higher education and training: Increased amounts. GN R391 GG41535/29-3-2018 (also available in Afrikaans).

Security Officers Act 92 of 1987
Amendment of regulations. GenN141 GG41504/16-3-2018.

Social Assistance Act 13 of 2004
Social grants increase. GN R362 GG41526/26-3-2018.

Special Economic Zones Act 16 of 2014
Governance and Management Regulations. GN390 GG41334/29-3-2018.

Sugar Act 9 of 1978
Sugar Industry Agreement: Varieties of sugar cane approved for planting com-
mencing 1 April 2018 exclusively in control areas. GN171 GG41473/2-3-2018.

**Tax Administration Act 28 of 2011**
Persons required to submit third party returns. GN241 GG41512/23-3-2018 (also available in Afrikaans, isiZulu and Sesotho).

**Draft Bills**
Draft Civil Union Amendment Bill. GenN96 GG41475/1-3-2018.

**Draft delegated legislation**
Draft Roads Policy for South Africa. GN192 GG41479/2-3-2018.
Amendment of the ethical rules of conduct in terms of the Health Professions Act 56 of 1974 for comment. BN39 GG41498/16-3-2018.
Regulations relating to the registration of forensic pathology officers in terms of the Health Professions Act 56 of 1974 for comment. GN R360 GG41524/23-3-2018.
Permit Tariff Fee Regulations, 2018 in terms of the Cross-Border Road Transport Act 4 of 1998 for comment. GN396 GG41544/28-3-2018 (also available in Afrikaans).
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Dismissal for insubordination and compensation for fixed term employees

In Jorgensen v I Kat Computing (Pty) Ltd and Others [2018] 3 BLR 254 (LAC), the appellant was a manager of a branch in Durban which, was running at a loss. The employer instructed the appellant to send monthly reports to the managing director, which he failed to do. The managing director then informed the staff that they would not be paid until they started to make a profit. He later relented and paid them half their salaries. A letter was sent to the appellant explaining why the salaries had been halved and recording that the appellant had not met any of his performance targets. The appellant was requested to attend an inquiry, which the appellant failed to attend. It was stated in the letter to the appellant that should he fail to attend the inquiry this would be an act of gross insubordination.

Two inquiries were subsequently held in Durban and chaired by an independent chairperson. The first inquiry related to a charge of misconduct for gross insubordination in that he failed to attend the inquiry in Johannesburg. The second inquiry was in relation to complaints about the appellant's work performance. Both parties made written submissions to the chairperson who found the appellant guilty of gross insubordination and recommended dismissal. The chairperson did not recommend dismissal for poor work performance as the chairperson had not been in a position to properly evaluate the concerns about performance. The employer dismissed the appellant for gross insubordination, causing financial loss to the company as a result of inactivity, actions and mismanagement of the branch and failing to follow company policies and procedures.

The employer referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner considered the fact that the chairperson had not made a finding on poor performance and found that it was not competent for him to arbitrate that aspect of the dispute. He therefore considered whether the appellant committed gross insubordination and, if so, whether it was a dismissalable offence. The appellant argued that he did not attend the inquiry as he had only been paid half his salary and thus the employer had breached his employment contract. The commissioner agreed that the appellant was not obliged to attend the inquiry as the employer had not fulfilled its contractual obligations. The commissioner found further that it is an employee's choice whether to attend a disciplinary inquiry or not. Thus, the commissioner found that the dismissal was substantively unfair and awarded compensation equal to nine months' renumeration.

The employer approached the Labour Court (LC) to review the arbitration award. The LC held that the commissioner erred in finding that he was not required to arbitrate the dispute insofar as it related to poor work performance. This was because the LC was of the view that the appellant was dismissed for gross insubordination and poor work performance. The LC found that the appellant was not guilty of gross insubordination because he could elect to attend or not attend the inquiry. The LC accordingly reviewed and set aside the award. The LC found that the financial loss referred to was not as a result of poor performance, but rather gross insubordination and causing a financial loss as a result of inactivity, actions and mismanagement of the branch. He was of the understanding that the financial loss referred to was not as a result of poor performance, but was related to the wasted costs as a result of the appellant's failure to attend the inquiry in Johannesburg. He found that the commissioner was correct not to consider poor performance and there was accordingly no reason to remit the matter back to the CCMA for another arbitrator to make a determination regarding the issue of poor performance. Furthermore, the appellant's dismissal was already found to be unfair and compensation had been ordered so the referral back to the CCMA would be purely academic. Phatshoane AJA concurred with Tlaletsi DJP in this regard.

All three judges of the LAC agreed that the dismissal for gross insubordination was substantively unfair as it was not fair to expect the appellant to attend a disciplinary inquiry when the employer had breached the obligations to pay him his full salary. Landman AJA also remarked that the appellant's concerns that he would not be treated impartially were validated by the fact that the employer dismissed the appellant for poor work performance despite the fact that the chairperson did not make a finding on performance. Landman AJA further upheld the commissioner's finding that there is jurisdiction that an employee has a choice whether or not to attend a disciplinary inquiry.

As regards compensation, all three judges of the LAC found that the commissioner did not consider the fact that the appellant was engaged on a fixed term contract, the balance of which was five months at the time of his dismissal. It was found that there was no cause to award compensation more than his actual loss of income and thus the award of compensation was not one that a reasonable commissioner would have made and the amount should be reduced. The order of the LC was accordingly set aside and replaced with an order that the dismissal was substantively unfair and the respondent was to pay the appellant the difference between what he had earned and what he would have earned had he worked the balance of the contract term of five months.
union, the National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAWU) concluded a three-year wage agreement ending 30 June 2018 (the substantive agreement). In terms of this agreement, certain categories of employees would work a 45-hour week and take a one-hour unpaid lunch break daily.

The employer contended that the substantive agreement was, in terms of s 24(1)(d) of the Labour Relations Act 66 of 1995 (LRA), extended to NTM’s members and hence they were bound by the substantive agreement.

The court was, however, not persuaded by this argument. A collective agreement can only be extended to employees who are not a party to the collective agreement if the agreement -

- was concluded with a majority union;
- identifies those employees who are not members of the signatory union; and
- expressly stated that such employees were bound by the collective agreement.

On a reading of the substantive agreement, the court was not satisfied that these requirements had been met.

The employer further referred the court to a collective agreement it concluded with NTM in May 2017 termed the ‘Relationship Agreement’.

As set out in the Relationship Agreement, NTM and the employer agreed that for purposes of negotiating wages and other terms and conditions of employment, the employer would only recognise the majority union in its workplace as a bargaining agent, which at the time was not NTM. The Relationship Agreement further stated that NTM will not, during the duration of a valid collective agreement, strike over any issue which forms the subject matter of that collective agreement.

The court found that NTM was bound by its own agreement with the employer. By entering into the Relationship Agreement, NTM accepted that it is not the majority union and hence could not be recognised for purposes of bargaining and furthermore, agreed not to strike over matters, which were governed by a collective agreement - in this instance the issue of working hours and meal intervals were addressed in the collective agreement the employer entered into with NUFBWSAWU, which remained valid and binding at the time. Therefore, the Relationship Agreement prevented NTM from striking over the issue in dispute.

Lawfulness of the demand
Notwithstanding the fact that this finding alone would have been sufficient reason to confirm the rule, Lagrange J nevertheless assessed the nature of NTM’s demand. NTM’s contention was that its members have their meals while driving or while working and, therefore, should be paid for the work performed during their lunch breaks. While the employer disputes these allegations, the court reasoned that if the employer was to accede to such a demand, the parties would be in breach of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and hence any intended strike action would be underpinned by an unlawful demand.

Section 14 of the BCEA states:

‘14 Meal intervals
(1) An employer must give an employee who works continuously for more than five hours a meal interval of at least one continuous hour.
(2) During a meal interval the employee may be required or permitted to perform only duties that cannot be left unattended and cannot be performed by another employee.
(3) An employee must be remunerated -
(a) for a meal interval in which the employer is required to work or is required to be available for work; and
(b) ...
(4) For the purposes of subsection (1), work is continuous unless it is interrupted by an interval of at least 60 minutes.’

Evaluating the nature of NTM’s demand in relation to s 14 of the BCEA, the court held:

‘The effect of these provisions is that it is only in circumstances where the work performed by an employee cannot be left unattended and nobody else can perform those duties that an employer is entitled to require the employee to remain available for work or to perform the duties, in which case the employee must be paid for those duties. …

To the extent that NTM’s demand is a demand that the affected workers must simply be paid for the lunch hours they claim they do not take because they work without a break, then if Vector accedes to this demand it would be acceding to a 9 hour working day without a lunch break in circumstances where the exceptional circumstances in sub-sections 14(2) and (3) do not apply. This would amount to a breach of s 14(1) of the BCEA and would be unlawful. Protected strike action cannot be undertaken in pursuit of an unlawful demand.’

Adjudication of dispute
In addition, if the employer was in breach of s 14 of the BCEA, NTM’s recourse would either be to utilise the enforcement mechanisms set out in the BCEA, which includes adjudication at the Labour Court, alternatively refer a contractual dispute to the Labour Court. The cause of action in respect of the alternative remedy rests on the fact that a basic condition of employment is incorporated as a term into an employment contract
(unless replaced with a more favourable term), following which an alleged breach of an employment contract can be dealt with as a contractual dispute by way of s 77(3) of the BCEA.

The upshot of both remedies prevents NTM from calling out its members to strike as the amended s 65(1)(c) of the LRA reads;
‘No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – ...

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law’.

For reasons advanced, the court confirmed the rule with no order as to costs.

Environmental law
Ashukem, JCN ‘A comparative analysis of the right to access to environmental information in South Africa and Uganda’ (2017) 33.3 SAHR 247.

Human rights
De Vos, P ‘Rejecting the free marketplace of ideas: A value-based conception of the limits of free speech’ (2017) 33.3 SAHR 259.
Madlalate, R ‘(In)equality at the intersection of race and space in Johannesburg’ (2017) 33.3 SAHR 429.
Swart, M ‘When the state fails: The role of the Khulumani Support Group in obtaining reparations for victims of apartheid’ (2016) 31.2 SAPL.

Inheritance and succession

Insolvency

Judiciary

Jurisprudence
George, E ‘Imagining equity and inclusi-
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RISK ALERT

MAY 2018 NO 2/2018

IN THIS EDITION

RISK MANAGEMENT COLUMN

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By Mfundo Sesenyi

A NOTE FROM THE EDITOR

It feels like just a few weeks ago that the previous edition of the Bulletin welcomed you to 2018 and we are now almost halfway through the year! 2018 has been a momentous year for South Africa on many fronts, including the legal profession. This year will see the legal profession undergo major changes with the implementation of the Legal Practice Act 28 of 2014 (LPA). It is concerning to note that many legal practitioners still indicate that they have not read the LPA. It can be expected that legal practitioners would make it a priority to gain a deep understanding of the most important piece of legislation that governs their profession, but this is sadly not the case in reality. Practitioners are urged to familiarise themselves with the LPA and to ensure that their practices are ready for the implementation of this legislation. Attorneys must also have regard to the draft practice rules published by the National Forum on 2 February 2018.

In the previous edition of the Bulletin we published the risk management self-assessment questionnaire. The response thereto has been encouraging and we have seen a large number of firms complete and submit their questionnaires. Those firms who have not, as yet, done so should attend to this as soon as possible. The AIIF Master Policy prescribes that the questionnaire must be completed. The questionnaire can be accessed at: http://www.aiif.co.za/wp-content/uploads/2018/01/Self-Assessment-Form-2016-2017.pdf

In this edition of the Bulletin we have articles contributed by attorneys on the AIIF panel as well as a contribution from a member of our team of legal advisors, for which we thank the contributors. Practitioners are encouraged to submit articles that they would like us to consider publishing.

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DISCLAIMER
Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.
SCAM ALERT!

A practitioner in KwaZulu Natal has alerted us to a new scam targeting conveyancers. The practitioner has summarised the *modus operandi* of the scam as follows:

A person purporting to be from SARS sends an email to the firm relating to a recently concluded conveyancing transaction attended to by that firm. The email alleges that the amount paid to SARS was in respect of arrear provisional tax owing by the seller of the property. For this reason, SARS has not required payment of the transfer duty relating to the transaction in question. The perpetrators then request that funds be paid into a particular bank account. Practitioners must be aware of this scam and not pay any monies into the bank account as requested by the perpetrators. This scam must be brought to the attention of staff in the firm and reported to the authorities (including the SAPS and SARS). Claims arising out of such scams will not be covered by the AIIF.

AIIF 2017 CLAIM STATISTICS

The table below gives a breakdown of claims notified to the AIIF in the 2017 calendar year.
The Prescription Alert service offered by the AIIF will assist practitioners in mitigating the risks associated with the prescription of claims. Firms are encouraged to register all time-barred matters with the Prescription Alert unit at: http://www.aiif.co.za/prescription-alert/prescription-alert-register-2/

The numbers of conveyancing practices still falling victim to cybercrimes is another cause for concern. Since 1 July 2016, the AIIF has repudiated more than 100 such claims on the basis of the cybercrime exclusion in the policy (clause 16(o)). The value of the excluded claims exceeds R63 million rand. Under no circumstances should practitioners act merely on an email instruction to change beneficiary banking details. The client must be contacted in order to verify the authenticity of such requests.

NOTIFICATION OF CIRCUMSTANCES WHICH MAY GIVE RISE TO A CLAIM

1 Many practitioners may not be aware of the fact that, in terms of the AIIF professional indemnity insurance policy, notice must not only be given to the insurer of an actual claim or demand, but also of circumstances which may give rise to a claim.

2 Clause 22 of the AIIF professional indemnity insurance policy reads as follows:

“22. The Insured must
a) Give immediate written notice to the Insurer of any circumstance, act, error or omission that may give rise to a claim; and
b) Notify the Insurer in writing as soon as practicable of any claim made against them...” [own underlining]

3 The notification requirement in respect of circumstances is a factual enquiry and the answer will depend on the circumstances of each particular case.

4 According to LAWSA Volume 12(2) - Second Edition, paragraph 250:

“Liability policies as a rule require the insured to notify the insurer of particular facts... The purpose of the notification is to alert the insurer to the possibility of an action, so that they may take steps to mitigate the insured’s loss (liability) and, with it, their liability to pay him an indemnity for it.

Under an occurrence-based policy, for instance, the insured will be required to notify the insurer of any occurrence that may give rise to a claim. Notice is to be given of an occurrence giving rise to a claim against the insurer, not of a claim by the third-party against the insured. The insured cannot therefore wait for a third-party claim against it before notifying the insurer of the occurrence having taken place as the duty of notification is not dependent on a third-party claim arising from the occurrence having been made against the insured...”

5. According to LAWSA Volume 12(1) - Second Edition, paragraph 380:

“A term requiring the insured to notify the insurer of the occurrence of an event is generally construed as a vital term, even in the absence of words empowering the insurer expressly to refuse a claim on breach of the term. The term is regarded as a “condition precedent”[Norris v Legal & General Assurance Society Ltd supra]. Accordingly, where the insured has failed to give notice within the time specified or, if no time has been specified, within a reasonable time, the insurer is entitled to refuse the claim, irrespective of whether the insurer has suffered any actual prejudice as a result. Strict compliance will be required and any non-compliance, whether because of ignorance or impossibility, however reasonable, will amount to a breach of the term.” (footnote omitted.)

6 In Thomson v Federated Timbers (KZD) (2011), an unreported case, the well-known, as he was then, Wallis J, currently a Judge of the Supreme Court of Appeal, considered the notice requirement. In this regard the relevant facts were as follows:

Mr Thompson (the Plaintiff) alleged that he had sustained injuries after he tripped over an electrical cord at a shopping centre owned by Federated Timbers (the First Defendant). The First Defendant pleaded that it had employed Durban Property Cleaning Services (“DPCS”) as an independent contractor to attend to the cleaning of its premises. DPCS notified its insurers, Zurich Insurance Company (South Africa) Limited (“Zurich”), of the joinder, claiming indemnity from Zurich. Zurich rejected the claim alleg-
ing that DPCS failed to comply with the notification provisions of the policy. As a result DPCS joined Zurich as a third party to the action. The relevant issue to be decided was thus at what stage it was reasonably possible for DPCS to have notified Zurich of the event?

The notification clause (clause 6) in the policy provided as follows:

Claims:
“a) On the happening of any event which may result in a claim under this policy, the insured shall, at their own expense
   i. give notice thereof to the company as soon as reasonably possible ...”

7 The Court held that “the requirement that the notification be made so soon as reasonably possible must mean so soon as is reasonably practicable in all the circumstances. The enquiry is a factual one. And the answer will depend upon the circumstances of each particular case”.

The Court held further that while the test for reasonableness is an objective one, it highlighted the necessity to consider certain subjective elements. The Court stated that “it is perfectly conceivable that an insured person may know that an event has occurred but have no knowledge of the potential for a claim to arise in consequence of that event”. The Court went on to emphasise that “even if the insured is aware that a particular event has occurred and that damage has resulted, the circumstances may be such that there is no appreciation of the potential for a claim. That is particularly so when dealing with the type of cover under consideration in this case”.

The Court held that two issues potentially arise as to whether in fact there was an appreciation of the possibility of a claim being made under the insurance policy or not:

(i) If there was such an appreciation then that is an end to the matter. The obligation to notify the insurer of the relevant event is then clear.

(ii) If, however, the court is not satisfied that there was such an appreciation, that does not resolve the issue the other way. If the failure to appreciate the possibility of a claim is unreasonable, in the sense that a reasonable insured in the same position would appreciate the possibility of a claim, the fact that this particular insured did not [appreciate the possibility of a claim] cannot, relieve it of the consequences of its failure to notify the insurer of the event.

8 The Court thus considered DPCS’ approach as to why Zurich was not notified of the claim earlier. The Court held that DPCS did not fully appreciate the obligation imposed under Clause 6(a)(i). The Court stated (in paragraph 13 of the judgement) that:
“[T]hat obligation is to notify the insurer of the happening of any event, such as Mr Thompson’s fall, which could lead DPCS to make a claim against Zurich under the insurance policy. It is not an obligation to notify of the event only if or once a claim has been made. The fact that the obligation to notify the company of a claim against the insured is dealt with separately in sub-clause (iii) from the obligation to notify the company of an event in sub-clause (i) makes it clear that the obligation to notify the insurer under the first clause is not dependent upon a claim having been made against the insured. The obligation to notify the insurer of a claim arises separately under clauses 6(a)(iii) and (iv).”

9 The Court found that when DPCS was informed about this incident it appreciated that there was some small risk that it might result in a claim that it would, in turn, refer to its insurer for an indemnity. The Court thus dismissed the claim for an indemnity against Zurich.

10 It is clear from the above case law and authority that in broad terms three issues potentially arise when determining whether in fact there was appreciation of the possibility (circumstances) of a claim which must be reported to an insurer:

10.1 If there was as a fact an appreciation, then it is the end of the enquiry as the obligation to notify an insurer will then be clear.

10.2 If the court is not satisfied that there was as a fact such an appreciation, that does not resolve the issue the other way. If the failure to appreciate the possibility of a claim is unreasonable, in the sense that a reasonable insured in the same position would appreciate the possibility of a claim, the fact that the insured did not appreciate the possibility of a claim cannot relieve it of the consequences of its failure to notify the insurer of the event. The key question for determination will therefore be whether the failure to have appreciated the possibility of a claim was reasonable or not. If it was unreasonable, notification was late and the insurer may be entitled to repudiate liability. If it was not unreasonable, there was no late notification and the insurer cannot repudiate liability.

10.3 Even a small risk that it may result in a claim should be reported.

11 My recommendation to practitioners is to follow a conservative approach in respect of notification of circumstances which may give rise to a claim and rather notify the AIIF if in doubt.

By Wim Cilliers, a director at VDT Attorneys in Brooklyn, Pretoria
DOES TIME HEAL THE WOUND?

The summonses were served on 20 June 2012 on the MEC for Health. The MEC raised the defence of prescription. Mr Loni denied that his claim had prescribed as alleged. He submitted that before he met Dr Olivier, he was unaware that he had a claim for damages against the MEC. He averred that he only acquired that knowledge in November 2011 when Dr Olivier advised him that the medical staff at the hospital had been negligent.

According to section 12(3) of the Prescription Act, “a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”.

In arriving at its judgment, the CC considered the judgment of Links having regard to the personal circumstances of Mr Loni.

The CC in this case re-affirmed the principles enunciated in Links in terms of test prescribed for all professional negligence matters. The assessment of professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.

In this regard, Links was distinguishable to the facts of this matter. In Links, the plaintiff required expert medical opinion to establish that the treatment that he had received had been negligent and to draw the causative link between the harm suffered and the negligent treatment.

In applying the principles enunciated in Links to the facts before it, the court held as follows:

“The applicant (Loni) should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011”.

In addition, the court held that: “It is clear, that long before the applicant’s discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of this treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain ever since continuously thereafter. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration”.

The CC had re-affirmed the principle that the court was required to either reaffirm or augment the principles enunciated in Links to the personal circumstances of Mr Loni. Strangely, it did not.

In applying the principles enunciated in Links to the facts of this matter, the court held that:

“However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises”.

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The CC had re-affirmed the principles enunciated in Links in terms of test prescribed for all professional negligence matters. The assessment of professional negligence matters should equally apply as those applied in Links. As the old law maxim goes, every matter is to be determined on its own facts or circumstances. So, does time heal the wound? Legally, it depends on the circumstances of each case. As for Mr Loni, sadly it did not.

By Ayanda Nondwana, partner at Hogan Lovells (South Africa), Sandton

[Editor's note: The principles in the Loni case are far reaching. In many instances we have found that professional indemnity claims brought against attorneys have prescribed! This leads us into a discussion of one such case, Mgobozi Patricia Fumeka v T Qina & Sons, in the next article.]
The importance with which creditors and attorneys should be alert of prescription periods and institute claims against debtors timeously was highlighted in a recent judgment of Mgobozi Patricia Funeka v T Qina & Sons. The plaintiff instituted an action against her erstwhile attorney for allegedly negligently allowing her claim for loss of support against the Road Accident Fund to prescribe. The attorney had lodged the claim with the RAF but had failed to issue summons within the five year statutory period and the plaintiff’s claim against the RAF prescribed on 26 April 2007. A special plea of prescription was filed in response to the action on the basis that the plaintiff’s claim against her erstwhile attorney had prescribed as more than three years had elapsed since the attorney’s alleged negligence and more than three years had passed since the plaintiff ought to have knowledge or could, by the exercise of reasonable care, have had knowledge that her claim against the RAF had prescribed. In order to overcome this special plea, the plaintiff alleged in the pleadings that section 12(2) of the Prescription Act was applicable in that her erstwhile attorney had wilfully prevented her from coming to know of the existence of his debt to her and therefore prescription did not commence to run until she became aware of the existence of the debt during November 2009, when she instructed her new attorneys. The accident occurred on 27 April 2002 and the plaintiff’s claim against the RAF had prescribed on 26 April 2007. The attorney received the instruction from the plaintiff in 2004. He addressed various letters to the RAF on a regular basis in an attempt to ascertain whether any progress had been made in assessment of the claim. The periods between each letter appear to have increased with time and the attorney had prescribed on 26 April 2007. The plaintiff alleged in the pleadings that section 12(2) was without foundation and unsupported by the evidence. That court found that the plaintiff’s existing attorneys ought reasonably to have had knowledge of the existence of the debt owed to her by her erstwhile attorneys on receipt of the contents of her file from the erstwhile attorney. The Court was of the view that as the plaintiff’s duly appointed agents, the knowledge of the existence of the debt by her existing attorneys is knowledge which ought to be imputed to the plaintiff.

In addition the court was of the view that there was an expectation that the plaintiff ought to have taken steps to acquire knowledge of the debt owed to her. It was not unreasonable to expect that a person in the position of the plaintiff, in the exercise of reasonable care, should have contacted another attorney well before she actually did. In as much as she did not do so, her circumstances are hit by the proviso to section 12(3) of the Prescription Act.

According to 12(3) of the Prescription Act, a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

The court mentioned that the concept that a lay person is required to exercise reasonable care when in circumstances such as the plaintiff is no stranger in our law.

The plaintiff’s inability to acquire the requisite knowledge of the circumstances giving rise to the debt owed to her by the attorney was the result of her failure to exercise reasonable care in respect of taking a decision to seek alternative legal advice which could have been done at a much earlier stage than she did in November 2009. The special plea was upheld with costs.

The case is a clear illustration of when attorneys do not act diligently and allow their client’s claim to prescribe. In this matter, and unfortunately for the plaintiff, her two claims prescribed in the hands of both her attorneys. However, the court made it clear that a creditor, who is a lay person, cannot simply rely on her attorneys and postpone the commencement of prescription when she failed to exercise reasonable care.

By Trudie Nichols (director) and Lauren Turner (associate) from Bowman Gilfillan
The legal profession is at the door step of the enactment of the Legal Practice Act (Act 28 of 2014) (“LPA”). On 1 November 2018, the professional will see section 34 (Forms of legal practice) of the LPA come into operation. The effects of these provisions have been the subject of much academic writing, sparked interesting debates in court foyers and even received attention in a number of judgements, of recent, being that of Schippers J in the unreported Western Cape Division case of Noordien v Cape Bar Council and Others (WCC) (unreported case no 9864/2013, 13-1-2015). The controversy being that section 34(2)(b) of the LPA erodes the rudiments of the current referral rule, that advocates may not take instructions directly members of the public, which is fundamental to the distinction of the advocates’ profession from that of attorney.

Despite initial protests and challenge, particularly from certain interest groups of advocates, the provision will come into operation in November 2018 and the profession will see the creation of three types of legal practitioners, namely: (i) attorneys; (ii) advocates practicing with a fidelity fund certificate (“FFC”) and operating a trust account; and (iii) advocates without FFC’s and without a trust account.

This article does not, at any length intend to discuss the effects of the LPA and its surrounding controversies, rather the purpose of this article, given the inevitable enactment of the LPA, is to simply look at the bare facts regarding the advantages and disadvantages of the practising with the FFC and operating a trust account, particularly from a risk management point of view.

The LPA will give advocates a choice of practising with a FFC, which would then enable them to receive instructions directly from members of the public (end-user clients) or continuing in the referral profession where they will be briefed by attorneys.

Advantages:

1. Advocates who choose to practice with a FFC and operate a trust account will be able to receive briefs directly from the end-user clients. Presumably, however, this does not prevent the same advocate from receiving briefs through the traditional referral system from an attorney. One could see this as an advantage in that an advocate can now broaden their practice by accepting briefs from a wider network of people both attorney firms and members of the public which could include public and government organisations, thus potentially increasing the advocates revenue streams.

Many have also argued, as a disadvantage, that the LPA will see the removal of the attorney who plays an important role as a “middle man” between end-user client and the advocate, in collecting and processing the necessary information, ultimately to prepare a comprehensive brief for the advocate. That is a fair comment, however it also depends on who the end-user client is. How different would a brief from a senior advocate, brief only those who hold an FFC. This is simply because advocates practicing with a FFC will also become entitled to automatic professional indemnity insurance cover from the Attorneys Insurance Indemnity Fund NPC (“AIIF”) and this is an attractive benefit to any end-user client, from a risk management point of view. Particularly in the public sector, it can be foreseen that many organs of state will include as a specific tender requirement, that attorneys on their respective panels, brief only those advocates who hold FFC’s as this would allow such institutions recourse for professional negligence that may have been committed by the advocate, even where briefed by an attorney.

2. As the provisions of the LPA become better known to the public at large, it will increasing become a requirement from the end-user client themselves, that attorneys who brief advocates, brief only those who hold an FFC. That is simply because advocates practicing with a FFC will also become entitled to automatic professional indemnity insurance cover from the Attorneys Insurance Indemnity Fund NPC (“AIIF”) and this is an attractive benefit to any end-user client, from a risk management point of view. Particularly in the public sector, it can be foreseen that many organs of state will include as a specific tender requirement, that attorneys on their respective panels, brief only those advocates who hold FFC’s as this would allow such institutions recourse for professional negligence that may have been committed by the advocate, even where briefed by an attorney.

3. Section 87 (Accounting) of the LPA, read with Rule 50 (Accounting Rules) of the proposed South African Legal Practice Rules, obliges advocates practicing with a FFC and operating a trust account to comply with the accounting standards and requirements set therein. From a risk management perspective, this should be a welcomed change. Accounting standards and requirements will include keeping recognised and acceptable accounting records.
Disadvantages:

1 There are, of course, disadvantages that come with practicing with a FFC and operating a trust account. The first disadvantage is that such advocates will now owe each and every end-user client who instructs them directly, a list of non-exhaustive fiduciary duties. Our case law is besieged with judgments relating to attorneys’ fiduciary duties owed to their client, which would now similarly apply to advocates practicing with FFC and electing to receive briefs directly from the members of the public. The courts have held that the relationship between client and legal practitioner includes:

“the implied obligation to devote attention to the client’s business with the reasonable care and skill to be expected from a normally competent and careful practitioner… that obligation is not only a compendious or exhaustive definition of all the duties assumed under the contract created by the retainer and its acceptance).… A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one…”

(See Ramonyai v L P Molope Attorneys (2010/29310) [2014] ZAGPJHC 65 (27 February 2014).)

A further consequence of operating trust account practices, is the duties owed to each and every trust creditor who deposits money into their trust account, even where the depositor is not a client of the advocate.

Advocates will also have to comply with Financial Intelligence Centre Act 38 of 2001 (“FICA”) requirements. FICA imposes on accountable institutions, (which advocates practicing with a FFC and operating trust accounts would become) specific responsibilities to implement a number of control measures aimed at facilitating the detection and investigation of money laundering and terrorist financing before commencing a business relationship with a client as well as during the lifecycle of the business relationship. This includes, inter alia, the requirement to “Know Your Client” by establishing and verifying the identity of all clients prior to establishing a business relationship or concluding a transaction.

2 Dealing directly with members of the public will also require a larger investment into the practice infrastructure and advocates may now even need to employ drivers, messengers, purchase more printers, invest in marketing and other tools required to service walk-in clients.

3 Finally, the annual FFC renewal process will require compliance with the requirements and payment of the prescribed fee. Obtaining and practicing with a FFC is not only about receiving briefs directly from the public but has its own advantages and disadvantages which every advocate and aspiring advocate should consider thoroughly.

By Mfundo Sesenyi, legal advisor at the AIIF

ADVOCATES REFERRED TO IN SECTION 34(2)(b) OF THE LEGAL PRACTICE ACT - A NOTE BY THE EDITOR

In the article immediately above, Mfundo Sesenyi expresses his views on some of the considerations to be taken into account and some of the implications (as he sees them) of advocates practising with fidelity fund certificates. This is an important debate and we welcome the views of the profession in general on this topic, especially with regard to the risk implications. There have been wide ranging views expressed on the position of advocates practising with FFC’s and a few points must be made of the position in so far as the AIIF professional indemnity insurance scheme is concerned.

A ‘legal practitioner’ is defined in section 1 of the Legal Practice Act (LPA) as meaning an advocate or attorney enrolled as such in terms of the LPA. ‘Advocate’ and ‘attorney’ are also defined in the LPA. The definitions of ‘conveyancer’ and ‘notary’ refer to an attorney admitted and enrolled to practice as such. An advocate would thus not fall within the definitions of ‘conveyancer’ or ‘notary’ and would thus not (in terms of the LPA) be authorised to act as a conveyancer or notary. Advocates contemplated in section 34(2)(b) of the LPA would thus not be expected to carry out conveyancing transactions as defined in clause VIII of the AIIF policy.

Section 77(1) contemplates that the board of control of the Legal Practitioners Fidelity Fund may provide professional indemnity insurance to attorneys and advocates referred to in section 34(2)(b) through an insurance company (the AIIF). The deeds of suretyship entered into to the satisfaction of the Master of the High Court are only proved on behalf of attorneys (section 77(3)).

Attorneys and advocates contemplated in section 34(2)(b) will be obliged to pay the contribution levied by the board- see sections 77(4) and 74(1)(a) of the LPA and rule 55 of the draft rules published by the National Forum.

in terms of the International Financial Reporting Standards (IFRS) or the “IFRS for SMEs”, being IFRS for Small and Medium Enterprises.

With law firms, particularly conveyancing practices, becoming a prime target for cybercrime scams and a hunting ground for theft by employees, the advocacy fraternity will no doubt benefit from improved accounting and bookkeeping standards.