DIPLOMATIC IMMUNITY: 
ITS NATURE, EFFECTS AND IMPLICATIONS

Share buy-backs and waiver of mandatory offers in terms of the Companies Act

Equality for all religions and cultures in the South African legal system

Time’s up for employers hiding from sexual harassment settlements

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FEATURES

26 Diplomatic immunity: Its nature, effects and implications

Section 15(1) of the Diplomatic Immunities and Privileges Act 37 of 2001 creates an offence if anyone obtains or executes any legal process against diplomats. It is noteworthy that a party to such proceedings, an attorney and the Sheriff are specifically referred to therein. Should s 15(1) be contravened or if any other offence is committed resulting in the infringement of a diplomat’s personal inviolability or that of their property or residence, the offender could, on conviction, be fined and/or imprisoned for up to three years. In light of the far-reaching implications of s 15, Riaan de Jager, explains the nature, effects and implications of what is known as ‘diplomatic immunity’ in order to assist members of the profession not to fall foul of its provisions. In doing so, he first examines the purpose of immunity, thereafter, the difference between state (or sovereign) immunity and diplomatic immunity will be highlighted. Lastly, Mr de Jager will identify the different types of immunity, as well as the implications of each.

30 Equality for all religions and cultures in the South African legal system

South Africa is a religious and culturally diverse country where all cultural, religious and other belief systems are accorded equal constitutional protection. However, it can hardly be gainsaid that, in practice, certain religious beliefs and practices enjoy more protection and privileges than others. Against this backdrop, this article, written by Ndihuvhu Ishmel Moleya, questions the relevance of the doctrine of entanglement in our religious and cultural pluralistic society.

32 Share buy-backs and waiver of mandatory offers in terms of the Companies Act

It has been historically recognised that a decision to invest in a particular company, by an investor, is an extremely personal decision based to a large degree on trust that the investor has in the individuals or teams running the particular company. Any drastic changes made in the running of the company could have an effect on this ‘trust relationship’ requiring the investor to re-consider their investment in the company in the event that there are changes in its running, including changes to its ownership structure. Basil Kgaugelo Mashabane writes that the purpose of this article is to briefly deal with the mandatory offer requirements in terms of s 123 of the Companies Act 71 of 2008 (the Act) involving regulated companies and the investor to re-consider their investment in the company in the event that there are changes in its running, including changes to its ownership structure. 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36 Time’s up for employers hiding from sexual harassment settlements

During a recent round table discussion held in London in February, Associate Professor Matteo Winkler of Tax and Law at business school HEC Paris proposed that employers should disclose how much they had paid out to settle sexual harassment claims. This is an interesting proposal. In this article, Kershwyn Bassuday, considers the limits of privacy and confidentiality relating to the settlement of sexual harassment claims and whether the disclosure as suggested by Prof Winkler is workable and justifiable in South Africa?
Is the profession ready for the full implementation of the LPA?

With only a few months left until the full enactment of the Legal Practice Act 28 of 2014 (LPA) and the termination of the National Forum on the Legal Profession (NF), legal practitioners must be pondering whether the profession is ready for the envisaged Legal Practice Council (LPC).

The NF, which has been in operation since February 2015, is due to be terminated on 31 October when the LPA is fully implemented, this will also close the four statutory law societies. Member of the NF, Jan Stemmett prepared the summary to give an update on the NF and the LPA (for more info see www.LSSA.org.za).

The NF has completed the following tasks or the tasks are near completion:

- A Code of Conduct for all legal practitioners, non-practising legal practitioners, candidate legal practitioners and corporate legal entities was drafted and published. The Code, gazetted in February 2017 (GN 81 GG40610/10-2-2017), will only be operational when the new LPC starts to regulate the legal profession.
- Regulations were finalised by the Department of Justice after recommendations by the NF and after consultation between the minister and the NF. The Regulations will be promulgated after approval by Parliament.
- Rules were finalised by the NF after drafts were published for comment by interested parties. The final version will be gazetted in July.
- Transfer agreements have been concluded with the four statutory law societies, providing for the transfer of assets, rights, liabilities, obligations and staff to the LPC and the Provincial Councils. The parties agreed that R 50 million of the money to be transferred to the LPC, will be transferred to the LSSA.
- Transitional arrangements are being attended to by the NF’s Transitional Arrangements Committee to ensure a smooth transfer of regulatory functions of the existing law societies and advocates’ structures to the new LPC and the nine Provincial Councils.
- Election of the ten attorneys and six advocates to serve on the first LPC is intended to be conducted in August by an election service provider under supervision of the NF. An Election Committee was appointed by the NF for this purpose. Three additional members are due to be appointed to the LPC by the minister, two by the law teachers and one each by the Attorneys Fidelity Fund (AFF) and Legal Aid South Africa (Legal Aid SA). The legal practitioners to serve on the nine Provincial Councils are due to be elected under supervision of the LPC. In terms of the election Regulations and Rules, the composition of the LPC and Provincial Councils is due to reflect the demographics of the country.

The NF has established to attend to all transitional aspects. The committee will be attending to the following, in cooperation with the Pre-transitional Committees of the law societies:

- Arrange for the payment of interest on trust banking accounts by attorneys over the transitional period to the provincial law societies until the effective date, whereafter the money will be transferred to the AFF.
- Prepare for the transfer of work in progress from the provincial law societies to the LPC and Provincial Councils.
- Prepare for the transfer of regulatory work in progress from advocates structures to the LPC and Provincial Councils.
- Arrange for the handing over by the provincial law societies of – documents of title to the assets and rights, which are in their possession or under their control;
  - the originals (or copies) of all their contracts;
  - records relating to the activities of the provincial law societies prior to the effective date and relating to its assets, rights, liabilities and obligations.
- Standardise the operational and financial procedures and systems currently in place at the various provincial law societies and aligning such procedures with the rules and regulations of the LPC (eg, disciplinary procedures).
- Take steps to urgently deal with existing backlogs, to ensure a smooth transition of the operational functions of the provincial law societies to the LPC.
- Arrange for the continuation of the Benevolent Funds of the provincial law societies after the effective date.
- Arrange for the LPC to take over the pending court cases in which the law societies and advocates structures are involved.
- Compiling a database of all admitted legal practitioners, including unaffiliated advocates.
- Communication by the NF with the minister, the law teachers, the AFF and Legal Aid SA to arrange for the appointment of the non-elected designates to the LPC.

As can be seen from the above, a lot of work has taken place to ensure a smooth transition from the exiting regulatory bodies to the new LPC.

- Upcoming deadlines for article submissions: 23 July and 20 August.
Implications of the increase in the prescribed income amount in terms of the Extension of Security of Tenure Act

An ‘occupier’ is defined in s 1 of the Extension of Security of Tenure Act 62 of 1997 (ESTA), as a ‘person residing on [essentially rural] land which belongs to another person, and who has on or after 4 February 1997, or thereafter had consent or another right in law to do so’. In terms of para (c) of the definition of ‘occupier’, and in terms of the Regulations issued under ESTA, a person will not qualify as an occupier if the person earns an income in excess of the prescribed amount of R 5 000 per month.

On 6 February, the Minister of Rural Development and Land Reform amended the prescribed amount from R 5 000 per month to R 13 625 per month. This amendment of the Regulations under ESTA was subsequently published in the Government Gazette (Gen N72 GG41447/16-2-2018). The effect of the amendment is that a person who earns a monthly income of between R 5 000 and R 13 625 will now also qualify as an occupier as defined in ESTA.

In terms of the Stellenbosch University Law Clinic (the Law Clinic) means test, used by Legal Aid South Africa to determine whether or not a person qualifies for legal aid at the Law Clinic, a single applicant should not earn an income of more than R 5 500 per month, while an applicant who has a spouse or partner should not earn a combined income of more than R 6 000 per month.

During December 2017, the public was invited to comment on a proposed amendment to the Regulations issued under the Legal Aid South Africa Act 39 of 2014 relating to the above means test. The proposed amendment entails increasing the income threshold of a single applicant to R 7 400 per month (from R 5 500 per month), while increasing the income of an applicant with a spouse or partner to an amount of R 8 000 per month (from R 6 000 per month). The public was invited to comment on the proposed amendments before 19 January. The proposed amendments have not yet taken effect.

Regardless of whether the proposed amendment to the Regulations under the Legal Aid South Africa Act is effected, the negative implication of the amendment to the Regulations under ESTA is that certain farm occupiers – as defined in ESTA – will no longer qualify for free legal aid at institutions, such as the Law Clinic. This is particularly problematic as the Law Clinic is the only law clinic in South Africa, which assists in opposing ESTA eviction applications.

It is commendable that the reach of ESTA has been extended. However, the Law Clinic notes its concern that the extended reach of ESTA may result in large numbers of individuals who cannot enforce their rights under the legislation, because they do not qualify for legal aid and cannot otherwise afford to pay for the services of an attorney in private practice. Raising a legal defence to an eviction without a lawyer will remain possible when defending attorneys have to be compensated for their efforts. One would have to question to what extent this practice will remain possible when defence attorneys have to be compensated for their work. The likely scenario is that these legal costs will simply reduce the compensation available to the occupier, further limiting the prospects of securing a roof over their heads.

The increase in the prescribed income ‘cap’ amount in terms of ESTA increases the need for legal services. The question remains, however, who will meet this requirement and what cost?

Nikita Roode, attorney, Stellenbosch

The small arbitration procedure

An arbitration procedure to deal with smaller commercial matters was designed during 2017 by senior members of the Pretoria Bar in conjunction with the Arbitration Foundation of South Africa.

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- disputes pertaining to children;
- concerning the status of persons; as well as
- interdicts.

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The claimant institutes proceedings by filing a statement of claim and paying a registration fee. This is followed by a statement of defence and if applicable, a reply. The parties may choose whether they wish to have legal representation or not.

The proceedings are directed and guided by an arbitrator who will proceed in an inquisitorial fashion. The hearing is presided over by an arbitrator who will proceed in this forum. Matters specifically excluded are:

- matrimonial disputes;
- disputes pertaining to children;
- concerning the status of persons; as well as
- interdicts.

The application of an estate after a divorce order was granted can, however, also be dealt with in this forum.

Arbitrators’ fees are capped in order to curtail the costs of the proceedings. No fees are payable for the venue at which the arbitration is held. Parties may agree on an arbitrator from the panel of arbitrators who completed the training course for this procedure. If there is no agreement, an arbitrator will be appointed from the panel of arbitrators.

Persons interested in this procedure can contact Tanya at (012) 942 2107 or e-mail: manager@gkchambers.co.za.

**Letters to the Editor**

**Serialong Lebasa,**
attorney, Vereeniging

Discovery affidavits practice

An unnecessary practice exists in terms of which a legal practitioner, after filing a discovery affidavit also files a copy of each of the discovered documents. Not only does this immediately exacerbate costs on both sides and burden the court file, but more importantly it may inadvertently lead to the disclosure of privileged communications. Particular care should be exercised when the legal practitioner institutes proceedings against their former client, invariably for fees. Discovery of all communication between the legal practitioner and the former client to support the legal practitioner’s claim, or to respond to the former client’s defence or counterclaim, is necessary for the proper conduct of the legal practitioner’s case.

The rules of court (Uniform Rules of Court r 35(2), Magistrates’ Courts Rules r 23(2)) regulating discovery call for a list of documents identified by date and description confirmed under oath. As a matter of practice that a party intending to utilise any of the documents discovered by either party identifies that document for the purposes of a trial bundle. In my view, the legal practitioner seeking to recover a fee from a client will invariably breach professional confidentiality obligations by filing a bundle of documents, which includes in that bundle privileged communications. It is incontrovertible that professional privilege is that of the client and that the privilege survives termination of the legal practitioner’s mandate, whether by the client or the legal practitioner’s withdrawal from the matter.

The apprehension to be guarded against is that a party who has interest in the affairs of the legal practitioner’s client will become privy to the privileged communications of the client in circumstances where the legal practitioner has filed such a blunderbuss bundle of documents, including privileged communications. Lewis writes that ‘It is no excuse at all that the facts are public property ascertainable by anyone on appropriate search’ (EAL Lewis Legal Ethics: A Guide to Professional Conduct for South African Attorneys) led (Cape Town: Juta 1982) at 295).

As a consequence of litigation in a public forum (s 34 Constitution) states that those privileged communications might well be subjected to scrutiny by the court. The important point is that: ‘Without the client’s consent his attorney should not relax confidence merely because the matter has become public, either in the courts or in the press’ (Lewis (op cit) at 299).

The legal practitioner is obliged to protect the professional privilege that adheres to communications with his client, even and especially when they are at loggerheads.

**IG Bredenkamp SC,**
advocate, Pretoria

Attorneys and clients – when relations turn sour

One cannot help but wonder: Are clients becoming more knowledgeable of their rights or have we, as legal practitioners, become so complacent in our work that we forget to cover our backs when dealing with clients?

Legal practitioners can all attest to the joy of securing a client or two on a given day. Besides, economic times are hard and as a result, securing clients has become a challenge for some law firms.

It is normal practice – for most firms – to start working on a client’s instruction immediately after the latter has signed a mandate and paid a deposit. Most clients come to a legal practitioner’s office with big, or sometimes, even impossible or unrealistic expectations. It is our duty as the legal practitioner to identify and attend to such possible risks beforehand. The other common risk in the legal profession is that failing to secure enough funds to see the given instruction through to its finalisation. It is a known fact that the latter is capable of permanently destroying the relationship between a legal practitioner and client.

Some legal practitioners are careful enough to discuss the risks with the prospective client and this is done verbally during the first consultation. At this stage the clients are quick to say they understand and agree to the terms explained to them, until that time when their file gets closed ‘due to lack of funds’. We all know what the client’s reaction is going to be. The most common utterances are ‘the attorney did not explain’, ‘I did not understand’ or the most dangerous one ‘the attorney squandered my money without doing any work’.

Lately, I have come across people telling negative stories about legal practitioners. Whether there is merit in these stories or not is of less importance. What matters is that word of mouth can help build a legal practitioner’s reputation, as much as it can also help destroy such a reputation.

It is high time that legal practitioners should consider taking time to draft documents to cover themselves against the clients before they rush into writing that letter of demand on behalf of the client.

Indeed, practice does make perfect. If legal practitioners practice drafting important documents, they will not only be protecting themselves against potential litigation, but they will also be fine-tuning themselves for those binding provisions of the Legal Practice Act 28 of 2014. Let us all keep our attorney-and-client relations sweet.

**LETTERS TO THE EDITOR**

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**Grotrius Greenhorn,**
Johannesburg
LSSA AGM: Blueprint for the future of our profession

T

he Law Society of South Africa (LSSA) held its annual conference in Cape Town on 23 to 24 March under the theme: 'Blueprint for the future of our profession'. Topics discussed at the conference centered on the future of the profession after the full enactment of the Legal Practice Act 28 of 2014 (LPA).

Immediate past Co-chairpersons of the LSSA, Walid Brown and David Bekker, welcomed delegates to the conference. Mr Brown noted that during his tenure as Co-chairperson, the LPA and its implementation thereof was one of the main features on the agenda. ‘We have had complex and emotional set of negotiations and discussions to ensure a smooth transition,’ Mr Brown said.

Mr Brown said that the LPA was amended to extend the lifespan of the National Forum on the Legal Profession (NF) and change the envisaged handover date to the Legal Practice Council (LPC) from February to October. ‘There are a number of issues the NF is still grappling with, including professional vocational training,’ he added. Mr Brown assured delegates that the NF was planning for the unforeseen during the full implementation of the LPC and when the provincial law societies cease to exist.

Mr Brown noted that the Legal Education and Development arm of the LSSA, which provides legal education to some 11 000 legal practitioners a year, and professional vocational training programme to some 1 500 candidate attorneys a year, was one of its biggest functions and required R 80 million a year to run. He said that once the LPA was fully enacted, the issue of who and how the public over the profession, as would be likely with a regulatory body. A strong, united self-regulatory body was also essential in deciding on the needs of the public versus the profession. ‘We are not always in conflict, but such conflicts do occur, and in such a situation it was essential to distinguish between the two interests and not give preference to the public over the profession, as would likely be the case with a regulatory body. A strong, united self-regulatory body was also essential in deciding on the needs of the public versus the profession. We are not always in conflict, but such conflicts do occur, and in such a situation it was essential to distinguish between the two interests and not give preference to the public over the profession, as would likely be the case with a regulatory body. A strong, united self-regulatory body was also essential in deciding on the needs of the public versus the profession.'

Speaking about conflict of interest, Prof Dr Ewer said it was important for the legal profession to have a single identity and a common purpose. ‘Legal practitioners should have a united front as they would always have enemies to challenge. They need to be united against enemies of democracy and we should not give the enemies a chance to split the profession regardless of the differences,’ he added.

Mr Brown noted that when the professional body is formed, it should be considered whether the body will be financially viable according to what the profession can afford. He added that the body should be a national body that, regardless of the differences, was essential in deciding on the needs of the public versus the profession. ‘We are not always in conflict, but such conflicts do occur, and in such a situation it was essential to distinguish between the two interests and not give preference to the public over the profession.'

Speaking about the future of the LSSA, Mr Bekker noted that four of the six constituent members of the LSSA will dissolve once the LPA is fully operational. ‘This would mean the end of the LSSA in its current form and this should be of major concern to the profession as it would mean that the profession would no longer have a unified voice, therefore, no one would listen to us,’ he added.

Professional body for legal practitioners

During the conference, a panel discussion was held under the title ‘A professional body for legal practitioners: A critical necessity or an optional extra?’ Speakers on the panel included guest speaker and Immediate Past President and executive board member of the German Bar Association, Prof Dr Wolfgang Ewer; Mr Brown; member of the National Forum on the Legal Profession, Krish Govender; President of the Black Lawyers Association (BLA), Luwando Sigogo; LSSA Management Committee member, Jan van Rensburg; Co-chairperson of the LSSA, Etienne Barnard; and former LSSA Co-chairperson Nano Matlala.

Prof Dr Ewer said the German Bar Association was a representative body of German lawyers with more than 60 000 members. He noted that regulatory bodies could not and should not be the representative body of professionals. Highlighting the need for South African legal practitioners to retain their independence, he said that legal practitioners needed to form a voluntary association that is separate from the LPC, which would represent the interests of legal practitioners. He suggested that the representative body could be similar to the system in operation in Germany, Denmark and the United Kingdom, where both regulatory and self-regulatory organisations representing legal practitioners exist side-by-side.

Speaking about conflict of interest, Prof Dr Ewer said a self-regulatory body was essential in deciding on the needs of the public versus the profession. ‘We are not always in conflict, but such conflicts do occur, and in such a situation it was essential to distinguish between the two interests and not give preference to the public over the profession, as would likely be the case with a regulatory body. A strong, united self-regulatory body was also essential in deciding on the needs of the public versus the profession. We are not always in conflict, but such conflicts do occur, and in such a situation it was essential to distinguish between the two interests and not give preference to the public over the profession.'

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Mr Brown noted that when the professional body is formed, it should be considered whether the body will be financially viable according to what the profession can afford. He added that the body should be a national body that, through its functions and activities, coordinates and promotes the interest of the profession.

Mr Govender said that the existence of various separate legal bodies in South Africa (SA) was a result of the country's fragmented past. He added that in other jurisdictions, there is one voice representing the legal practitioners of the country. Adding that this was the opportune time for building faith in a united professional body.

Mr Govender said the LPA was far from perfect with several sections still
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Deputy Minister of Justice and Constitutional Development, John Jeffery, said 25 years after democracy the legal profession was still not where it should be in terms of reflecting the racial and gender demographics of the country.

He added: ‘The sections of particular concern to the profession were those dealing with fee structures, the definition of work and roles performed by advocates and attorneys, compulsory community service. On such issues, and others that may arise in the future, it was essential for legal practitioners to be able to add their voices and advance their interests via a united professional organisation.’

Mr Sigogo, noted that the main difficulty in moving forward with a unified self-regulatory body was ‘our past’. He said black legal practitioners, had been marginalised in terms of governance of the profession, and that entry to the profession for black people was not easy. He added that governance of the profession had, therefore, been seen to be white and male. Mr Sigogo questioned whether the formula used for the composition of the LSSA when it was formed, which is 25% BLA, 25% for National Democratic Lawyers Association (NADEL) and 50% non BLA or NADEL, would work for a new structure considering that the four provincial societies, which largely made up the non-BLA/NADEL representation would no longer exist.

Mr Matlala emphasised the need for any new organisation to be seen to represent the whole of SA’s society, as it would otherwise not receive support. He added that any formed organisation, which takes place within a society and it should be representative of that society. ‘We want to create a different LSSA, this new body should serve the needs of legal practitioners. The body will function outside the parameters of the LPC,’ he said.

Deputy Minister Jeffery admitted that the implementation of the LPA was taking longer than it should have, saying further amendments as requested by the LSSA would have meant more delays. He added, however, that some aspects, which the legal profession had objected to, were taken into consideration.

Envisaged professional body

Three breakaway sessions were held to discuss how the envisaged professional body will be formulated. Topics covered by the breakaway sessions were membership and governance, core functions and sustainability.

Membership and governance

The recommendations given under this commission were:

- The composition of the new body starts with membership and it must be representational of the demographic of the country and must include women.
- Three entities (BLA, NADEL and the former provincial law societies) must share membership and power three ways on a 33.3% basis.

Core functions

The recommendations given under this commission were:

- The organisation must perform trade union functions.
- Workshops should be held for entry level practitioners to show them the nuts and bolts of practice.
- Candidate legal practitioners should be engaged while studying on what to expect in practice.
- Regular communication should take place with practitioners on the law and practice.
- The organisation must assist to promote the services of attorneys.

Sustainability

The recommendations given under this commission were:

- Increasing costs of practising should be addressed particularly in the context of the envisaged regulation of fees charged by legal practitioners for legal services.
- First and foremost there should be clearly identified benefits for the individual practitioners, and secondly for the organised profession.
- Many legal practitioners are already struggling to sustain themselves, the plight of single practitioners has to be taken into consideration in the determination of an affordable subscription amount for them.
- There should be programmes that will benefit practitioners, offering continuous professional development – similar to that offered by organisations such as South African Institute of Chartered Accountants – which can be used to derive additional income.
- Consideration should be given to practitioners who are already members of existing voluntary legal organisations such as NADEL, BLA, South African Women Lawyers Association etcetera, in order to minimise the costs of subscriptions that their members may be expected to pay for joining the professional association.
- The professional association should consider how to attract and retain practitioners in the profession.

Naicker Attorneys, Ugeshee Naicker, discussed work-life balance and social consciousness challenges for young lawyers during the Law Society of South Africa conference.
• Find innovative ways of attracting practitioners to join the professional association, essentially looking at collective bargaining power to get benefits for members (ie, approaching insurance companies to get better rates for members professional indemnity cover).
• Look at a sliding scale of membership subscriptions for single practitioners and newly admitted practitioners, which may be for a limited period of time.
• Investigate why practitioners are leaving and not staying in the profession and to address the causes thereof.
• Reduction of costs by making use of video conferencing for any meetings that may be necessary.
• Approach the Attorneys Fidelity Fund to assist with the funding of programmes aimed at benefiting practitioners through the professional association.

Client and fees
On the second day of the conference a session was held to discuss how s 35 of the LPA envisages changing the way legal practitioners deal with and charge their clients. Co-chairperson of the LSSA, Ettienne Barnard noted that when speaking about legal fees, one needs to bear in mind that access to legal services is not a reality for most South Africans. He added that one of the aims of the LPA is to broaden access to justice. ‘Discussion on legal fee structures is an ongoing process, however, it is important to protect the rights of the public,’ he added.

Speaking about the future of fee structures when the LPA is fully enacted, Mr Barnard noted that the Rules Board would not be ready with the fee structures by 1 November. He added: ‘What will we do in our practices when that happens? Will it be business as usual until we know about the tariffs?’

Speaking about doing cost estimates for clients, which s 35 of the LPA will introduce, Mr Barnard said that when legal practitioners conduct cost estimates, it should be subject to a disclaimer. ‘The disclaimer should clearly state to your client that things will change during the course of you conducting the case,’ he added.

• See www.lssa.org.za

The Millennial legal practitioner
Attorney at Bowmans, Lenja Dahms-Jansen made a presentation on social media and the law. Ms Dahms-Jansen noted that a growing number of companies were addressing the balancing act between protecting their business while needing to act against employees who do not understand the perils of social media. ‘We have seen a surge in the numbers of cases reaching the CCMA,’ she added.

Ms Dahms-Jansen highlighted several high-profile international and national court cases, including Heroldt v Wills [2014] JOL 31479 (GSJ) where an interdict was sought against the defendant for a Facebook post suggesting that the plaintiff was not a proper person because he allegedly failed to care for his daughters and had a problem with alcohol and drugs. The court ordered the defendant to remove all posts involving the plaintiff and also to pay the plaintiff’s legal costs. She cautioned delegates that the very nature of the social media space was that: ‘Once it is out there, it is incredibly difficult to contain the damage. You put it out there to your detriment,’ she added.

• See p 19.

Legal Practice Act, 2014
National Forum on the Legal Profession
Important notice to all admitted advocates

The National Forum requests that attorneys please bring this notice to the attention of advocates they know.

The National Forum on the Legal Profession (NF) must establish a voters’ roll of attorneys and advocates who will be entitled to be nominated for election and to vote in the election. The NF urges admitted advocates not affiliated to the General Council of the Bar, the Advocates for Transformation, the National Bar Council of South Africa and the National Forum of Advocates to register for the voter’s roll by 23 July.

Visit www.lssa.org.za for more information.
Legal practitioners must be ambassadors in fighting corruption

The Black Lawyers Association (BLA) held its national general meeting (NGM) on 26 May in Nelspruit. The theme for the NGM was: ‘Corruption: A Hindrance to the Development of Black Legal Practitioners.’

Deputy President of the BLA, Baitseng Rangata said legal practitioners were not as clear from corruption as they would like to think. She pointed out that some legal practitioners seek more work contracts than their counterparts and in the process end up committing corruption. She spoke about reports in the news about events that took place in the North West Province when chaos erupted after staff at a hospital went on strike over corruption claims and the collapsing health care system, which they blamed on provincial Premier, Supra Mahumape-lo. She added that problems at the hospital in the North West Province sparked up with what they called the amended B-BBEE legislation.

Ms Rangata said legal practitioners must do self-introspection and realise the effects that corruption can have on their careers and find ways to make sure that corruption does not happen around them. She pointed out that the BLA went to the streets and protested against the state on briefing patterns, however, she said nothing had changed, because there are still a few individuals who are being briefed and benefiting more than others, as corruption is rife. She added that legal practitioners must make sure that corruption does not take place around them. She was speaking at the BLA’s national general meeting (NGM) in Nelspruit on 26 May.

B-BBEE discussed

Senior manager for compliance at the Broad-Based Black Economic Empowerment Commission (the commission), Advocate Lindiwe Madonsela, said in 2013 the amendments to the Broad-Based Black Economic Empowerment Act 53 of 2003 (the Act) were effected, after former President Jacob Zuma appointed a Presidential Black Economic Empowerment Advisory Council. She noted that the council constitutes of people from the private sector, businesses, as well as organised structures. She added that the council assessed the Broad Based-Black Economic Empowerment (B-BBEE) legislation since 2003 to see if there has been any transformation in the country and focus on what had been achieved since then.

Ms Madonsela said the council came up with recommendations that were tabled in Parliament and also came up with what they called the amended B-BBEE legislation. She added that the purpose of the amendment was to address namely:

- Proper monitoring of the B-BBEE legislation: As from time to time there have been various reports from the economy stating that the country is transforming, but other reports raised structural issues.
- Ms Madonsela added that the B-BBEE amendment introduced the B-BBEE amendment commission, as the body that would be responsible to monitoring the issues around economic transformation.
- Misalignment between various pieces of legislation on issues of transformation: To say that the goal was to transform the economy, why would there be different pieces of legislation that do not speak to one another? Ms Madonsela also highlighted the issue of Preferential Procurement Policy Framework Act 5 of 2000 and also highlighted the issues around the Mining Act 5 of 1998. She added that there was a clause that said, if there was a conflict on issues of transformation between the B-BBEE and any other law, the B-BBEE must supersede.
- Alignment of the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 (the Amendment Act) itself and the Code of Good Practice due to anomalies between the two pieces of legislation. She pointed out that the Code of Good Practice came from the Amendment Act and that certain definitions could only be found in the Code of Good Practice, but not in the Act. The process of the amendment was to transfer some of the definitions that were critical from the codes into the Act.

Ms Madonsela added that the commission is currently administering two types of strategies, which are –

- the compliance strategy;
- the enforcement strategy.

She pointed out that the compliance strategy was created at the conceptualising stage of the commission. She said there was a realisation that there was no common understanding of what transformation was about. She noted that the reason for this was that people wanted to start implementing transformation, but ended up cutting corners. She pointed out that the commission decided that it needed to educate people on what transformation was about.

Ms Madonsela said that the enforcement strategy was established for those found to be violating the legislation. She added that the commission had the investigating mandate and that corruption in the Amendment Act also defined ‘fronting’. She said that people thought fronting could happen only through ownership, however, it went beyond that. Ms Madonsela noted that the commission had seen issues around mushrooming, which is called opportunistic intermediaries.

Ms Madonsela added that when the commission read a report that highlighted, that black companies are used to acquire opportunities by other compa-
Director in the forensic services division of Sizwe Ntsaluba Gobodo, Alfred Sambaza, said more often than not it is believed that middle to lower management are the ones who engage in corruption.

Does corruption only happen in the public sector?
Director of forensic services at Sizwe Ntsaluba Gobodo, Alfred Sambaza, said corruption is often perceived as a victimless crime but pointed out that there are victims of corruption. He added that there is a perception that corruption only happens in the public sector, and added that if the public sector is corrupt, there is someone who is a corrupter. He pointed out that more often than not it is believed that middle to lower management are the ones who engage in corruption. However, he noted that in a report that was released globally this year by the Association for Certified Forensic Examiners, it showed that company owners or executives are responsible for corruption and fraud.

Mr Sambaza said people should ask themselves what their part in corruption was and whether or not people got tenders in an appropriate manner or it was bribed police just to get out of an offence. He asked ‘if one lacks integrity, then how will one fight corruption?’ He spoke about legal practitioners and said if a legal practitioner did wrong and it was published in the media, then all legal practitioners were going to be painted with the same brush.

Mr Sambaza added that if a black legal practitioner engaged in acts of corruption, it could lead to a stereotype that all black legal practitioners are corrupt. He told legal practitioners that the fight against corruption should start with them. They should be the ambassadors to fight corruption.

Women taking a stand against corruption
The President of the South African Women in Law (SAWLA), Nolukhanyiso Gcilithana said the legal profession had been tarnished by financial and behavioural scandals. She added that it had been painted by accusations of power in race, even within black people it was found that women were being oppressed. She pointed out that women were not able to thrive in the legal profession because of corruption, which is in the element of money, but also sexual favours. She noted that at a Law Society of South Africa (LSSA) annual general meeting, there was a report by the LSSA women’s task team that women in the legal profession are exiting the profession for more stable roles, because they were not able to thrive in their current positions.

Ms Gcilithana added that it was reported that woman in the legal profession were being abused by their principals, even female law students suffered abuse from the hands of their lecturers. She pointed out that if these female law students do not perform sexual favours, they will not pass exams or even become law graduates. She said that corruption goes with greed and hinders development because development will not be the focus, but the gain after one has done a corrupt deed will be the focus.

Ms Gcilithana added that corruption marginalises upcoming legal practitioners and women legal practitioners and that their education and aspiration is crushed. She pointed out that corruption creates ‘elite people’, because a certain group of people would be the ones who can only access a certain type of work or access certain places. She said that for some legal practitioners to access those places, they would have to give a bribe or be involved in an act of extortion. She pointed out that upcoming legal practitioners have a challenge, because when they go knock at certain institutions to seek work, they find that the only way to get work is by buying it or in the case of women doing sexual favours to get employed or get ahead.
Ms Gcilitshana said as a result of corruption there is no transformation and that gender transformation in the legal profession will not happen. She added that corruption corrodes the rule of law because the rule of law rests with the jurist and the jurisprudence of the country. She noted that if the rule of law gets corroded, the interest of the people that legal practitioners are supposed to represent are less valued than those of the legal practitioners themselves. She pointed out that it is important that the issue of corruption gets addressed.

Questions addressed

During the question and answer session a comment came from the floor that corruption was looked at on one side. The member of the BLA said the role legal practitioner’s play to perpetuate corruption must be looked at. He added that often when they read about corruption in the context that it is happening in politics, it strikes that many transactions went through by a legal practitioner’s knowledge to avoid being seen or being regarded as a corrupt transaction.

Another member said that when the issue of Black Economic Empowerment (BEE) is discussed, it is spoken of as if it is a formulation of South Africa (SA), where it was not. He added that the BLA must engage sufficiently enough to interrogate the legal instrument that is greasing the legal system and schematic legal arrangements. He pointed out that if SA does not interrogate, it will contentiously clamour attempts to confront, that the BEE is not a South African formulation, but a result of the influence of the private institutions in America.

A member of the BLA student chapter posed a question to the BLA. She asked what the BLA does to help candidate legal practitioners and legal secretaries who receive harsh treatment from their principals and sometimes suffer the abuse at the hands of those principals. Ms Gcilitshana responded that it is a challenge to help the victims of abuse when they are not comfortable to talk about or report the abuse and harsh treatment they receive from their principals. She said that it was because of how the profession and the society covers women with the blanket of shame. She added that when a woman comes forward to report an indiscretion the first thing she is asked is what did she do?

Ms Gcilitshana said it then becomes about the woman and not about the act of abuse the woman had suffered. She pointed out that attitudes and mind-sets needed to change and that women must come forward to report abuse. Ms Gcilitshana added that the legal fraternity and legal organisations such as SAWLA and the BLA must create a platform and a comfortable space for female legal practitioners to be able to express themselves about such matters.

BLA deputy president Baitseng Ranggata admitted that the BLA did not have a formal structure that handles such matters, however, she said that the BLA women are available to give support to those who suffer abuse and who are receiving bad treatment from their principals. She appealed to senior legal practitioners to be mentees to the young people and added that mentoring does not mean assisting only with work, but also with social issues.

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Impact of the LPA on the LSSA and way forward

Attorney, Richard Scott, gave an update on the Legal Practice Council (LPC) and the Legal Practice Act 28 of 2014 (LPA), he said that in April of this year the Rules for the Legal Profession were published for comment by the National Forum on the Legal Profession and the deadline for comment was on 5 April. GN43 GG 41419, 2-2-2018. He added that in July, Minister of Justice and Correctional Services, Michael Masutha, will publish the regulations in the Government Gazette. He pointed out that in August ch 2 of the LPA will come into effect.

Mr Scott said the LPC and provincial councils will call for nominations for the LPC and will take place in October and that the four existing provincial law societies will dissolve and other chapters of the LPA will come into operation. He pointed out that it was agreed that during the transitional period the LSSA will continue to exist from 2018 to 2020. He added that the mission and core role of the LSSA may be adapted to a structure that needs to be created in the future, as well as to continue promoting and representing the interests of legal practitioners to form a counter weight to the regulatory LPC, whose primary function is to protect the public and access to justice among its other objectives.

Mr Scott added that there will be a house of constituents made of 27 representatives in a ratio of nine, where each of the constituents BLA, NADEL and the stats (non-BLA and non-NADEL members) will elect nine members. He noted that the organisation must be done by consensus and that the LSSA constitution was simplified and clearly states that there is to be no dominance over any constituency.

AIIF proposal on payment of PI cover

General manager of the Attorneys Insurance Indemnity Fund NPC (AIIF), Thomas Harban, said that under the LPA the AIIF would continue to exist. He added legal practitioners should be aware that a Professional Indemnity (PI) premium is paid by the Attorneys Fidelity Fund (AFF), however, he pointed out that the reality is that the situation had become unsustainable and the AIIF currently has outstanding claims worth R 475 million. He noted that the claims were increasing at a rate of about 16% a year during the past five year period. He said that the board of the AIIF and the AFF board of control accepted the proposal that over a period of number of years, a programme must be implemented where legal practitioners would be called on to start making a contribution to the PI premium.

Mr Harban also spoke about cybercrime. He pointed out that in July 2016 cybercrime was excluded from the AIIF PI cover. However, he said that the AIIF had gone through a process of trying to educate the legal profession through various media publications about legal practitioners falling victim to cybercrime. Mr Harban advised that cybercrime insurance is available in the market for legal practitioners who are interested in having the insurance cover.

How to deal with a data breach in your organisation

Cliffe Dekker Hofmeyr (CDH), hosted a seminar on data breach and other risks faced by organisations, such as theft. The seminar was held in Johannesburg on 9 May. Cliffe Dekker Hofmeyr’s Director of Technology and Sourcing practice, Preeta Bhagattjee, said data breaches are a reality. She added that most organisations are likely to be victims of data breaches and pointed out that data breaches can affect companies in various ways, whether it is a staff member downloading ransomware, an employee who has lost an unsecure laptop, or a hacker who has managed to hack a client’s data.

Ms Bhagattjee said organisations need to focus and have clear strategies pertaining to data breach in place. She pointed out that report released by McAfee in February, put the total annual global cost of cybercrime at US$ 600 billion. She said a data breach can happen to anyone, however, it may not be an organisation’s worst nightmare if the organisation is well-prepared and knows how to deal with it.

Ms Bhagattjee said when a data breach occurs, an organisation faces a number of risks, namely -

• reputational risk;
• business interruption;
• business continuity;
• shareholders and customer confidence;
• technology risk; and
• regulatory scrutiny if you are in a regulated jurisdiction.

Ms Bhagattjee added a data breach in a regulated jurisdiction could lead to consequences, such as a fine or even imprisonment for senior managers. She noted that the fine in the Protection of Personal Information Act 4 of 2013 (POPI) could result in a fine, which will not exceed R 10 million in comparison to other direct or indirect costs that an organisation could incur.
Ms Bhagattjee said the solution for organisations to mitigate risks is to be ready for possible data breaches and that means that the organisation needs to formulate a road map to comply within the data breach area. She added that organisations must have cybersecurity and data protection as an agenda item at board level. She pointed out that organisations need to adopt a proactive risk management strategy and make sure that they have gathered evidence and have internal investigation processes in place.

Ms Bhagattjee added by assisting authorities to fight cybercrime in organisations will go a long way. She said that for organisations to develop a responsive plan for data breaches and cyber incidents, they had to start by determining the level of exposure by looking at the organisations:

- universe of compliance;
- assess which business assets or data is critical to the business;
- understand the likely threats, such as disgruntled employees, external hackers, criminals, system vulnerability; and
- with regard to the perspective of POPI and not just focus on technology, but also physical documentation.

Ms Bhagattjee said it is important for organisations to look at third-party suppliers and assessing risks in that regard. She added that a data response plan should contain the following components:

- an established notification and escalation procedures;
- a way to address when an attack or incident occurred;
- a formulated Public Relations (PR) marketing strategy, or communications strategy that when a data breach occurs everyone in the organisation related to the PR department is aware of the breach and knows what to do;
- cybercrime and data protection awareness campaigns, which include training programmes. Ms Bhagattjee said it is important that not only senior management are aware of the risks of data breaches, but it is equally important that employees are made aware of the risks, because vulnerability of breaches can often arise from the support staff in the organisation;

- a reporting requirements procedure;
- established evidence gathering procedures;
- an established time when to notify police or shareholders;
- cyber risk insurance to cover the cost that could be incurred at the organisation if or when a data breach occurs; and
- appropriate processes for a broader level of awareness.

Ms Bhagattjee said when a data breach occurs within an organisation and a response plan is in place, it should be implemented by the task team who was put together to deal with the incident. She added that appropriate steps must be taken – where possible – to minimise damage and focus on the necessary technology implementations to recover data. She pointed out that the response plan must include notifying all the legislation, regulatory and industry bodies, depending on the circumstances one may need to report to the police and if POPI is fully implemented the organisation must notify the regulator and the data subjects of the breach.

Ms Bhagattjee added that it is advisable to test a response plan on an ongoing basis to make sure that the response plan and the Internal Information Security Policy and procedures remain adequate, and updated for the business’ needs in a changing world. Ms Bhagattjee touched on the Cybercrime and Cybersecurity Bill B6 of 2017 and mentioned that an electronic communication service provider or financial institution needed to be aware that if a data breach has taken place they are required to notify the South African Police Services (SAPS) within 72 hours of becoming aware of the incident.

Ms Bhagattjee pointed out that an electronic communications service provider and financial institution would also have to preserve evidence and any related information linked to the cybercrime. She added that there is an obligation in terms of the Cybercrime Bill that organisations’ house would be required to cooperate in assisting with evidence against a court order where the organisation’s computer system has been involved in a certain type of cybercrime. She noted that failing to comply with the specified requirements is considered an offence. She said that under POPI, organisations would need to notify the regulator and data subjects as soon as possible in respect of every data breach. She said unlike certain jurisdictions, elsewhere in the world, the notification was not only for high impact or high risk cases, but for all data breaches.

Ms Bhagattjee added that the regulator may require the organisation where the breach occurred to publicise the fact that the breach had occurred. She said that there are certain requirements in providing data subjects’ information when notifying the regulator, so that the organisation could take steps to help curb any further damages and potential consequences. She pointed out that the requirement of POPI also extended to operators, the third parties to whom an organisation might have asked to process information on their behalf. She said that there is an obligation for the third-party entities to alert the organisation whom they are processing information for immediately when there is a data breach.

Ms Bhagattjee referred to the King IV Code on Corporate Governance and said that, if an organisation is required to comply with King IV there is a very specific focus on the audible oversight of information and technology management and rolling it out into the organisation. She pointed out that the board is specifically tasked to make sure it proactively monitors cyber incidents and ensure that systems and processes are in place to protect personal information and ensure company operations from a cybersecurity perspective. She added that when South African organisations look at the compliance universe, they have to start in South Africa (SA), however, she said that it does not end in SA.

Ms Bhagattjee pointed out that if South African organisations have operations outside of SA or if they service clients outside SA, they should take cloud services into account. She noted that under these circumstances the organisation may have to comply with foreign laws and this includes cases where an organisation hosts personal information or company information offshore with a cloud service provider. She added that if an organisation operates in Africa there are 15 countries that have data protection legislation in place, however, she said some countries like SA do not have implemented data protection but have a number of jurisdictions and Bill’s in progress.

Ms Bhagattjee pointed out that there is also the General Data Protection Regulation (GDPR) in the European Union. She said that if an organisation processes personal information relating to European citizens, that organisation must comply with the GDPR.

Director in Dispute Resolution of CDH, Zaakir Mohamed, spoke on how to deal with commercial crimes in an organisation.

CDH’s Director in Dispute Resolution, Zaakir Mohamed, spoke on how to deal with commercial crimes in an organisation.
and would never thought they could commit such a crime," Mr Mohamed said. He added that sometimes one panics because of the amount of money involved. One would start thinking of how long the crime had been going on for. However, Mr Mohamed pointed out that one must not panic but remain calm and think about how the situation is going to be managed.

Mr Mohamed said that what organisations do when they have discovered that a crime has been committed is very critical. He pointed out that ultimately when an organisation discovers that they have been hit by commercial crime, it is likely to result in a legal processes. He added that it could be a civil legal process, where an organisation may want to recover some funds, however, it could be an employment law issue where there is a disciplinary inquiry to consider or a criminal case. He said that said that organisations must make sure that they do not hinder any investigations, compromise evidence or compromise legal processes.

Mr Mohamed highlighted what organisations should do and what not to do when dealing with a commercial crime. He said the following questions must be asked:

• How did the suspicion and the knowledge come about?
• Was the crime discovered by someone in the finance department, because the numbers did not add up?
• Was it a whistle-blower who came forward?

He pointed out that it is important with regards to the Protective Disclosure Act 26 of 2000, that there is a certain way investigations are to be conducted. He added that the way the organisation found out about the crime is also important especially, if it was a rumour or if there was speculation in the organisation. He added that it is important to establish the source of the rumour, then see what the timelines in the investigation of the particular incident are.

Mr Mohamed said the organisation must know how credible and reliable the source that they are dealing with is if the whistle-blower has an agenda or a score to settle with the accused person. He added that the organisation had to check if the conduct had been an ongoing occurrence or if it had been a one-time thing, because that will determine the scope of the investigation. He noted that the organisation also has to check on who was potentially involved in the crime, as there may have been more than one suspect. He added that the organisation had to investigate further than the department and has to see who was close to the suspect. That would determine the kind of interviews that the organisation would have to will conduct, or the sources of information that might have to be used as evidence.

Mr Mohamed said the organisation has to also consider whether there was a reasonable explanation for what had been discovered, if there was an administrative error in finance or a miscalculation of funds. He added that organisations must bear all of these facts and start to formulate how they were going to deal with the particular incident. He pointed out that an organisation had to understand what it was dealing with and had to work on a plan of how they were going to deal with the crime. Having a plan in place would save the company a lot of money on unnecessary legal fees that may be incurred if the wrong approach is followed.

Mr Mohamed said that importantly one must identify the immediate risk and check if the relevant suspect had access to the organisation’s its IT system, because the suspect could go and destroy evidence. He added that the organisation had to be careful of how information was shared when a commercial crime occurred. He pointed out that sensitive documents should be password protected to prevent information falling into the wrong hands. He noted that organisations had to be fully aware of the insurance policy terms and reporting deadlines of the crime to the insurer. He said that when an organisation has realised that a commercial crime had taken place, they should make sure they do not do anything to compromise their insurance claim.

Mr Mohamed said that organisation did not need to rush to the SAPS unless there was an urgent need for urgent action. He added that when an organisation conducts an investigation the starting point should be:

• With whom I should consult?
• Is this something that can be handled within the organisation?
• Does the organisation have the right skills to conduct the investigation?
• What implications may there be if the organisation conducts the investigation externally?
• Could a third-party be appointed to conduct the investigation?
• What would be the benefit of using a third party to conduct the investigation?
• What skills set should the investigation team have?
• What sort of expert advice does the organisation need?
• What is the objective of the investigation?
• Where can the evidence be found?
• What kind of questions are going to be asked?
• Who are the suspects?
• What will the financial analysis reveal?

Mr Mohamed said that after conducting an investigation, there had to be an incident plan in place. He said managers had a way of dealing with matters differently and that if the organisation did not have a plan in place it would risk having the matter not being confidential. He added that the suspect might get a tip off if the managers went around speaking to people and not just dealing with one person about the matter. This could lead to the suspect destroying evidence. He noted that the organisation inappropriate action, if sufficient evidence is not gathered.

Mr Mohamed said an incident plan would help the organisations deal with the commercial crime in a systemic and efficient manner. He added that it provided an effective framework so the organisation was not in the position where they did not know what to do when an incident or crime occurred. He pointed out that organisation also needed to have a whistle-blowing policy set out, which included a data breach policy. He noted that organisations had to have fraud and corruption response plan.

National Practice Head of the Employment Practice, director, Aadil Patel, said the problem that whistle-blowers face is what do they do when they have identified an act of corruption or an act of impropriety. He added that it did not help anyone when SA told people that they have great legislation or tell them what other countries did, but pointed out that practically people need to know what to do, because as the potential cooperate it may affect an organisations brand.

Mr Patel added that it could affect the reputation of the organisation in the market place and the like. He pointed out that a disclosure was when the whistle-blower wants to tell somebody that a criminal offence is going to be under taken or someone is misbehaving and
The increase in data breach and cybercrime as modern technology takes over the world

Thomson Wilks attorney, Lee Swales said technology has become an indispensable part of modern life. He added that technology has changed the way people communicate and do business, and because of that technology has logically changed regulations in the technology environment. Mr Swales was speaking at the Lex-Informatica annual SA Cyber Law and ICT Conference held in Johannesburg on 24 and 25 May. He noted that South African statistics showed that 15 years ago approximately 5% of the population had Internet access. Fast forward to 2018 and half of the population can access the Internet largely because of mobile connectivity. He pointed out that developing countries such as South Africa (SA), has distributed mobile connectivity which means that social media is used regularly and communication is changing and there could, in future, be some legal dispute arising over these mediums.

Mr Swales added that research statistics in 2016 show that most South Africans spend two to three hours on social media a day. He said that there is a variety of social media platforms and South Africans use them widely. He pointed out that an important aspect of social media is that everyone has become their own editor and can easily place content all over social media platforms, which sometimes includes defamatory content that many people can be exposed to. He noted that in earlier years for one to get published, they would have to write to a newspaper or have a similar kind of format to get ideas out to the public.

Mr Swales said that if you put something on a social media platform and delete it, it is likely that before it gets deleted someone would have liked or shared it with other users. He added that posting on social media has come to a point where one cannot control what gets out to the public. He highlighted cases where there have been social media explosions that have seen laws promulgated relating to data protection, cybercrime and cyberbullying, cases such as Trustees for the time being of the Delsheray Trust and Others v ABSA Bank Limited [2014] JOL 32417 (WCC).

Mr Swales noted a few current trends happening with regards to technology, such as:

- Privacy concerns and new privacy laws.
- Mr Swales said that on 25 May, the European Union (EU) enhanced the General Data Protection Regulation (GDPR), a new privacy law designed to protect the personal information of EU residents. He added that it is only relevant to South African businesses if a business processes personal information of EU residents. He added that it is similar to the Protection of Personal Information Act 4 of 2013 (POPI), however, the GDPR seeks to achieve the same thing.
  - Rise of fake, online news sites (fake news).
  - Corporate and political use of social media as a tool for building narrative and selling products (paid twitter).
  - Services of legal process via social media.
  - Business regulation of Internet and social media use.
  - Continual rise in dismissals/warnings for social media misconduct.
  - Defamation online commonplace/warnings speech being regulated strictly in future.

Mr Swales said people can manage risks when using social media by engaging in a manner that is professional, ethical and respectful. He added that if you would not say it, or show your message to a room full of people, do not post it on social media. He pointed out that one should not post personal details and protect one’s online privacy, understand the security and privacy details. He noted that people should be aware of fake news and must quantify what they share on social media or the Internet.

Overview of cybersecurity legislation

Director in Technology and Sourcing practice at Cliffe Dekker Hofmeyr, Simone Dickson, said the Cybercrime and Cybersecurity Bill 86 of 2017 (the Bill) gives effect to a number of cybercrimes. She added that cybercrimes are recognised under the legislation and pointed out that a lot of these crimes dealt with data. She noted that unlawful and intentional accessing of any data from a
Ms Dickson added that the unlawful acquisition of passwords or access codes including a user's password is an offence under the Bill. She said the crimes of fraud, extortion, and forgery have been given specific recognition as offences under the Bill, as well as intangible theft of software products. She pointed out that the Bill makes provision for a number of aggravated offences, which will result in serious loss if one had to commit that offence. She noted that the Bill stated that any hovering, concealing, assisting in any of the above mentioned crimes would constitute an offence.

Ms Dickson said that the Bill also made provision for offences relating to malicious communication. She pointed out that if one person sent an e-mail to the next person and the e-mail purposely incited violence, condemned privacy or instigated discrimination it was a clear offence under the Bill. When data is sent out that is harmful, intends to bully or harass or intimidate it is also an offence under the Bill.

Ms Dickson added that another offence under the Bill was revenge porn. She said if anyone had not consented and there is a naked image of them, which was shared electronically it is an offence under the Bill. She pointed out that the remedies to these offences were that victims could make a case at the South African Police Service (SAPS) who in turn would issue an order which can order the service provider to remove or disable access to the data to prevent further distribution. She said that the SAPS has the power to inquire about the identity of the source where harmful content came from.

Ms Dickson, however, said the problem was that when data is placed on social media, it cannot be taken back but one can only try to prevent further distribution. She added that jurisdiction with cybercrime is different to any other jurisdictional issues, which are traditionally territorially based. She noted that there has to be cooperation and support between countries to combat cybercrime, because victims implicated in cybercrime may be located in different countries and the crime may be perpetrated from anywhere in the world.

Ms Dickson said that SA's Bill has a very instinctive jurisdiction provision. She pointed out that a court in SA trying an offence has jurisdiction if the offence was committed in SA, or if any part of the preparation of the offence was committed in SA, if the offence was committed by a South African resident or person with South African residence, even though at the time they are not in SA or away on business, or a person who is on business in SA. This would include if the offence was committed on board a ship or aircraft registered in SA. She said that the Bill provides for fines and imprisonment, however, the current draft does not provide the value of the fines.

Ms Dickson added that there were various structures put in place to help enforce the Bill. She said the SAPS have been given power to search, seize and investigate cybercrimes. She said the Bill allowed the SAPS to search or seize without a warrant in certain circumstances. She pointed out that the Minister of Police is tasked with essentially a contact body, which will be active on a 24 hour basis to respond to immediate threats, investigate and assisting complainants with the potential offences. She noted that the Minister of State Security has been tasked with the responsibility of cybercrimes and cybersecurity within government.

Ms Dickson said the Minister of Defence has also been tasked to establish a cyber offence department, which will look at the coordination of cyber threats, not just in SA but on a mutual assistance basis with other countries. She pointed out that in her view on paper the Bill's enforcement of powers are good, however, on a practical level the way the powers are split in different ministries may create problems and a lot of finger pointing. She added that the Minister of Telecommunication and Postal Services is tasked to work with the private sector by getting the private sector to buy-in and establish the necessary structures, directives and standardised procedures to make sure that cyber responses are uniform and consistent.

The impact of cyber security and data protection

Director at Snail Attorneys, Sizwe Snail said everyone has been a victim of cybercrime, whether it was successful or only an attempt. He added that IT law is a problem for everyone, be it government, minors at school or even adults who are surfing the Internet trying to buy things online. He went through some of the questions he and his co-authors Anthony Olivier and Jason Jordan answered in The Cybercrimes and Cybersecurity Bill Pocket Book 1 lead (Cape Town: Juta 2018), which included: How does the Bill substantially change the legal position as it was in the Electronic Communications Transaction Act 25 of 2002 (ECT Act) regarding cyber criminality? Mr Snail summarised the answer and said that the Bill is the first piece of independent draft legislation in SA that combines the aspects of cyber criminality (procedural law and substantive law) and cybersecurity structures proposed in the Bill that are the result of the previous National Cyber Security Policy Framework of 2012. This means that all the sections dealing with cybercrime and cybersecurity in the ECT Act will be repealed. Mr Snail pointed out that there are cybersecurity structures and international cooperation to name a few - the Cyber Security Centre; the Cyber Command (within South African National Defence Force (SANDF)); the National Cybercrime Centre (within the SAPS); the government security incident response team (e-gov Computer Security Incident Response Team (CSIRT)); and the private sector security incident response team (private sector CSIRT).

He said that these structures already exist, however, they have not been put into one piece of legislation. Mr Snail also dealt with a question on how the new Bill deals with cyberwar. He said that the Bill envisions the existence of cyber command, which will be housed in the SANDF. He added that there is an issue of cyberterrorism and said that in 2015 there was a section on terrorism, however, he noted that a decision was taken not to include cyberterrorism in the Bill. He pointed out that it was not meant to be included as there already was terrorism legislation that would deal with terrorists, he suggested that if an issue of cyberterrorism must be dealt
with, the terrorism legislation should be amended to include cyberterrorism.

Mr Snail touched on the legal position on jurisdiction. He said s 90 of the ECT Act includes a section on jurisdiction and extra-territorial jurisdiction in particular that sets out the instances in which South African courts have extra-territorial jurisdiction. He added that jurisdiction was a problem and in some instances, there were countries who wanted to bully other countries, such as America calling on other countries to extradite criminals to their country. He pointed out that he was concerned about the concept of cloud service and that the South African government is looking into implementing a policy to move to the cloud. He said that if the government was not safe in a physical data environment, then how would they be secure at a cloud environment?

Mr Snail added that data breaches have been going on and they are still going to continue. He said the only difference now was that people were aware of them. He pointed out that it was important for businesses to have a competent IT specialist and department and to spend, money on cybersecurity for data breaches, defences and in certain circumstances spend on cybersecurity offences. He noted that the whole culture of protecting information needs to change and people should protect their personal information and protect their freedom of speech.

Digital forensic expert, Yusuph Kileo, said according to an insider threat report released this year, 27% of organisations said insider attacks have become more frequent. He added that insider threats are malicious threats to an organisation that come from within the organisation, such as employees, former employees, contractors or business associates who have inside information concerning the organisation’s security practices, data and computer systems.

Mr Kileo said types of insider threats are namely -
• privilege escalation by impersonation;
• privilege escalation by exploiting vulnerabilities;
• own privilege abuse; and
• social engineering attacks.

He added that insider threats mostly happen because of -
• frustration with co-workers;
• stress that an employee may have;
• financial problems that employees may find themselves in;
• unaddressed grievances;
• feeling ignored or mistreated;
• taking revenge for perceived injustices; or
• acting on opportunity.

He pointed out that there were common insider threat indicators, which could include -
• attempts to bypass security controls;
• requests for clearance or higher-level access without need;
• frequent access of workspace outside of normal working hours; and
• irresponsible social media habits.

Mr Kileo said that when dealing with risks from insider threats, organisations must do background checks as pre-hire screening of employees. Watch employee behaviour and make separation of duties and least privilege. He pointed out that employees need to work at their fields and only access resources relating to their work. He added that organisations must also control user access, make use of strict password and account management policies. Mr Kileo noted that organisations need to monitor user actions in terms of software monitoring, as well as video recordings of all user sessions, which security specialists can review. Organisations should implement policies and employee recognition programs, and include training and educating staff on certain security practices and consequences.

Mr Kileo said other key findings that were found on the insider report, was that the most popular technologies to deter inside threats are data loss prevention, encryption and access management solutions. He added that to better detect insider threats, companies deploy intrusion detection and prevention and log management. He pointed out that organisations need to build successful insider threat programmes.

Mr Kileo noted that there are eight steps to building a successful threat programme and organisations should have the following -
• gain senior leadership endorsement and develop policies that have buy-in from key stakeholders and take into account organisational culture;
• develop repeatable processes to achieve consistency in how insider threats are monitored and mitigated;
• leverage information security and corporate security programmes, coupled with information governance, identify and understand critical assets;
• use analytics to strengthen the programme backbone;
• coordinate with legal counsel early and often to address privacy, data protections and cross-border data transfer concerns;
• implement a clearly defined consequence management process so that all incidents are handled following a uniform standard, involving the right stakeholders; and
• create training curriculum to generate awareness about insider threats and related risks.

Mr Kileo pointed out that when developing an insider threat programme organisations should collaborate with stakeholders/other departments to identify critical assets, risk indicators, relevant data sources, compliance requirements, cultural concerns and privacy implications.

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**LEAD SEMINARS**

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Did you miss the LSSA information session roadshows?

During February and March the Law Society of South Africa (LSSA) held information session roadshows across the country. The immediate former Co-chairpersons of the LSSA, Waid Brown and David Bekker, as well as other members of the LSSA Management and Transitional Committees, spoke to practitioners about the changes that the full implementation of the Legal Practice Act 28 of 2014 (LPA) – coming into operation at the end of October this year – will bring. To date, these sessions have been held in Pretoria; Kempton Park; Potchefstroom; Bloemfontein; Port Elizabeth; Kimberley; Rustenburg; and Pietermaritzburg with a total attendance of some 700 practitioners. Further sessions are planned to be held in the coming months. Below is a summary of some of the questions raised by practitioners from the floor and discussed at the roadshows.

Interim structure for the LSSA in a transitional period

Practitioners that attended the roadshows indicated their support for the continuation of the LSSA for a three-year transitional period. During the three-year transitional phase from 2018 to 2020, the LSSA’s mission, role and core functions could be adapted to possibly create a professional body to support, promote and represent legal practitioners. This would form a counterweight to the purely regulatory Legal Practice Council (LPC), whose primary function will be to protect the public.

Practitioners present were generally of the view that it would be important to convert the LSSA into a new entity to speak for attorneys and it would be prudent to have regional representation rather than various voluntary organisations.

Practitioners were concerned with the status of the ‘circles’ and whether they will disappear once the provincial law societies do so towards the end of the year. A question was posed: ‘Who would represent the profession at the Portfolio Committee; who would comment on legislation?’

There was a question regarding what practitioners would gain from and what benefits there would be for practitioners who are members of the new professional body. It was explained that the new body would be able to speak on their behalf in a unified voice, and that it would represent the interests of legal practitioners.

Membership

Membership concerns were also raised, with attorneys posing questions on how any new body would monitor this issue. A question was posed as to what would happen if some practitioners pay the membership fees and others do not, with those who do not pay also benefitting from what that body does. ‘What will make the others want to pay if they will receive the same benefits anyway?’ The panel explained that this is why it was important for attorneys to spread the word and to tell their colleagues how important it is to join the new professional association and pay their dues so that the new body would be adequately capacitated. Attorneys are to encourage their colleagues to read the LPA and to attend meetings such as these, as significant numbers would give the new professional body leverage and status. An attorney suggested that it should be made a statutory requirement for attorneys to belong to a representative professional body and to pay a fee to a professional association, since voluntary fees would probably not be feasible.

Disciplinary representation

The panel said that a representative body would be able to assist attorneys with the LPC and the Legal Services Ombud regarding disciplinary issues. It was explained that an independent association would be in a better position to intervene and engage on behalf of members with these bodies rather than individual members. These bodies were more likely to take note of concerns raised by an association than by individual practitioners.

Representation with stakeholders

The panel also explained that as regards the specialist committees and making representations at various stakeholders, a unitary voice has a stronger impact than individual voices of practitioners. The panel added that an independent association should become involved in advocacy and be a prominent voice of the dispossessed in high-level cases.

Both advocates and attorneys?

A question was asked whether the association should represent attorneys only or if advocates should also be represented. The panel indicated that the feeling at this stage was that it should represent attorneys so it could get its house in order and later consider other legal practitioners. Advocates would continue to have their voluntary representative bodies once the LPC comes into operation.

Section 35 of the LPA

There was great concern regarding s 35(7) of the LPA which focuses on fees in respect of legal services and states: ‘(7) When any attorney or an advocate referred to in section 34(2) (b) first receives instructions from a client for the rendering of litigious or non-litigious legal services, or as soon as practically possible thereafter, that attorney or advocate must provide the client with a cost estimate, in writing, specifying all particulars relating to the envisaged costs of the legal services.’

A participant indicated that s 35 had been drafted by someone who knew very little about practice. He added that it was impractical and that it cannot be implemented. Another participant questioned why the LSSA does not challenge the constitutionality of s 35. In response, the panel said that the LSSA is not of the view that those aspects cannot be challenged but pointed out that it may not be the correct approach to challenge it. The LSSA has expressed the view that s 35 and s 26(2) of the code of conduct cannot be implemented and is waiting on the Department of Justice and Constitutional Development to come back to it on the changes. (See also LSSA AGM report on p 6 of this issue.)

Another participant wanted to find out if the contingency fee agreement would be affected by s 35, which speaks of a cost estimate in relation to normal fees. This has relevance to contingency fees in that one of the caps on fees refers to double the normal fee. The panel explained that it would not be affected at all as per s 35(2) of the LPA.

A question was asked whether attorneys should relook at their fees from 1 November when the other chapters of the LPC come into operation and it was explained that attorneys should continu-
ue with the current fees until new information becomes available.

The LPC elections
There was a question on how the election for the LPC would work. The panel explained that in the first round of elections attorneys would vote for attorney representatives and advocates for advocate representatives.

Fees
Many practitioners inquired what the subscriptions would be to the LPC in order to practise.

The panel indicated that the National Forum on the Legal Profession (NF) had calculated the LPC fees to be between R 3 000 and R 4 000. Attorneys were advised that they would also need to budget to pay for PI insurance, which was being phased in. The Attorneys Fidelity Fund (AFF) currently covers the insurance premium of the Attorneys Indemnity Fund.

Costs of the LSSA in transition
The LSSA is considering multiple funding streams for a new professional association, such as subscriptions, partnerships, sponsorships etcetera. The LSSA had hoped that government would fund the LPC since it had established it as the regulator, but government disagreed and said it should be funded by the profession. The LSSA has not taken that lying down and is engaging with the AFF. Membership to a future professional association could include government lawyers and corporate lawyers as their interests would also need to be protected.

Existing contracts of articles
A question was posed regarding existing contracts of articles on 1 November when the other chapters of the LPA come into operation. It was explained that there is a transitional committee in place at the NF that is dealing with those aspects, but that everything should continue seamlessly.

Legal education and training
The participants wanted to know whether the LPC would provide affordable and quality training like Legal Education and Development (LEAD) Division of the LSSA does at the moment. The current funding of LEAD by the AFF through s 46(b) was explained. Although the LPC did not have a similar section, the AFF was committed to funding legal education whether through the LPC or outsourced to the LSSA via the LPC (subject to accreditation).

Reserved work
The panel stressed that reserved work had been retained for attorneys (conveyancing and notarial work). It also explained that the LSSA had taken on matters such as the Proxi Smart matter (Proxi Smart Services (Pty) Ltd v the Law Society of South Africa and Others (GP) (unreported case no 74313/16, 16-5-2018) (Matjoe J) (Van der Westhuizen J and Strijdom AJ concurring)), in the interest of attorneys and the public. It added that an LSSA committee was looking at amendments to the LPA and that the LSSA committee would continue to lobby for changes in the interest of the profession.

• See ‘Proxi Smart loses conveyancing battle against the LSSA’ 2018 (June) DR 3.

The LSSA urges all attorneys that have not yet attended any of the roadshows to be on the lookout for one taking place near them so that they can attend and participate in the discussions to ensure that maximum practitioner input is received.

See also –
• ‘So what does the LSSA do for you?’ 2017 (Dec) DR 20;
• ‘LSSA discusses way forward after implementation of LPA’ 2018 (March) DR 17; and
• ‘LSSA information session roadshows kick-start dialogue on a new representative professional body for practitioners’ 2018 (April) DR 11.

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Also see www.LSSA.org.za for further information.
People and practices

Compiled by Shireen Mahomed

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

Catherine Baijoo has been promoted as an associate in the banking and finance department.

Nonhlanhla Hugo has been promoted as an associate in the banking and finance department.

Jordyne Löser has been promoted as an associate in the employment department.

Daniel Magowan has been promoted as an associate in the corporate department.

Jaco Meyer has been promoted as an associate in the corporate department.

Phukubje Pierce Masithela Attorneys in Johannesburg has two new appointments.

Yashoda Rajoo has been appointed as an associate. She specialises in corporate and media law.

Sasha Beharilal has been appointed as an associate. She specialises in data protection.

Bentley Attorneys in Durban has a new appointment.

Freshika Naidoo has been appointed as an associate in the commercial litigation and debt recoveries department.

Kellerman Hendrikse Inc in Cape Town has two new promotions.

Aimee Joubert has been promoted as a director in the litigation department. She specialises in family law, tax, wills and estates.

Susan Lourens has been promoted as a director in the conveyancing department. She specialises in conveyancing, notarial practice and property law.

Norton Rose Fulbright in Durban has a new appointment.

Ian Petherbridge has been appointed as a director in the corporate mergers and acquisitions department.

Book announcements

Medical Malpractice in South Africa – A Guide for Medical and Legal Practitioners
By John Saner SC
Durban: LexisNexis
(2018) 1st edition
Price R 1 150 (incl VAT)
Loose-leaf book, updated on an annual basis.

The Law of the Sea: The African Union and its Member States
By Prof Patrick Vrancken and Prof Martin Tsamenyi
Cape Town: Juta
(2017) 1st edition
Price R 950 (incl VAT)
789 pages (soft cover).
Bringing advancing technology in litigation – time to explore electronic discovery

What exactly is Electronic Discovery (eDiscovery)? Why do we need it? Why should South Africa (SA) change its rules to incorporate it into the legal system? The definitive answer to the first question is that eDiscovery is the collection, processing and review of documents, which are stored in an electronic format. When this definition is mentioned to some legal practitioners in SA, the response is that these documents are printed, so why all the fuss? Statistics indicate that well over 90% of all business communications and documentation are now electronic and, importantly, more than 35% of these documents never 'see' paper. It is not just e-mails, but their attachments and other company documents, which have to be considered, including other forms of communication, such as SMS, as well as types of social media. There are decided cases in various parts of the world confirming that these are 'discoverable'.

I am often told that in SA e-mails are printed, to which my response is that this action has potential risk, not to mention the inefficiency and costs involved. If you print e-mails from someone's inbox and outbox you will not print any e-mails that have been deleted and as a legal practitioner, you will know the potential importance of deleted e-mails and other documents. Furthermore, when printing e-mails any blind carbon copy will not appear. Again, as a reviewing legal practitioner, you will not know of a particular recipient of that communication, which may be crucial to the knowledge of the matter you are working on.

These are just some examples of the perils of printing electronic documents, but a more compelling example is that electronic documents are more evidentially reliable than printed formats. The reason for that is largely because, when capturing electronic documents in their native format, the metadata of that document is also captured. Metadata comprises the properties of each document, which is created electronically and it can inform the user who created the document, when it was created or subsequently modified, who were included as recipients and much more. In the countries where eDiscovery has been adopted, as part of the rules of civil procedure, the metadata is stored as a part of the document and is discovered along with the document itself. An example – on the subject of evidential reliability – can be used from an instance where a number of printed sets of board minutes were the subject of the review. At one particular meeting it was said that a specific person was not present. However, these documents were originally electronic documents and on examination of the original, metadata showed that the document had been altered by the insertion of the word 'not' when dealing with those present. Therefore, the printed document said a person was not at the meeting, but in fact, that person was present and only the original electronic document along with the metadata verified this. Clearly the electronic version was more reliable than the paper version.

The difficulty with the Uniform Rules of Court along with s 15 of the Electronic Communications and Transactions Act 25 of 2002 is that the legislation does not go far enough where electronic documents are concerned. There is provision to discover electronic documents, but only by a certificate, presumably of authenticity. The truth is the opposite, whereby if the original document was electronic, but only a paper version is discovered, it is that version – in my view - that should require a certificate of authenticity. The Rules need to be amended so that eDiscovery becomes mandatory, as is the case elsewhere in the world and there is currently an initiative, which has been under consideration by the Rules Board, for some time now. The proposed amendments would only apply to High Court cases so that there are financial limits based on the ‘value’ of the case, as is the case in other jurisdictions. Implementation of amended rules is a practicality to be dealt with, rather than an objection to change. It is covered quite easily by guidelines produced by people who understand and know the procedures (eg, the Law Society of South Africa) and in many countries procedural implementations are covered by practice directives.

The proliferation of electronic data over the past 20 years has been immense and eDiscovery has simply moved with the times. eDiscovery does not change the basic ‘law’ of discovery, which is about making a reasonable search for documents that are or have been in the possession or control of the party, but the question here is, is SA making a reasonable search if it is not dealing with electronic documents properly?

All of the jurisdictions that have embraced eDiscovery into their civil procedure rules have successfully moved over to the system, so there is no reason to believe that SA would not be able to do the same. Some law firms in SA are dealing with electronic documents successfully, but the frustration comes when the law firm wishes to electronically discover, along with metadata, but the other law firm only has paper or original electronic documents, which have been converted to PDF’s. It is messy at best and potentially very dangerous and the only real remedy is to enforce a level playing field.

One of the objections, used also in other international jurisdictions before eDiscovery was adopted, was one of cost and the misconception that eDiscovery brings higher costs. It is accepted globally that the use of eDiscovery technology will reduce the cost of litigation cases by at least 30%. Other statistics show that the greatest cost of a case is the legal practitioner’s review, which accounts for approximately 70% of the total. Furthermore, the use of filtering technology is encouraged, if not demanded by knowledgeable client corporations as they refuse to pay their legal practitioners for reading irrelevant documents when there are means available to avoid unnecessary costs.

South Africa is already experiencing a ‘drain’ of data in global cases whereby lawyers and providers from other jurisdictions have to arrange to collect data from SA and then ship it back to their own country for processing, hosting and reviewing. In other words, SA is losing valuable business, which extends to arbitrations and other forms of alternative dispute resolution, as they often follow the High Court Rules. South Africa cannot be a true international center for dispute resolution until eDiscovery is adopted and incorporated into the Uniform Rules, as well as other forms of dispute resolution.

Terry Harrison is an independent international eDiscovery consultant in Cape Town.
Succession planning in law firms: Some points to ponder

Succession planning is important for every legal practitioner and in this article the Attorneys Indemnity Insurance Fund NPC (AIF) will look at succession planning in the context of law firms. The phrase 'succession planning', is used in reference to the plan of what will happen to the legal practice after the practitioner ceases practising. It is advisable that, in the development of a succession plan - as far as is practically possible - to consider that there are some risks associated with unplanned, unexpected events. To some, this may be seen as a rather morbid topic, which should be avoided or postponed, but consideration of this issue is necessary. It is best to consider and plan for the departure - especially of senior practitioners - rather than hope that 'things will somehow work themselves out' in the absence of proper prior consideration and the development of an appropriate plan. As is succinctly put in a Thomson Reuters article: ‘If you fail to plan, you plan to fail’ ('Law firm succession planning: Does your firm have a plan' (http://insight.thomsonreuters.com.au, accessed 15-6-2018)).

Succession planning is important: - for every legal practitioner and in this context of law firms. The phrase 'succession planning', is used in reference to the plan of what will happen to the legal practice after the practitioner ceases practising. It is advisable that, in the development of a succession plan - as far as is practically possible - to consider that there are some risks associated with unplanned, unexpected events. To some, this may be seen as a rather morbid topic, which should be avoided or postponed, but consideration of this issue is necessary. It is best to consider and plan for the departure - especially of senior practitioners - rather than hope that 'things will somehow work themselves out' in the absence of proper prior consideration and the development of an appropriate plan. As is succinctly put in a Thomson Reuters article: ‘If you fail to plan, you plan to fail’ ('Law firm succession planning: Does your firm have a plan' (http://insight.thomsonreuters.com.au, accessed 15-6-2018)).

Over the years of activity in the profession, the practitioner would have built up a substantial practice and a good client base. What will happen to the practice after the practitioner leaves? What, if anything, should the practitioner consider ahead of leaving practice to ensure the successful continued existence of the firm? This consideration is the subject matter of this article and it is hoped that the questions raised will assist in focusing the attention of legal practitioners to this important matter.

A legal practice is a business enterprise and it is thus important that consideration be given to what happens to the enterprise after the practitioner leaves. This is an important question, irrespective of whether the sole practitioner wishes to dispose of or close the practice on their departure from practice. The practice may, in many instances, be one of the highest valued assets in the estate of the practitioner, which has been built up after many years in practice, the practitioner would have made many sacrifices to ensure success.

The practitioner may have planned, over the years in practice, to build what they perceive to be value in the firm, which could be sold in the future and thus reap the financial (and reputational) rewards for sustained efforts over many years (many decades in most cases). This is referred to as the branding of a practice. Taking a view along the lines that ‘I am the practice and the practice is me’ is rather myopic. If you regard yourself as the sole or most important asset within your practice, then you should ask yourself whether you have been successful in creating any real value in the practice as a business with a value in and of itself. If so, how do you protect that value and pass it on to the next generation of lawyers while being appropriately remunerated for your years of work? Is there a mandatory retirement age in the firm or do you plan to work ‘and die at your desk’ (as it is often colloquially put)?

For firms made up of sole practitioners or even partnerships of two or three partners, the departure of a key practitioner may have a significant impact on the firm, if not properly planned and managed. Failing to do so could result in the eventual downsizing or unplanned closure of the firm. If succession planning is not properly addressed, it may result in a loss of significant clients and staff, which can also lead to the firm closing down. Consider how the financial well-being of the firm will be affected in such cases and how the interests of the various stakeholders (including yours) could be prejudiced without a succession plan. The departure of a key individual must be properly planned, structured and implemented. Some practitioners may have decided that they do not plan to retire from practice and thus plan to work for the rest of their lives. If that is the case in a particular firm, all the implications and risks of this must be fully appreciated.

Legal practitioners, like many others in the professional service industry, sell a service and expertise to clients and this is in essence the service offering of a legal practice. The service provided by the legal practitioner is based on the skill, expertise and a specific area of practice of the practitioner. As with all other aspects of life, the service and the skill sold to clients come to end when the practitioner leaves practice for any reason or, sadly, passes away. Death is unplanned, but a properly planned exit from practice in the event of the retirement, relocation or other structured manner of exit can be appropriately prepared for. There may be unfortunate circumstances that lead, for example, to a striking-off of a practitioner, a sudden illness or other change in life circumstances that may lead to a practitioner being unavailable to continue with practice. One wonders how many attorneys have considered this in the context of their own practices. For sole practitioners or small partnerships, the departure (or death) of the practitioner may lead to the firm closing down, particularly where that person was the sole or a significant fee earner. In larger firms, the practitioner may work as part of a team where there are other professionals available to step into the breach and thus fill the vacancy. The relationships that key clients have with the firm may be due to a personal relationship between the client and the firm and those relationships may thus not survive the departure of the practitioner concerned.

Over the duration of the practice, the practitioner would have built up client relationships. What will happen to these clients when the practitioner leaves the practice?

Why succession planning is important

The practice and the goodwill created over the time in practice may have significant value for the practitioner. Planning gives the advantage of enabling the practitioner to determine what happens to the practice. The questions to be considered include:

- Do I want my practice to continue after I leave and, if so, how can I ensure that?
- Will the practice be sold?
- In the event that the practice is sold, how will the appropriate value be determined?
- Will the files be transferred to another practitioner (within the same firm or in another firm)?
- Have I identified, recruited and trained a possible successor?
How can I close the firm and wind it down in a structured manner taking the interests of all stakeholders into account?
Is succession planning addressed in the partnership agreement of the firm?
Has the buy-out of the interests of partners been addressed in the partnership agreement?
How will the value of partnership interests be determined?
How will the value be paid to the departing person?

Succession planning will ensure that the departure of the practitioner is properly structured and documented, thus mitigating or avoiding disruption to the firm. The succession plan developed by the firm should be properly documented and updated as and when the circumstances of the firm and the individual senior practitioners in the firm change. The remaining practitioners may decide to downsize the firm after the retirement of a senior practitioner.

Alan R Olson in the article ‘Law firm succession planning: Do one simple thing’ (www.de-lap.org, accessed 7-6-2018) suggests that the reasons legal practitioners in law firms are reluctant to have the succession planning discussion, include:
- inertia or aversion to planning;
- concerns over lawyer retention;
- concerns over client retention;
- a lack of viable successors; and/or
- over-reliance on compensation systems.

The phenomenon by some who feel irreplaceable can be added to that list.

When should succession planning be addressed?

Succession planning should be addressed as early as possible and not only with the imminent departure of the practitioner concerned. It may not be necessary to develop a succession plan for younger practitioners who are part of broader teams, however, succession planning becomes more important where there are senior and/or long-established practitioners in a firm. An added advantage of the early development of a succession is that the practitioner then has the luxury of time to recruit and even develop a possible successor or to consider other available options. The planned departure of the practitioner concerned can then also be communicated to internal and external stakeholders in a structured manner and the narrative of the departure can be determined by the firm and the departing practitioner together thus mitigating rumours and reputational damage.

The area of work carried out by the practitioner should also be considered. Litigious matters, for example, may take many years to be finalised and may need to be attended too (and fees earned thereon) long after the practitioner who initially dealt with the matter has departed.

Succession plan options

The appropriate succession plan will depend on the individual size, structure, location and area of practice of the firm. Arthur G Greene, in ‘Succession Planning for Solo and Small Firms and Rewards for Retiring Lawyers’ (www.mebaroverseers.org, accessed 7-6-2018) suggests the following available choices –
- winding-down and closing the firm;
- recruiting a successor;
- merger with another firm;
- acquisition by a large firm; and
- the sale of the firm.

Greene also suggests that the considerations a firm should consider include the following –
- a partnership structure that takes succession planning into account;
- having a generational spread of partners;
- developing a firm with leadership requirements and management responsibilities;
- encouraging an entrepreneurial spirit;
- transitioning clients;
- implementing two-tiered partnership structure issue that addresses control issues; and
- compensation issues.

John Niehoff in ‘Succession planning for law firms’ (http://bakertilly.com, accessed 7-6-2018) suggests that senior lawyers should be eager to:
- ‘Train and develop the leadership skills of the next generation;
- Delegate client relationships to additional partners;
- Share and introduce their professional network with others;
- Assist new partners with practice development activities and reputational building; and
- Transition from indispensable to supportive as they near retirement.’

Do risks follow a practitioner after ceasing practice?

It must also be remembered that even after a practitioner has left practice, professional indemnity (PI) claims may arise out of matters dealt with by that practitioner while in practice. In that event, the AIIF policy will respond as long as the practitioner concerned was in possession of a Fidelity Fund Certificate (or obliged to apply for one) at the time that the cause of action arose. It will not matter that when the claim is made, the practitioner is no longer practicing. In the event of liability, the claim will be paid out of the limit of indemnity (amount of cover) available to the firm of which the practitioner was part. The applicable deductible (excess) payable will also be determined in this manner. Unlike most other PI policies, legal practitioners thus do not need to purchase run-off insurance cover in respect of the cover afforded under the AIIF policy.

Section 34(7)(c) of the Legal Practice Act 28 of 2014 provides that present and past shareholders and members of a practice conducted through a commercial juristic entity (in other words, an incorporated practice) will be jointly and severally liable with the juristic entity for:
(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
(ii) in respect of any theft committed during their period of office.’

Practitioners must thus plan accordingly for their lives after practice and what will happen to their practices after their departure.

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The ease of doing business in South Africa receives a boost with the launch of a digital financial reporting solution

The ease of doing business and particularly reducing the regulatory burden for businesses received a boost with the launch of Companies and Intellectual Property Commission (CIPC’s) eXtensible Business Reporting Language (XBRL), a digital financial reporting solution at the Johannesburg Stock Exchange in Sandton. The system will allow companies to file annual financial statements using this mechanism and the data can be shared across the regulatory spectrum for multiple purposes. Speaking at the launch of XBRL on 12 June, the Minister of Trade and Industry, Dr Rob Davies said while there are many challenges with the fourth industrial revolution, it does offer the possibilities of improving governance. Minister Davies was of the opinion that South Africa (SA) has already seen this in the work that CIPC has done to apply digital technologies to company registrations.

According to Minister Davies, the XBRL will align the submission of annual financial statements with that of the global reporting standards for businesses. ‘This system has the capacity to ensure that there is integrity in the financial reporting mechanism to different agencies in government. Furthermore, it supports greater transparency, improves the efficiency of capital markets by assisting analysts, financial and security regulators, business registrars, tax authorities and other users to access relevant facts,’ Minister Davies said.

Minister Davies added that the essence of the fourth industrial revolution is about large data management and application, where technologies can be applied in various ways across all forms of production, as well as service activities.

Digital financial reporting in iXBRL, a move aimed at boosting investment in South Africa

By Rory Voller

Recently South Africa (SA) was ranked first out of 115 countries for the transparency of its national budgeting process. It should come as a big surprise that a country on the Southern tip of Africa leads the entire world in the stakes of playing open cards with the public by allowing anyone to analyse and scrutinise its finances. This is no small feat and certainly not a once-off accolade as SA has been ranked in the top three of the Open Budget Index since 2010.

But this level of scrutiny should not only be the reserve of the public sector, especially in a country where the financial mismanagement in the private sector has also reared its ugly head of late. This is why the introduction of digital financial reporting, called eXtensible Business Reporting Language (XBRL), by the Companies and Intellectual Property Commission (CIPC) should be welcomed by all. None of the qualifying entities as registered with the CIPC could argue that they should not be expected to be held accountable to the same standard as their public representatives, who have displayed transparency about how taxes are being generated and how budgets are allocated and spent.

The speed of development and benefits of technology had surpassed the imagination of all who lived before the change of the century. In the same way, digital financial reporting is revolutionising the business world. This is how the CIPC envisages that technology can be used to the eventual benefit of all in SA. The scope of the ongoing XBRL Pilot Programme applies to the submission of audited or independent re-viewed annual financial statements by a sub-set of around 100 000 qualifying entities and close to 50 Johannesburg Stock Exchange listed companies who recently participated in our pilot phase.

Not only will this technology improve the efficiency of sorting through high volumes of financial reports, but it has been proven around the world that improved transparency in financial reporting in a rigorous regulatory environment improves investment. The Programme – to be rolled out from 1 July - will also pave the way for eventual standard business reporting in SA, where various regulators can share data, thus achieving the principle of ‘report-once-share-many’.

Improved transparency has also been proven to heighten investor confidence and investment

A 2002 study by the Organisation for Economic Co-operation and Development - an intergovernmental economic organisation with 35 member countries - found that transparency in financial reporting reduces ‘herding’ of fund managers’ investment decisions. The study also found that ‘improved transparency could improve the quality of investment decisions’. Reasons for XBRL as technology standard for financial reporting are gaining momentum worldwide with various countries attesting to the benefits of XBRL outweighing the status quo of legacy mechanisms of reporting for consumers of financial or business information.

If SA is to move into the new age, improve investor confidence and boost entrepreneurship, there is no better time than now for the private sector to emulate the transparency displayed by those entrusted with public finances in their own business environment.
Diplomatic immunity: Its nature, effects and implications

By Riaan de Jager

Section 15(1) of the Diplomatic Immunities and Privileges Act 37 of 2001 (the Act) creates an offence if anyone obtains or executes any legal process against diplomats. It is noteworthy that a party to such proceedings, an attorney and the Sheriff are specifically referred to therein. Should s 15(1) be contravened or if any other offence is committed resulting in the infringement of a diplomat’s personal inviolability or that of their property or residence, the offender could, on conviction, be fined and/or imprisoned for up to three years (s 15(2) of the Act).

In light of the far-reaching implications of s 15, I will attempt to explain the nature, effects and implications of what is known as ‘diplomatic immunity’ in order to assist members of the profession not to fall foul of its provisions. In doing so, I will first examine the purpose of immunity, thereafter, the difference between state (or sovereign) immunity and diplomatic immunity will be highlighted. Lastly, I will identify the different types of immunity, as well as the implications of each.

Immunity from?

The Vienna Convention on Diplomatic Relations of 1961 (VCDR) has the force of law in South Africa (SA) (s 2(1) of the Act) and applies to all diplomatic missions and members of such missions in SA (s 3(1) of the Act). The VCDR provides a complete framework for the establishment, maintenance and termination of diplomatic relations. Moreover, it not only codifies pre-existing principles of customary international law relating to diplomatic immunity, but resolves points on which differences among states had previously meant that there was insufficient consensus to create a rule of customary international law. The Preamble of the VCDR also states that the purpose of diplomatic immunity is to ‘ensure the efficient performance of the functions of diplomatic missions as representing States’. Its main aim is to shield diplomats from actions interfering with the performance of their official duties in the receiving state (refer to the fourth recital of the VCDR).

Immunity of this nature is procedural in character and does not affect any underlying substantive liability (Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues 2001 (1) SA 1285 (W) at 1293 G – I; Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000) [2002] ICJ Rep 3 at paras 59 – 61). This principle is essential as the receiving state cannot at the same time receive a foreign diplomat by mutual consent (art 2 of VCDR) and then subject such diplomat to the authority of its own courts in the same way as other persons within its territorial jurisdiction. Diplomats, however, are not exempt from the jurisdiction of their own countries’ courts (art 31.4 of VCDR) and, in important respects, to the jurisdiction of the courts.
of the receiving state after their posting has ended (art 39 of VCDR). It is noted that s 110A of the Criminal Procedure Act 51 of 1977 ensures that South African diplomats who are immune from the criminal jurisdiction of the receiving state could under certain circumstances be prosecuted in our courts if they commit offences during their tour of duty.

State immunity

The doctrine of state or sovereign immunity refers to the immunity, which one state enjoys within the jurisdiction of another state, which flows from the public international law principle of the equality of sovereign states or par in pares non habet imperium. This means that a sending state, which incurred legal liability in the receiving state, cannot under certain circumstances be summoned before the receiving state’s courts to be judicially forced to discharge its liability. The majority of states nowadays apply the doctrine of restrictive sovereign immunity, which distinguishes between non-sovereign acts, such as commercial transactions (so-called acta iure gestiones) and acts performed in the exercise of sovereign authority – the so-called ‘acts of state’ or acta iure imperii. The former does not entitle a sending state to immunity within the jurisdiction of the receiving state. South Africa, by promulgating the Foreign States Immunities Act 87 of 1981, followed suit and based it to a large extent on the United Kingdom’s State Immunity Act 1978.

Diplomatic and state immunity have a number of points in common –
- both are immunities of the state, which can be waived only by the state;
- both may extend to individual agents of the state, acting as such;
- both are creatures of international law; and
- although only diplomatic immunity has been codified by treaty, the embryonic United Nations Convention on Jurisdictional Immunities of States is generally regarded as an authoritative statement of customary international law on the major points which it covers.

As will be seen below, the immunity of diplomatic agents are wider than those of the state because their purpose is to remove persons who are within the receiving state’s territory and under its physical power from its jurisdiction (Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 4ed (Oxford University Press 2016) at 1; Reyes v Al-Malki and Another [2017] UKSC 61 at para 27 – 28).

Immunity enjoyed by diplomatic agents, consular officers and other mission personnel

Categories

1. Diplomatic

Ambassador

High Commissioner

Diplomatic Agent

2. Internal organisation

Head of International Organisation

P1, D5 and International Organisational Representative

Member of International Organisation

3. Consular

Consul

General Head of Consulate

Honorary Consul

Consular Agent

4. Administrative

5. Temporary

Diplomatic immunity is dealt with in art 22 and 29 to 40 of the VCDR. These provisions confer different degrees of immunity on persons connected with a diplomatic mission according to their status and function. The VCDR distinguishes between diplomatic agents (ie, heads of mission and members of their diplomatic staff) the administrative and technical staff of the mission, their respective families and service staff of the mission.

- Diplomatic agents

The highest degree of protection is conferred on diplomatic agents and is virtually absolute. In the case of diplomatic agents, the VCDR substantially reproduces the previous rules of customary international law, by which a diplomatic agent was immune from the jurisdiction of the receiving state, namely -
- in respect of things done in the course of their official functions for an unlimited period; and
- in respect of things done outside their official functions for the duration of his mission only.

Thus, art 31.1 confers immunity on currently serving diplomatic agents in respect of both private and official acts, subject to specific exceptions for three designated categories of private acts (see art 31.1(a) to (c)). Diplomatic agents enjoy the following immunity –
- personal inviolability (art 29);
- inviolability of their official residence (art 22.1 and 30.1);
- inviolability of their papers, correspondence and property (art 30.2);
- immunity from the criminal, civil and administrative jurisdiction of the receiving state (art 31.1); and
- non-compellable witness (art 31.2).

As a result, the representatives of the receiving state cannot arrest or detain diplomatic agents and their residences, property or persons are immune from search, requisition, attachment or execution due to their personal inviolability. A summons or warrant cannot be served on them personally, nor on their residences, or the mission. For more detail in this respect, refer to Riaan de Jager ‘Diplomatic law: Service of process on foreign defendants’ 2017 (Dec) DR 34. Also, they cannot be charged in the criminal courts, nor sued in the civil or administrative courts of the receiving state. The reason: What a diplomatic agent does in the course of his official functions is done on behalf of the sending state and is an act of the sending state, although it may give rise to personal liability on the part of the individual agent. Any acts that a diplomatic agent performs in a personal or non-official capacity are, however, not acts of the state that employs them. The right to assert immunity in this respect can only be justified on the practical ground that their exposure to civil or criminal proceedings in the receiving state, irrespective of the justice of the underlying allegation, could impede the functions of the mission.

Because diplomatic missions are usually situated in the capital of the receiving state, all such missions in SA are located in Pretoria (Tshwane).

- Diplomatic agents’ family members

Diplomatic agents’ family members forming part of their
households will in terms of 37.1 enjoy the same immunity. The justification for it is to protect diplomats from harassment particularly by means of framed or politically motivated legal proceedings so that they can perform their functions whatever the situation in the receiving state (Denza (op cit) at 320).

- **Administrative and technical staff**
  Members of the administrative and technical staff of the mission, together with their family members, enjoy their immunity in terms of art 37.2 includes -
  - personal inviolability (art 29);
  - inviolability of their private residence (art 30.1);
  - inviolability of their papers and correspondence (art 30.2);
  - immunity from the criminal jurisdiction of the receiving state (art 31.1);
  - immunity from the civil and administrative jurisdiction of the receiving state with regard to acts performed in the course of their official duties (art 31.1); and
  - non-compellable witness (art 31.2).

  It is evident that these members enjoy the same immunities as diplomatic agents except for immunity from the civil and administrative jurisdiction regarding acts performed ‘outside the course of their duties’. They can never be tried on a criminal charge in any circumstances (unless their immunity is expressly waived), but they may be sued on personal matters.

- **Service staff**
  Members of the service staff of the mission who are not nationals of or permanently resident in the receiving state only enjoy immunity in respect of acts performed in the course of their duties (art 37.3) – this is known as functional immunity.

- **Consular officers**
  The immunity that consular officers enjoy in terms of international law are regulated by the Vienna Convention on Consular Relations of 1963 (VCCR), which also has the force of law in SA (s 2(1) of the Act). These officers are attached to consular posts (eg, Consulates-General, trade offices, etcetera) in cities outside Pretoria (Tshwane) (eg, Johannesburg, Cape Town, Durban, etcetera). Unlike the almost absolute immunity, which diplomatic agents and their family members enjoy in terms of the VCCR, consular officers only enjoy functional immunity which is limited to -
  - immunity from arrest or detention pending trial except in case of a grave crime and pursuant to a court order (art 41);
  - immunity from the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions (art 43.1); and
  - although they may be called on to attend as witnesses in the course of judicial or administrative proceedings, no coercive measure or penalty may be applied to them if they decline to do so (art 44.1).

  It is worth noting that the members of the family of consular officers forming part of their households do not enjoy any immunity whatsoever.

- **Intergovernmental organisations**
  The immunities that officials attached to representative offices of intergovernmental organisations (eg, the African Union, United Nations, International Labour Organisation, etcetera) in SA enjoy are set out in the various host agreements, which such organisations conclude with the South African government. With the exception of the most senior representatives of such organisations, who usually enjoy full diplomatic immunity, these officials only enjoy functional immunity.

### Abuse of status by diplomats

Despite their immunity, diplomats are under a duty to respect the laws and regulations of the receiving state (art 41.1 of the VCDR and art 55.1 of the VCCR). Where any law or regulation has been breached, the receiving state has the following remedies:

- Request an official apology from the sending state by way of note verbale.
- Request the sending state to waive the offending diplomat’s immunity (s 8 of the Act, read with art 32.1 and 32.2 of VCDR or art 45 of VCCR).
- Request the sending state to recall the offending diplomat.
- Declare such diplomat undesirable or persona non grata.
- Deregister the diplomat from accreditation and request their immediate departure from its territory.

Since all accredited diplomats are registered with the Department of International Relations and Cooperation (DIRCO) (s 9(2) of the Act), its Chief of State Protocol is empowered by s 9(3) to issue a certificate on request to clarify whether a person enjoys immunity. Before taking any measures against a person who might enjoy immunity or inviolability, attorneys are advised to approach the Directorate: Diplomatic Immunities and Privileges of DIRCO for confirmation of their status.

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Equality for all religions and cultures in the South African legal system

By Ndivhuwo Ishmell Moleya

South Africa (SA) is a religious and culturally diverse country where all cultural, religious and other belief systems are accorded equal constitutional protection. However, it can hardly be gainsaid that, in practice, certain religious beliefs and practices enjoy more protection and privileges than others. Against this backdrop, this article questions the relevance of the doctrine of entanglement in our religious and cultural pluralistic society.

Loosely defined, the doctrine entails that the courts should refrain from adjudicating internal disputes of religious associations (De Freitas ‘Doctrinal Sanction and the Protection of the Rights of Religious Associations: Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa (726/13) [2014] ZASCA 151’ PER 2016 (19) at 9). This article argues that the doctrine does not neatly fit in our pluralistic society and that it may engender veiled discrimination against cultural practices, which are not considered ‘religious’ by the courts.

Equal constitutional protection to religious and cultural practices

The Constitution accords both culture and religion equal recognition and protection.

Section 9(3) of the Constitution prohibits the state from unfairly discriminating against anyone on one or more grounds, including, among others, ‘religion, conscience, belief, [and] culture’ (my italics).

Section 15(1) bestows everyone the right to ‘freedom of conscience, religion, thought, belief and opinion’ (my italics) but excludes culture.

Section 30 confers every person the right to ‘use the language and to participate in the cultural life of their choice’ but only to the extent consistent with the Bill of Rights. The provision excludes religion.

Section 31 entitles persons belonging to a cultural, religious or linguistic community -

‘(a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society’ (my italics).

Culture also enjoys special constitutional recognition and protection by virtue of ss 211 and 212 and 181(1)(c) of the Constitution. It is clear from the foregoing that neither culture, nor religion enjoy elevated constitutional protection. The mere fact that culture is not included in s 15(1) does not, in itself, point to its insignificance. If that were so, the same would be said of the exclusion of religion under s 30.

The doctrine of entanglement: An anachronism unbefitting to a democratic SA?

The doctrine of entanglement was defined as the ‘reluctance of the courts to become involved in doctrinal disputes of a religious character’ (Taylor v Kurnstag NO and Others 2005 (1) SA 362 (W) at para 39). It was observed in Singh v Ramparsad and Others 2007 (3) SA 445 (D) at para 50 that: ‘Our courts have tried assiduously not to get entangled in doctrinal issues and it can be safely accepted that “the doctrine of non-entanglement” is part of our law.’ In De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another 2015 (1) SA 106 (SCA) at para 39 the SCA pointed out that: ‘A court should only become involved in a dispute [involving religious doctrine] where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement.’ It reasoned that ‘a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine’. The difficulty that comes with adjudicating religious disputes was highlighted in Prince v President, Cape Law Society, and Others 2002 (2) SA 794 (CC) at para 42 where Ngcobo J (as he then was) observed that: ‘Human beings may freely believe in what they cannot prove’ and that although ‘their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, [this] does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion’ and they ‘should not be put to the proof of their beliefs or faith.’ The doctrine also draws from the widely accepted principle that a state (and its organs) should be a-religious to ensure religious freedom and equality.

However, the doctrine is premised on the understanding that there is a clear divide between secular and ecclesiastical matters. Thus, the difficulty in applying the doctrine lies in defining that which is purely ‘religious’. In SA, religion is also a constitutional matter. The right is guaranteed by the Constitution itself. Religious practice is, therefore, not a purely ecclesiastical issue from which our courts may be excluded. As the guardians of the Constitution, our courts cannot effectively discharge their mandate if they remain strictly faithful to the doctrinal doctrine. Moreover, in SA, some cultural practices have a religious significance to those who practise them. But the courts may not accord them the same measure of adjudicative restraint – as they would to mainstream religious practices - because they do not fit into the orthodox definition of religion. This misconceived ‘hierarchical relationship between religion and culture’ was acknowledged by Amoah and Bennett when they stated that ‘[t]he same deference [by the courts to religious disputes] is not to be shown to systems of culture’ (Jewel Amoah and Tom Bennett, ‘The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?’ (2008) 8 AHRJ 357 at 359).

Similarly, Professor Pierre De Vos makes serious charges against the approach of our courts to religious disputes. He questions why certain religious beliefs and practices ‘so often get a free pass from society and the courts’...
and why they should not 'be evaluated in the same manner that all other beliefs and practices are evaluated' (www. dailymaverick.co.za, accessed 6-6-2018). These are serious questions that need to be interrogated.

The Constitution and Bill of Rights or the doctrine of entanglement: Which is the yardstick?

The application of the doctrine raises the question of the appropriate standard for adjudicating disputes emanating from both religious and cultural practices. Applying the doctrine presupposes that certain religious practices are adjudged separately (in line with the doctrine) and in some way shielded from constitution al scrutiny, while all cultural practices are expected to be constitutionally compliant. But such hierarchical treatment lacks a constitutional basis and should not be countenanced, especially by the judiciary. As we have seen, the Constitution does not accord religion special protection. If anything, the signification of culture in our democratic society is buttressed by special provisions of the Constitution. Section 31(2) of the Constitution subjects the rights of both religious and cultural adherents to practice in fellowship in terms of s 31 to the same requirement of consistency with the Bill of Rights. Therefore a principle, which prefers or elevates religion, as does the doctrine of entanglement seems to do, negates the spirit and letter of the Constitution. Indeed, Mokgoro points out that 'd[ivergent] cultural norms have been elevated from subordination and obscurity to a status of equality with the previously hegemonic western cultural norms' (Yvonne Mokgoro 'The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms' (1999) 52 SMUL L. Rev. 1549 at 1556). She observed that these constitutional provisions make it clear 'that South Africa is now bound to respect the cultural tradition of those of its people who choose to live according to a way of life or culture of their choice, subject, of course, to the standards set in the Constitution' (Mokgoro (op cit) at 1557). The Constitution and the Bill of Rights should, therefore, be the judicial entry to and exit from religious disputes of whatever nature. It is the appropriate yardstick against which all religious and cultural practices should be tested, not the doctrine of entanglement. Religious doctrine 'cannot influence what the Constitution dictates' nor should it be used as judicial guide to religious disputes (National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC), at para 38).

The doctrine of entanglement: A veiled judicial protection of mainstream religious practices?

It may be that the doctrine of entanglement is necessary for augmenting religious freedom, but then, its application may have the effect of discriminating against cultural practices, which are also religious in nature. The doctrine applies to orthodox religious practices. It does not necessarily take into account the deep and broad meaning that the term 'culture' connotes. As Mokgoro points out, although culture broadly refers to 'a way of life or a system of socialising', it also includes religious experience. Most African cultural practices are religious in nature. They, therefore, serve the same purpose to their adherents as religion does to believers. As Kofi would put it, almost '[e]very aspect of life in traditional African society had a religious connotation.' (Kofi Quashigh 'Religion and the republican state in Africa: The need for a distanced relationship' (2014) 14 AHRLJ 78 at 84). Thus, although the practices are usually branded cultural, they are also religious as they involve the spiritual relationship of some sort between the performer and a certain deity. It is to these cultural practices that the term 'African Traditional Religion' refers. It is lived, practised and is believed to have been handed down from generation to generation (Nokuzola Mndende 'Law and religion in South Africa: An African traditional perspective' (2013) 54 Dutch Reformed Theological Journal 74 (http://ngtt.journals.ac.za, accessed 8-3-2018)).

It was accordingly pointed out in Minister of Home Affairs and Another v Fourie and Another (Doctors for Life Internation and Others, Amici Curiae); Lesbian and Gay Equality Project and Interation and Others, Amici Curiae) 2006 (1) SA 524 (CC) that: 'Religion is not just a question of belief or doctrine. It is part of a people’s temper and culture and ... way of life.' This was again observed in MEC for Education KwaZulu-Natal, and Others v Pillay 2008 (1) SA 474 (CC) at para 47, that 'religion and culture may overlap as religious practices are frequently informed not only by faith but also by custom ... Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.'

Once it is accepted that there is a religious ingredient in some cultural practices, it follows that the same measure of reluctance or deference that our courts exercise in respect of disputes involving orthodox religious practices is applicable to the performer and a certain deity. It is lived, practised and is believed to have been handed down from generation to generation (Nokuzola Mndende ‘Law and religion in South Africa: An African traditional perspective’ (2013) 54 Dutch Reformed Theological Journal 74 (http://ngtt.journals.ac.za, accessed 8-3-2018)). It was accordingly pointed out in Minister of Home Affairs and Another v Fourie and Another (Doctors for Life Internation and Others, Amici Curiae); Lesbian and Gay Equality Project and Interation and Others, Amici Curiae) 2006 (1) SA 524 (CC) at para 90, that: ‘Religion is not just a question of belief or doctrine. It is part of a people’s temper and culture and ... way of life.’ This was again observed in MEC for Education KwaZulu-Natal, and Others v Pillay 2008 (1) SA 474 (CC) at para 47, that ‘religion and culture may overlap as religious practices are frequently informed not only by faith but also by custom ... Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.’

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The purpose of this article is to briefly deal with the mandatory offer requirements in terms of s 123 of the Companies Act 71 of 2008 (the Act) involving regulated companies and whether or not they can be waived with respect to share buy-back transactions done in terms of s 48 of the Act.

Background and rationale for mandatory offers and share buy-backs

It has been historically recognised that a decision to invest in a particular company, by an investor, is an extremely personal decision based to a large degree on trust that the investor has in the individuals or teams running the particular company.

Any drastic changes made in the running of the company could have an effect on this ‘trust relationship’ requiring the investor to re-consider their investment in the company in the event that there are changes in its running, including changes to its ownership structure.

These potentially harmful changes to the prevailing status quo in a company’s core ownership structure brought about the concept of a ‘mandatory offer’ (initially
developed in the United Kingdom (UK), which was developed to ensure that an investor who then finds themselves in a situation described above is able to then 'exit' the company by selling their shares to the new controller, who in turn, is required to offer to buy them on the same terms offered to the shareholders from whom they acquired them.

This is also in full recognition of the over-arching general principle of takeover law of ensuring that there is equality of treatment among the shareholders of the company.

As stated above, the UK under its Takeover Code, first developed the concept of 'mandatory offer', primarily for these two reasons and to also ensure that minority shareholders are also able to benefit from the control premium paid by the new controller to acquire control.

Companies are – in terms of the Act – allowed to buy-back their shares from their own shareholders. This could be done for various number of reasons and/or motivations, with the main and oft-quoted rationale, being that a company is of the view that the price of its shares is depressed or low and using the share buy-back process could help in boosting the share price, taking into account that there will now be less shares on issue in the company, which could lead to an increase in the share price.

The company in effecting this buy-back would, under normal circumstances, make use of its excess cash (which it can retain or pay its shareholders through dividends) it has at its disposal to pay the shareholders from whom these shares are being bought back. Therefore, the share buy-back mechanism could have a positive effect if used correctly, in that it ensures that this excess cash is returned to shareholders and at the same time ensuring that the entity is able to recover some of its value.

As stated above, the effect of a share buy-back is that the shares that are bought back are cancelled and do not form part of the issued shares of an entity, which could then lead to an increase in the value of one or more of the shareholders’ interest in the shares of the company; that is, a shareholder that had held 34.5% before the buy-back could end up now owning 35.5% or more of the shares of the company after the buy-back.

The question that needs to be determined is whether share buy-backs that achieve this twin aim of boosting share value, while at the same time returning excess cash to shareholders, could have an effect on mandatory offer rules and, if so, how this should be handled?

**Application of the Act on share buy-backs and mandatory offers in SA**

The mandatory offer and share buy-back regimes in SA fall under s 123(2) of the Act. The section applies to a regulated company that either re-acquires its own voting securities in terms of s 48 or where a person, either acting alone or in concert, who has acquired a beneficial interest in voting securities of a regulated company, and able to exercise less than 35% of all the voting securities and acquires further voting securities, and as a result thereof is able to exercise control of 35% or more of the voting securities of the company.

The Act defines a regulated company as either a public or a private company (as defined) that is subject to the takeover law provisions found in ch 5, Part B and Part C of the Act and a regulated company is obliged to comply with these provisions if it enters into a merger or takeover transaction in terms of the Act.

Therefore, in terms of the Act, a person that has acquired 35% or more of a regulated company’s securities that they did not own before will be required to make a mandatory offer. The same applies to a situation where a company undertakes a share buy-back and as a result thereof, a shareholder who ends up with 35% or more of the company’s shares, either acting alone or in concert, such a shareholder will also be required to extend an offer.

**International law on application of mandatory offer rules on share buy-back transactions**

The City Code on Takeovers and Mergers (Takeover Code) administered by the United Kingdom Takeover Panel (UK Panel) is the recognised source of law on takeovers and mergers – in mainly Commonwealth States, including SA.

The Takeover Code under r 9 provides that when ‘any person acquires, whether by a series of transactions over a period of time or not, an interest in shares which (taken together with shares in which persons acting in concert with him are interested) carry 30% or more of the voting rights of a company’ will be required to extend a mandatory offer to the rest of the shareholders (my italics).

It further provides under r 37 that: ‘When a company redeems or purchases its own voting shares, any resulting increase in the percentage of shares carrying voting rights in which a person or group of persons acting in concert is interested will be treated as an acquisition for the purpose of Rule 9’ (my italics).

A similar provision exists under the Hong Kong Codes on Takeovers and Mergers and Share Repurchases administered by the Securities and Futures Commission of Hong Kong (SFCH) and r 32 of the code provides that: ‘If as a result of a share repurchase a shareholder’s proportionate interest in the voting rights of the repurchasing company increases, such increase will be treated as an acquisition of voting rights for purposes of the Takeovers Code’ (my italics).

As a result, a shareholder, or group of shareholders acting in concert, could obtain or consolidate control of a company that has done a buy-back and, thereby, become obliged to make a mandatory offer in accordance with r 32, which deals with the extension of mandatory offers...
and reads similar to r 9 of the Takeover Code.

From the above, it is quite clear that the rule and requirements on mandatory offers, particularly in instances where there is a share buy-back involved, are almost universal and emphasis is put on ensuring that there is equality of treatment of shareholders, as well as providing the minority shareholders with an opportunity to exit the newly controlled company by having their shares bought.

The SFCH Takeovers and Mergers Panel dealt with this question in a matter involving Television Broadcasts Limited (TVB) – a decision granted on 10 May 2017 – wherein TVB, a Hong Kong registered media company, had embarked on a transaction to buy back up to 138 million of its own shares (representing 31.5% of its issued share capital). One of the shareholders in the company, Young Lion Holdings Limited together with its concert parties (YLCPG) already had a beneficial interest of 29.9% in the voting shares of the company’s issued shares.

YLCPG did not accept the offer from TVB to buy back the shares resulting in YLCPG ending up with 41.19% of the company’s shares triggering an obligation by the YLCPG to extend a mandatory offer to the remaining shareholders of the company.

The legal question before the panel was whether YLCPG should be allowed to obtain waiver in terms of which it can be excused from making a mandatory offer if 50% of the company’s independent shareholders agree to support the said waiver through a ‘whitewash resolution’.

In considering whether such a waiver can be granted, the panel indicated that the underlying principle in allowing a whitewash resolution to be granted after a vote by the independent shareholders is that ‘all shareholders of the same class are to be treated similarly’.

This clearly suggests that the net effect of the buy-back must result in shareholders being treated equally and this is the guiding principle in the panel exercising its discretion to grant the waiver irrespective that the shareholders pass the whitewash resolution.

The Takeover Code also has a similar provision in terms of which, the panel would waive any resulting obligation to extend a mandatory offer if there is a vote of independent shareholders and a procedure as set out in the Code is followed, including prior consultation with the panel, by the parties involved.

The question then follows if similar provisions apply under our Act, in terms of which the Takeover Regulation Panel (TRP) can be approached to allow a waiver after a whitewash resolution has been passed in similar circumstances involving buy-backs.

**Waiver of mandatory offers under the Act**

The position under the Act is found in the Companies Regulations, 2011, forming part of the Act.

Regulation 86(4) of the Regulations provides that: ‘A transaction is exempt from the obligation to make a mandatory offer following publication by a regulated company of a transaction requiring the issue of securities as consideration for an acquisition, a cash subscription or a rights offer, if the independent holders of more than 50% of the general voting rights of all issued securities of the regulated company have agreed to waive the benefit of such a mandatory offer’ (my italics).

The purpose of the provision is to provide for a whitewash resolution to be passed and for the panel to grant a waiver from the obligation to extend an offer once support is obtained from 50% of the independent shareholders, similar to what is found under the Takeover Code and the SFCH.

The whitewash resolution under the Act, however, is strictly limited to only those three circumstances highlighted above, whereas under the Takeover Code and the SFCH, share buy-backs are specifically referred to and regulated under their respective rules, which means that it cannot, therefore, be relied on to apply for a waiver in these circumstances.

Does this mean then that a waiver from extending a mandatory offer following a share buy-back cannot at all be obtained under SA law?

Section 119(6) of the Act could provide some relief in that it provides the TRP with powers to wholly or partially, exempt parties to an affected transaction (as defined under s 117(1)) from the application of any provision on takeovers and mergers if it can be shown that it will not be prejudicial to the shareholders, it is less costly or that it is both reasonable and justifiable to do so.

This could be the correct approach to follow without losing sight of the fact that the TRP is an administrative body in terms of Promotion of Administrative Justice Act 3 of 2000 (PAJA), and as a consequence, it is bound to always ensure that it obtains the views of all parties that could be affected by its rulings and/or decisions before it makes any decision that is likely to have an adverse effect on the parties involved, which clearly means that 100% support must be obtained from all the affected minority shareholders and not through a whitewash resolution.

This is clearly impossible to achieve for public companies or even for some private companies with large shareholders.

**Conclusion**

The main rationale for a company in embarking on a share buy-back is mainly to protect the value of its shares if same are under-valued while, providing an opportunity for the company to distribute its excess cash to its shareholders.

The main rationale of a mandatory offer on the other hand is to ensure that shareholders are able to exercise ‘freedom of association’ by exiting a company that has a new controlling shareholder and to also benefit from the control premium paid by the new controller.

South African law – as it currently stands – requires an extension of a mandatory offer if the company’s shareholder(s) crosses the 35% threshold, even if this is through a company buying back its own shares with very limited possibilities of the offer being waived.

It is, therefore, incumbent on South African companies and their shareholders to pay attention and ensure that they approach the TRP for advice and guidance before embarking on share buy-backs that could result in such an outcome.

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During a recent roundtable discussion held in London in February, Associate Professor Matteo Winkler of Tax and Law at business school HEC Paris proposed that employers should disclose how much they had paid out to settle sexual harassment claims (Ashleigh Wright 'Employers should disclose sexual harassment claims, says academic' www.personntoday.com, accessed 5-6-2018).

This is an interesting proposal. This article will consider the limits of privacy and confidentiality relating to the settlement of sexual harassment claims and whether the disclosure as suggested by Prof Winkler is workable and justifiable in South Africa (SA)?

The Labour Relations Act 66 of 1995 (the LRA) is supplemented by the notice of code of good practice on the handling of sexual harassment cases (the Code) published in 1998, it provides that employers should create and maintain a working environment in which the dignity of employees are respected. But could the LRA, and indeed the Code, provide further protective measures for employees by making employers disclose financial compensation paid out to employees who claim sexual harassment?

It would be helpful to briefly consider the current context of sexual harassment in the South African workplace. The Code defines sexual harassment as unwelcome conduct of a sexual nature. Du Toit, Godfrey and Cooper et al in Labour Relations Law - a comprehensive guide 6ed (Durban: LexisNexis 2015) writes that sexual harassment is the most widespread form of harassment and has been the subject of extensive analysis and legislative response. This article does not attempt to be a treatise on the subject. The Code identifies examples of sexual harassment, which includes, but are not limited to:

- all unwanted physical contract;
- verbal forms of sexual harassment;
- non-verbal forms of sexual harassment;
- quid pro quo harassment; and
- sexual favouritism.

The implementation of a disclosure system as described by Prof Winkler would further bolster the provisions of the applicable sections of the Constitution, Employment Equity Act 55 of 1998 (the EEA), the LRA and the Code. Such disclosures are easily hidden and silenced by employers and employees who enter into settlement agreements, which is used to silence the victim, where employers hide behind non-disclosure or confidentiality provisions.

When and how settlement agreements are reached

Employers in SA have long used the process of alternative dispute resolution to settle or compromise on a dispute with an employee, who alleges sexual harassment, by another employee. Mediation, and in fact other forms of dispute resolution, including arbitration and negotiation, have often been hailed as an efficient and discreet way of ending a dispute that could otherwise have been a long and costly legal dispute. In fact, item 7 of the Code provides that a dispute of a sexual nature may be resolved in an informal or formal process and may make use of various internal dispute resolution mechanisms, failing which, the complaint employee may approach the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation under s 135 of the LRA. There does not seem to be any bar set...
in regard to employers’ compensating complainants financially for transgressions by other employees. While there are no figures or statistics in this regard to show us that employers do pay out compensation as part of settlements – it is not unthinkably that it happens in reality.

How private is confidential?

It has been long thought that the cornerstone to the dispute resolution process is confidentiality. This aspect of private dispute resolution has made mediation a very attractive form of coming to a settlement, as parties are able to keep sensitive and private matters out of court. The inclusion of a robust confidentiality clause may keep private details of sexual harassment settlements out of the public eye.

Item 8 of the Code provides that matters of a sexual harassment nature must be handled in such a way that the identities of parties are kept confidential and that confidentiality must be ensured during the disciplinary inquiry.

It is trite that during certain dispute resolution processes parties are bound by an agreement not to discuss the process or divulge information to third parties, but when does this limitation and right to privacy end? Put another way, what becomes of confidentiality after dispute resolution has taken place and a settlement has been agreed on, the aggrieved employee who alleged the sexual harassment suffers from a kind of buyer’s remorse? (See Alan Rycroft ‘Legal review of the mandatory mediation process in South Africa’ (2016) 1 Mediation Theory and Practice 79). Could the aggrieved employee claim a myriad of allegations, including but not limited to duress, misrepresentation or undue influence?

The Rules for the Conduct of Proceedings before the CCMA, relating to conciliations were amended during 2015, and r 16 now reads:

1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing or as ordered otherwise by a court of law.

2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation unless as ordered by a court of law.

The effect of this amendment provides that a court of law may order that evidence of what transpired during conciliation proceedings be produced. This means that the dispute resolution process is not afforded absolute privilege such as the attorney-client privilege.

This point was made clear in the recent Constitutional Court (CC) judgment of September and Others v CMI Business Enterprise CC 2018 (4) BCLR 483 (CC) where the court examined the well-established concepts of negotiation privilege, settlement privilege or privilege attached to statements made without prejudice. The CC quoted DT Zeffert and AP Paizes The South African Law of Evidence 2ed (Durban: LexisNexis 2009) at 700: ‘Statements are made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute may not be disclosed in evidence without the consent of both parties.’

However, the court held that statements or admissions made during the course of settlement negotiations, that are unconnected to or irrelevant to the settlement are not covered by the rule.

The court stated at para 70 that the purpose of r 16 was to -

‘promote frank discussion and early settlement of disputes, is properly served by the application of the common law rule of settlement privilege. The interpretation of rule 16, as contended for by the respondent, to impose a blanket ban on the entirety of the content ofconciliation proceedings, does not further promote this purpose, or serve any legitimate purpose.’

The court went on further to state at para 71:

‘There may have been concern about determining the scope of the privilege under the rule with reference to the common law, given that conciliation involves lay people who may not know the common law parameters on privilege. And without legal advice, they could be inhibited from participating freely in the discussions. Since the rule has been amended, parties involved in conciliation would know that whatever is said during conciliation proceedings may be disclosed in subsequent proceedings with their consent or if ordered by a court. It is assumed that such an order would be issued sparingly and where the interests of justice warrant disclosure.

It is clear now that statements or communications by parties during a settlement or conciliation may be disclosed by means of a court order. In fact, the CCMA rules allow that the commissioner may even be called as a witnesses should the interest of justice allow. If the idea of in the interest of justice is used as the test for disclosures, should legal practitioners not make the extrapolation that the disclosures of financial settlements - by employers to claimants - would be in the interest of justice as proposed by Prof Winkler. The penalty of making such a disclosure would mean that the writing would be on the wall for those perpetrators and employers who do not take the curbing of sexual harassment seriously. An employer may be liable under s 60 of the EEA for having failed to take reasonable steps to protect an employee on becoming aware of circumstances of sexual harassment at work by another employee, as was the case in Liberty Group Limited v M (2017) 38 ILJ 1318 (LAC).

In reality though an employer’s astute legal adviser would ensure that the settlement agreement disallows the complainant from pursuing further legal remedies as it is in ‘full and final’ settlement.

Prof Winkler states that employers may lie about how many sexual harassment cases they have settled to keep their reputation and public image untarnished and submits that it would be very difficult to hide these settlement agreements if financial compensation was made to the victim and reflected in financial accounts (Wright (op cit)). In other words, Prof Winkler envisions a more rigorous financial auditing and recordkeeping by companies who wish to meet the compliance guidelines of regulatory bodies, such as perhaps the Department of Labour or the South African Revenue Service.

A new way forward

With recent cases such as Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC), there seems to be a push for parties in negotiations to act in good faith. The court held that there was a duty to negotiate in good faith – to the extent that the common law was at odds with this view, it argued, the common law required development in accordance with s 39(2) of the Constitution.

I submit that the legal principles of settlement agreements and negotiation may be pushed towards transparency if it is built on the principle of contractual good faith, as envisioned by the CC in watershed cases such as Everfresh. Perhaps this further step of obliging employers to be transparent and disclose settlement amounts would be an additional arrow in the quiver of complainants and a deterrent for employers who do not offer adequate protective measures for employees.

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

Ministerial authorisation necessary for future financial commitment: The interpretation of two provisions of the Public Finance Management Act 1 of 1999 (the Act) was at the centre of the appeal in Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation 2018 (3) SA 90 (SCA). These sections are:

• Section 66, which deals with the restrictions on borrowing, guarantees and other financial commitments by government, an organ of state or a public entity listed in sch 3 to the Act.

• Section 68, which governs the consequences of unauthorised transactions.

Section 66(1) read with s 3(3)(c) provides that only with ministerial authorisation may an institution enter a transaction binding itself to a future financial commitment. The appellant (Waymark), was the successful bidder in a public tender process administered by the respondent, the Road Traffic Management Corporation (RTMC), to develop and install an ‘Enterprise Resource Planning System’. The RTMC is an entity listed in sch 3 to the Act and is thus bound by the provisions of the Act. The parties concluded a contract on 31 March 2009. It made provision for various services to be rendered over a three-year period, and included a schedule for the payment of remuneration, the full contract sum being some R 33,7 million.

RTMC later repudiated the contract and Waymark sued for damages. RTMC counter-claimed that the agreement was unenforceable, because

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Abbreviations
CC: Constitutional Court
ECM: Eastern Cape Local Division, Mthatha
G: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal, Local Division
NCK: Northern Cape Division, Kimberley
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law
District Director must act within powers when placing learners at schools: The facts in Governing Body, Hoërskool Overvaal and Another v Head of Department of Education Gauteng Province and Others [2018] 2 All SA 157 (GP) were as follows: The second applicant (the school) was an Afrikaans-medium public school. The first applicant was the school’s governing body (the SGB). The first four respondents were the relevant provincial and national government officials. In essence, the school sought the reviewing and setting aside of an instruction issued by the District Director (the second respondent) to the school to admit 55 English-speaking Grade 8 learners for the 2018 school year.

The school was located in the Vereeniging District in which there were five other high schools in relatively close proximity to each other. The applicants alleged that the school was operating beyond its capacity, while the respondents contended that the school had not yet reached full capacity and could accommodate more learners in 2018. One of the main areas of dispute related to the number of learners per class, which ought to be accommodated. There were currently 36 learners per class, but the respondents contended that there should be 40.

Regulations relating to the admission of learners to public schools (the Regulations) were promulgated under the Gauteng Schools Education Act 6 of 1995 (the Act).

Prinsloo J pointed out that in terms of the Regulations, the second respondent, in placing a learner at a particular school, had to consider the proximity of the school from the learner’s home, and the capacity of the school to accommodate the learner, relative to the capacity of other schools in the district. Of all the high schools in the area in this case, only the second applicant and one other were single-medium Afrikaans schools.

Relevant to the dispute regarding capacity, was evidence that neighbouring English-medium schools (the sixth and seventh respondents) had capacity to accommodate more than 55 Grade 8 English-speaking learners for 2018. In addressing the subject of capacity, the court had regard to the Regulations.

Regulation 5(6) provides that notwithstanding the school’s admission policy, where a learner has not been placed at any school within 30 days after the end of the admission period, the District Director may place such learner at any school, which has not been declared full and in respect of which there are no remaining unplaced learners on a waiting list. It was found that the first respondent, who was the only official authorised to determine the objective entry level learner enrolment capacity, never determined such capacity. The court reasoned that the school had reached its capacity and ought to be declared full. The first and second respondents had also not considered the capacity of the school relative to other schools in the district.

The court considered a number of issues regarding language policy and legality. Suffice it to mention here that the court held that the second respondent’s decision, in forcing the single-medium Afrikaans school to place the 55 English-speaking learners at short notice and in the face of compelling evidence that the school was full to capacity, was found to have ignored the general norms and standards pertaining to language policy in terms of s 6 of the South African Schools Act 84 of 1996.

There was no authority on which the second respondent could justify having overridden the school’s language policy. In doing so, she had exceeded her powers, and her decision was in conflict with the constitutional principle of legality and thus illegal. The respondents’ instruction to the school was unlawful and set aside.

Because of the manner in which the respondents chose to litigate this matter, the court made a punitive costs order against them.
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of non-compliance with s 66 of the Act. The High Court held that because the contract was not authorised, it was invalid.

On appeal to the SCA, RTNC argued that since only the financial year in which the contract was concluded (2008/2009) had a specified budget allocation, any undertaking to pay for services in a later year amounted to a future financial commitment. The RTMC relied on Putco Ltd v Gauteng MEC for Roads and Transport (GP) (unreported case no JDR 0756, 2016), in which the court endorsed the view of arbitrators that if a contract was concluded in a subsequent financial year, it is a future financial commitment.

Lewis JA rejected this argument and pointed out that the Putco case did not concern procurement. The court reasoned that one should rather consider the design and purpose of ss 66 and 68 of the Act. It held that it is plain that s 66 does not apply to procurement contracts that follow on a proper process, and that do not embody loans, guarantees or the giving of security, even though they extend beyond one financial year. The contract in question did not amount to ‘any transaction that binds or may bind that institution ... to a future financial commitment’. It was a present commitment to pay for professional services as they were rendered, albeit over a three-year period.

The court concluded that the agreement did not involve a future financial commitment to pay for Waymark’s services, continuing over three years.

The appeal was accordingly upheld and the High Court order set aside, and substituted with an order dismissing RTM’s counterclaim.

Scope of powers: In June 2017 the Public Protector (the PP) issued a final report in which she prescribed certain remedial actions regarding the recovery of R 3.2 billion, which the South African Reserve Bank (the SARB) during the 1980s had lent, but improperly failed to recover from Bankorp Ltd/Absa. The remedial actions prescribed by the PP in para 7.1 of her report included that the matter be referred to the Special Investigating Unit (SIU) to approach the President to re-open and amend proclamation R47 of 1998 (‘Special Investigating Units and Special Tribunals Act 74/1996’): Referral of matters to existing Special Investigating Unit and Special Tribunal: South African Reserve Bank; Maladministration’ (GNR 46 GCI8893/7-5/1998) to recover the misappropriated public funds given to Absa. However, the matter concerning the possible recovery of the alleged misappropriated fund had already been investigated in 1998 in terms of the above proclamation by the Heath Commission. The Heath Commission had recommended that the money could not be recovered.

The PP’s report came under judicial scrutiny in ABSA Bank Ltd and related matters v Public Protector and Others [2018] 2 All SA 1 (GP). The first applicant (Absa), as well as the other three applicants, namely SARB, the Minister of Finance and the National Treasury, instituted review proceedings, challenging paras 7.1.1, 7.1.1.1 and 7.1.2 of the PP’s report. The applicants brought the present appeal for review under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in the alternative in terms of the principle of legality.

Absa’s grounds of review were based, first, on the argument that the PP was not authorised, either by the Public Protector Act 23 of 1994 (the PP Act) or any other law, to make the referral to the SIU in terms of para 7.1 of her report. Secondly, they argue that her conduct was illegal, and finally, the process she followed in making her recommendations was procedurally unfair. In short, the first two grounds of review relate mainly to the unlawfulness of the remedial action and the third pertains to the procedure followed by the PP.

The court, in a joint judgment, held that conduct by an organ of state (such as the PP) does not need to ‘adversely affect’ someone’s right for it to qualify as an administrative action under PAJA. PAJA also applies where an organ of state ‘determines someone’s rights’. Further, the language in which the remedial action is formulated is peremptory, which emphasises its administrative nature.

Judicial review is in essence the judicial detection and correction of maladministration. Section 6(4)(c) of the PP Act merely empowers the PP to bring a matter to the attention of the SIU. It does not empower her to be prescriptive or to instruct the SIU as to how to deal with the matter she brings to its attention. The PP thus acted in a manner inconsistent with the provisions of the Constitution and the PP Act by placing a duty on the SIU to re-open the investigation and to recover the misappropriated public funds from Absa.

Further, the remedial action referred to in para 7.1 was also ultra vires the Special Investigating Unit and Special Tribunals Act 74 of 1996 (SIU Act). The PP placed a duty on the SIU to approach the President in terms of s 2 of the SIU Act to reopen the investigation in terms of the proclamation. But s 2 of the SIU Act does not provide for the SIU to approach the President with such a request. The SIU is thus not authorised by statute to do so, and the PP cannot instruct the SIU to perform an ultra vires function.

The remedial action prescribed by the PP was also illegal, because the President has in any event no power under the SIU Act to reopen a completed investigation. The PP, had therefore, imposed remedial action on the President and the SIU that was unlawful. The remedial action was, therefore, reviewed and set aside under ss 6(2)(d) and 6(2)(f) of PAJA.

The court made different costs orders in respect of each of the four applications. Suffice to mention here that the PP, in her official capacity was ordered to pay 85% of the costs of the application by the SARB on an attorney and client scale, and the balance of 15% in her personal capacity.

See also ‘Banking law’ 2018 (Jan/Feb) DR 41 for the matter of South African Reserve Bank v Public Protector and Others 2017 (6) SA 198; [2017] 4 All SA 269 (GP).

Attorneys

Validity of contract of articles of clerkship: In Ndung’a v Cape Law Society [2018] 2 All SA 250 (ECM) the applicant entered into a contract of articles of clerkship with an attorney in Mthatha. She completed the requisite period of articles. Thereafter, she sought to be admitted as an attorney of the court. Her application was opposed by the
respondent (the provincial law society). It argued that the attorney with whom the contract had been entered was not in possession of a Fidelity Fund Certificate on that date, and he was thus not entitled in law to act as a practitioner.

The crisp issue was whether the contract of articles was valid or whether it was void by virtue of the circumstances in which her principal was practising when the contract was entered into.

Brooks J pointed out that the Attorneys Act 53 of 1979 regulates the requirements for practise as an attorney. The issue at stake concerned the effect of non-compliance by an attorney with one or more of the relevant rules of the provincial law society, which has the effect of denying the attorney a qualification for the issue of a Fidelity Fund Certificate. There is an important distinction between a person who purports to act as a practitioner, on the one hand, and a practitioner who practises without being in possession of a Fidelity Fund Certificate, on the other hand. The distinction recognises that although it constitutes an offence, the practice by a practitioner of his profession without a Fidelity Fund Certificate does not have the effect of invalidating that practice. It further does not reduce the attorney to the status of one who purports to act as a practitioner. The Act does not provide for the automatic suspension or invalidation in any way of the practice of an attorney where such practice is conducted without a Fidelity Fund Certificate.

The applicant had followed all the steps required of her for her admission to the profession. Her registration of her articles of clerkship was not objected to by the provincial law society, and objections were only raised after she had completed her period of clerkship.

The court granted an order admitting the applicant as an attorney of the court. As a mark of the court's censure of its conduct, the provincial law society was directed to pay the costs of the application on an opposed basis and on the scale as between attorney and client.

**Civil procedural law**

**Common-law grounds for rescission application:** In *Moshesh and Another v FirstRand Bank Ltd and Others* (2018) 2 All SA 236 (GJ) the applicants, a married couple, sought condonation for the late filing of their application for rescission of a court order obtained against them by default of their appearance in court when their case was called. In addition, they sought to have the order rescinded. The order concerned a loss of their primary residence which was situated in Benoni.

The case has a long and tortuous history. In 2006 the applicants concluded a loan agreement with the first respondent bank (FirstRand) in order to purchase a home. The property was pledged as security for the loan, but the address was incorrectly recorded in the loan agreement. The applicants alerted both FirstRand and the conveyancing attorney (which was appointed by FirstRand) of this error. The attorney advised them that the error was of no consequence since the property was correctly described on the title deed issued by the Registrar of Deeds. The error later proved to have a serious practical consequence for the applicants. They fell in arrears with the repayment of the loan, and they successfully applied to have themselves declared over-indebted in terms of the National Credit Act 34 of 2005 (the NCA). In June 2010, an attorney of FirstRand issued notice in terms of s 129 of the NCA, which notice came to the attention of the applicants. They informed the attorney that they were under debt review. Notwithstanding, FirstRand issued a summons against the applicants. The summons was sent to the wrong address and never reached the applicants. They were thus unaware that FirstRand obtained default judgment against them.

An order was granted against the applicants by the Registrar of the court as a result of their failure to answer to the summons issued against them. They then brought an application for rescission of the order issued by the Registrar. Their application was opposed by FirstRand and the subsequent owners of the property (the seventh to fourth respondents). They failed to make an appearance when the matter was called in the Opposed Motion Court, and so their application was dismissed. This prompted them to bring the present application to rescind that order.

First, Vally J pointed out that while the court in question had issued a default order, which dismissed the applicants’ rescission application, the order was made without going into the merits of the dispute and without making any findings on the merits. The only avenue open to the applicants was to have the order rescinded.

Secondly, the court considered the question of whether the order should in fact be rescinded. As the applicants relied on the common law, it was necessary to consider whether they had shown good cause for the rescission. To succeed on that basis, they had to at least provide a reasonable explanation of their default, show that the application was bona fide, and show that they had a bonafide case, which prima facie would succeed in setting aside the order of the Registrar.

It held that the application was bona fide. The applicants had done everything that could be expected of them. The order granted by the Registrar had been issued without them ever being given an opportunity to present their case as they were never served with the summons. Further, the execution process took place without any judicial oversight. The CC has held that the Registrar does not have to power to issue an order declaring a person’s home to be executable. The applicants had lost their primary residence, which prima facie appeared to have occurred through unlawful means or to have occurred in unfair and unjust circumstances.

The judgment and order in question was thus rescinded and set aside. FirstRand was ordered to pay the cost of the present application.

**Company law**

**Duration of business-rescue proceedings:** In *South African Bank of Athens Ltd and Zennies Fresh Fruit CC and a related matter* (2018) 2 All SA 276 (WCC); 2018 (3) SA 278 (WCC), the court considered two applications, which concerned the same respondent (Zennies). Each of the applicants (the bank and business partners) sought a declaratory order that the business rescue proceedings in respect of Zennies had ended or lapsed in terms of s 132(2)(c)(ii) of the Companies Act 71 of 2008 (the Act). Zennies, in turn, denied that the business rescue proceedings had been terminated and averred that the applicants were not entitled to proceed against it in terms of s 133 of the Act, which section places a general moratorium on legal proceedings against a company in those circumstances.

Although the decision turned on a number of aspects relevant to business rescue proceedings, the present discussion will be restricted to one of these aspects only, namely the duration of business rescue proceedings. Suffice it to mention here that one of the disputes between the parties turned on the question whether a final business-rescue plan had been accepted and approved by all the relevant parties.

In deciding whether the business rescue proceedings had terminated or whether Zennies was still under business rescue, Kusevitsky AJ had to determine whether it was agreed to amend the plan as contemplated in s 132(1)(d)(ii) without rejection of the plan; whether if the plan was rejected, a further step was taken within the ambit of s 132(2)(d)(ii) thereby preventing the termination of the business rescue proceedings; and whether, if a further step within the contemplation of s 132(2)(d)(ii) was taken, the business rescue still automatically terminates if the business rescue practitioner fails in any of his other statutory obligations.

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The salient question was whether the fact that no vote was taken to approve the plan at the second meeting justified a conclusion that the plan was rejected as envisaged by s 152(3)(a) of the Act.

The court held that a substantial degree of urgency was envisaged once a company decided to adopt the relevant resolution beginning business rescue proceedings. Although the main aim of business rescue was to avoid liquidation proceedings, it does not mean that an extraordinary amount of time must be allowed to achieve that, at the expense of creditors' rights. The mechanisms of business rescue proceedings were not designed to protect the company indefinitely to the detriment of the rights of its creditors. Where, as here, the practitioner was not making progress (as far as the court could ascertain) in securing the specific information required to finalise the amended plan for consideration, the practitioner was under a statutory duty to file a notice of termination.

The delay in the finalisation of the business rescue proceedings were unreasonable in the circumstances and the court ordered the termination of the proceedings.

Consumer law

Removal of debtor's records of over-indebtedness with credit bureau: The facts, which led to the decision in Phaladi v Lampaci 2018 (3) SA 265 (WCC) were as follows: The applicant (Phaladi) applied to a debt counsellor in terms of s 152(3)(a) of the NCA to declare over-indebted in terms of the National Credit Act 34 of 2005 (the NCA). An application to the magistrate's court for a debt-rearrangement order did not follow, however, as a voluntary rearrangement was agreed with the creditors pursuant to a recommendation by the debt counsellor in terms of s 86(7)(b) of the NCA. The applicant satisfactorily adhered to the payment agreement up to the extent that he claimed that he was financially sound, and in a position to demonstrate that he was able to punctually fulfil his outstanding obligations. He alleged that it would have been reasonable in the circumstances for his records at the credit bureau to be expunged so that he would be enabled to responsibly incur additional obligations by entering into fresh credit agreements.

The applicant accordingly applied to the High Court for an order declaring that he was no longer over-indebted and that his adverse credit record with the credit bureau be expunged. None of the existing creditors opposed the application.

Binnings-Ward J pointed out that a similar application was refused in an unreported matter in the WCC, but allowed in at least three unreported High Court cases in Gauteng. The WCC reasoned that a relief sought was inconsistent with the scheme of the NCA. It held that debt counsellors enjoyed no power under the NCA to release a debtor from debt review proceedings. The court held that s 71 of the NCA did not afford an adequate remedy in the circumstances to expunge the record that the applicant was in debt review.

In the Gauteng decisions the court emphasised that the High Court has 'wide powers' to grant the relief sought by the applicants, but without providing any foundation for such powers in the NCA.

In the Phaladi case the court held that the High Court has 'wide powers' to grant the relief sought by the applicant, but without providing any foundation for such powers in the NCA.

Pillay J dismissed the application on a number of grounds. The present discussion will focus on one of these grounds. At the heart of the present action was the quality and quantity of a written agreement on the basis of which the plaintiff claims payment of an amount of R 559 817,45 as the cost of repairing the vehicle, that was damaged while it was in the possession of the deceased.

The court held that the Consumer Protection Act 68 of 2008 (the CPA) applied to the present agreement, and the form and content of the agreement infringed the rights in ss 22, 40 and 48 of the CPA, namely, the consumer's right to information in plain and understandable language; not to be subject to unconscionable conduct; and against suppliers entering or administering transactions in an unfair, unreasonable or unjust manner.

The action was accordingly dismissed with costs.
that the property be transferred to it. Leave to appeal to a Full Bench was, however, granted.

Olivier J held that the result of the non-fulfillment of a suspensive condition was that the contract had to be regarded as if it never existed. The non-compliance with clause 4 meant that the sale never came into operation. The finding of the court a quo that the letter of 15 February constituted a 14-day extension of the period for the fulfilment of clause 4 was, thus incorrect. In any event, after having lapsed, the sale could not have been ‘revived’ by waiver in the manner held by the court a quo. Any ‘new’ agreement based on the letter of 15 February would have had to have been in writing and signed by both parties. There was no allegation that the alleged acceptance of the ‘offer’ contained in the letter of 15 February was also in writing. In fact, on all indications the acceptance was not made in writing.

Equity played no role in circumstances such as the present, the only relevant consideration being the intention of the parties at the time of contracting, which was that the purchaser would obtain a loan for the full purchase price within the stipulated period. Since the purchaser did not comply, the sale had failed, and the court a quo should on this basis have dismissed the application.

The appeal was thus upheld with costs.

**Lease**

**Effect on validity of lease where building plans were not approved:** The facts in *Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc* 2018 (3) SA 95 (SCA) were as follows: The appellant (Wierda) owned a building and leased it to the respondent (Gobodo). Wierda had no approved building plan or occupancy certificate for the building and, as a result, failed to comply with ss 4(1) and 14(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act). Gobodo failed to pay the rent and Wierda instituted action against Gobodo, for the amount of R 7.8 million in respect of rentals and municipal charges for the lease of a property in Houghton, Johannesburg (the property). The High Court dismissed the action with costs and held that the lease was valid, but unenforceable.

On appeal to the SCA Majiedt JA held that the lease was valid and enforceable. The court reasoned that ss 4(1) and 14(1)(a) did not apply. First, s 4(1) applies to a person who erects a building. And the penalty provision in s 4(4) also refers to any person erecting any building. Wierda did not ‘erect’ the building in question, within the definition of the word ‘erection’ in s 1.7. This much was common cause. Secondly, s 14(4)(a) deals with instances of occupancy without an occupancy certificate, but where there are approved plans in place. Because there were no approved plans in the present case, s 14(4)(a) was not applicable.

Further, so the court reasoned, even if these provisions of the Act did apply, the absence of an approved building plan and certificate did not invalidate the contract. It pointed out that the legislature did not intend a further sanction of invalidating agreements, which contravene the provisions of the Act over and above the penal sanction contained in s 4(4). This conclusion is supported by the nature of the penalty in s 4(4). Provision is made for a maximum fine of ‘R 100 for each day on which [a person] was engaged in so erecting such building [without plans]’. The longer the period of transgression, the harsher the penalty. And this is something, which cannot be achieved through invalidating a private contract.

The High Court’s order was thus set aside, and substituted with an order that Gobodo had to pay the rental and municipal charges.

**Sale of land – Eviction of squatters**

Duty on seller to evict squatters: The decision in *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* 2018 (3) SA 65 (SCA) concerned the reciprocity of performances in terms of a sale of land. The facts were as follows: In March 2009 the respondent (the seller) sold land to the appellant (the purchaser) for R 112 million. In terms of the agreement the purchaser, who had already paid a non-refundable sum as deposit, would pay a balance of some R 52 million on transfer, and the remainder of the balance in 30 monthly instalments thereafter. Although the contract provided that the seller would provide possession of the property, both parties were aware that there was a large number of squatters on the property. They were still there when the property was transferred to the purchaser on 7 May 2009. To address the issue, the parties on that same day signed an ‘indemnity and undertaking’ (I&U) in which the seller undertook to evict the squatters – at its own expense – by 31 August 2009, and to indemnify the purchaser against any claims or expenses resulting from the eviction. When no eviction materialised, the purchaser refused to pay the outstanding balance. The seller instituted action, claiming the outstanding balance, and the purchaser counterclaimed for damages resulting from the unlawful occupation of the property, which supposedly rendered it completely valueless. The purchase argued that since the parties’ obligations were reciprocal, it was not obliged to pay. In response the seller argued that its obligation to provide vacant possession under the agreement of sale was replaced by an obligation under the I&U to take steps to lawfully evict the squatters, which it had done. The purchaser argued that the I&U had merely postponed the obligation to give vacant possession to 31 August 2009. The High Court found in favour of the seller. In an appeal to the SCA the court had to decide whether –

- the purchaser was entitled to vacant occupation; and
- whether it had to pay the balance of the purchase price.

Tshiqi JA held that the objective of the I&U was to provide vacant occupation. The purchaser’s obligation to pay the balance of the purchase price depended on the applicability of the exception non adimpleti contractus, which would operate if the agreement were such that it contemplated an exchange of performances for the general principles of the exception. While the present agreement did create bilateral obligations, dismissal of the eviction application on the ground of the seller’s malperformance was, in the light of the purchaser’s election to persist in the agreement, not a suitable remedy.

The court accordingly decided to rather grant judgment in favour of the seller, on condition that the seller first evicted the occupiers. Since no evidence was led regarding the market value of the property at the relevant times, the counterclaim was dismissed.

**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, children, company law, constitutional law, contracts, criminal law and procedure, environment, hate speech, jurisdiction, land reform, marriages, practice and pleadings, property, restraint orders, tax, and vexatious proceedings.

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**LAW REPORTS**

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Despite 24 years of democracy and progressive South African legislation, racial and gender discrimination remain a reality in many South African workplaces. The media regularly reports on incidents where black and female employees have endured humiliating and degrading experiences of racism or sexism, or even both.

Recently Ms Adila Chowan, an Indian South African woman who is also a chartered accountant with extensive experience in the corporate world, both locally and overseas, made headlines when she sued a major corporation in the High Court after being repeatedly overlooked for a position for which she was eminently qualified. The recent judgment, *Chowan v Associated Motor Holdings (Pty) Ltd and Others* [2018] 2 All SA 720 (GJ) highlights the real challenges of eradicating systemic discrimination and inequalities in South African workplaces.

Chowan successfully sued her employer, Associated Motor Holdings (AMH), AMH’s CEO, Mr Mark Lamberti, and Imperial Holdings Limited (Imperial) for damages.

**Assurances made at the outset**

In 2012, Chowan was head-hunted by AMH for the group financial manager position. She accepted the group financial manager position, subject to the assurance that there will be opportunities for growth and career progression and, ultimately, the opportunity, in the future, to become chief financial officer. The chief financial officer at the time, a Mr Hibbit, was to groom Chowan for the chief financial officer position.

After Hibbit had resigned from AMH, Chowan fulfilled her own duties as group financial manager and those of the chief financial officer. Hibbit recommended Chowan for the chief financial officer position and required her to undergo a psychometric test to determine any gaps for development. She underwent the psychometric test, but was never informed about any such gaps.

AMH advertised the chief financial officer position, and Chowan, who was the only black candidate, applied and was interviewed. She was further interviewed by Lamberti who, at the end of the interview, apparently, informed Chowan that she would not be appointed chief financial officer. Lamberti professed Chowan that if she gave her full support to the new chief financial officer whom he appointed, ‘he promises [her] a career path within one year’ and that she would be ‘properly compensated’. Mr Ockert Janse van Rensburg was appointed chief financial officer in early January 2015.

Chowan, feeling aggrieved and disappointed, tendered her resignation, but withdrew it after Lamberti reassured her that she had career progression within the Imperial Group and would be appointed chief financial officer.

**From bad to worse**

Things did not improve for Chowan. Her relationship with Janse van Rensburg became tense. At one stage, Chowan was given a brown-colour company car. When she complained to Janse van Rensburg about the car’s colour, he replied that the brown colour suited the colour of her skin. Chowan felt degraded by those remarks.

Later on, Lamberti and Janse van Rensburg had a meeting where they discussed Chowan’s suitability to become chief financial officer. Janse van Rensburg told Chowan afterwards that Lamberti’s view was that Chowan ‘would never be a CFO in the Imperial Group’, as Lamberti did not believe she had what it takes to be one, ‘and that she should be moved to another part of the AMH group.’ Lamberti had also referred to Chowan as the ‘affirmative action candidate’.

Chowan was upset by these remarks and met with Lamberti. He told Chowan ‘that she is a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go – others have left his management and done better outside the company – and that she required three to four years to develop her leadership skills.’ Chowan felt she was discriminated against based on race and gender, and demanded that Lamberti apologise and honour the promises he had made to her.

Chowan later lodged a grievance against Lamberti with Thulani Gcabashe, the chairman of Imperial. Prior to doing so, Chowan had discussed the matter with another employee, a Mr Koornhof, who apparently warned Chowan that it would be a ‘career limiting move for her if [she] raised a grievance against a powerful man like Mr Mark Lamberti’. Nonetheless, Chowan was undeterred.

After an investigation to determine if Chowan’s grievance had merits, Gcabashe concluded that it had none, and that her assertions against Lamberti were unfounded. She was suspended from employment, subjected to a disciplinary inquiry, where she was subsequently found guilty, and summarily dismissed. She was marched out of AMH’s offices and her laptop and office keys were taken from her in the presence of other employees. Chowan felt she was being victimised and that the real reason for her dismissal was that she had blown the whistle to Gcabashe, exposing workplace discrimination.

Chowan then sued AMH, Lamberti and Imperial for damages. She asserted that her rights to equality and non-discriminatory treatment was violated, and that she was subjected to disciplinary action and dismissed contrary to whistle-blowing legislations. She claimed AMH and Lamberti had a legal duty to protect her from being exposed to racial and gender discrimination in the workplace and breached their legal duty not to subject her to occupational detriment (namely, disciplinary action and dismissal).

**Systemic discrimination must be eradicated**

In a highly critical judgment, the High Court judge concluded there was great public interest in ensuring eradication of systemic discrimination and inequalities. AMH, as Chowan’s employer, had a duty to ensure that Chowan was not subjected to occupational detriment on account of a protected disclosure she made to Gcabashe. The court found that the disclosure was made in good faith, that Lamberti’s racist and sexist comments infringed on Chowan’s right to human dignity, and that all she wanted
was for Lamberti to apologise and keep the promise he made to her. AMH was liable to Chowan for damages as AMH had failed in its duty.

In relation to the second component of the claim, that Chowan’s reputation has been injured, Meyer J concluded that Chowan had been insulted as she was a qualified, professional chartered accountant with extensive experience and achievements whom has held various top positions at influential companies.

The remarks about her made her feel as if she was only appointed to the position at AMH because she was a ‘female empowerment equity candidate’. Accordingly, she succeeded in her claim that her dignity had been impaired. The court has yet to determine the amount of damages, but Chowan is reportedly claiming some R 28 million for loss of earnings and impairment to her dignity.

Lessons for employers

While the judgment highlights real challenges in eradicating systemic discrimination and inequality in South African workplaces, it also provides important lessons for employers and it serves as a textbook example of what employers should not do.

Chowan’s legal claim was based on contract law and the common law of delictual liability and, surprisingly, not on statute such as the Employment Equity Act (EEA) of 1998 (EEA), Sections 5 and 6(1) of the EEA expressly require employers to take steps to promote equal opportunity by eliminating unfair discrimination in any employment policies or practices. An employer that fails to do so may be held liable for non-compliance and be ordered to pay damages.

Officials and other employees of a company should refrain from making degrading discriminatory remarks against other employees. Companies will be jointly and severally liable with their employees for any of their employees’ conduct that amounts to unfair discrimination. For example, s 60 of the EEA makes express provision for the liability of an employer for breach of the provisions of the EEA unless the employer proves that it did all that was reasonably practicable to ensure that its employees do not contravene the EEA provisions. In the context of this judgment, what was significant was that Chowan was only subjected to disciplinary action, suspended from her employment and eventually dismissed. Lamberti and Janse van Rensburg were not subjected to suspension or disciplinary action.

The evidence presented at court strongly suggests that Chowan was repeatedly overlooked for the position of chief financial officer, primarily on impermissible grounds such as race and gender. This was supported by various inappropriate, humiliating and degrading utterances and unfulfilled promises and assurances attributable to Lamberti.

By
Janus Olivier

Evolution of Customary Marriages

Ramuhovhi and Others v President of The Republic of South Africa and Others 2018 (2) SA 1 (CC)

One of the reasons for the enactment of the Recognition of Customary Marriages Act 120 of 1998 (the Act) was to provide for the equal status and capacity of spouses in customary marriages. Since its commencement on 15 November 2000, it has been on the receiving end of criticism for having the opposite effect.

According to s 7(2) of the Act a customary marriage entered into ‘after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss’. This rule applies unless such consequences are specifically excluded by the spouses in an antenuptial contract. As a result, spouses, who were married in terms of the Customary Law – after the commencement of the Act – have enjoyed the benefit (or disadvantage) of community of property. The benefit of community of property has not been available to spouses who were married before the date of the commencement of the Act. In addition, s 7(1) led to unhappiness among spouses, who got married before the Act came into operation, because in terms of that section, customary marriages entered into before the commencement of the Act continued to be governed by customary law.

This imbalance was addressed by the Constitutional Court (CC) in Gumede v President of The Republic of South Africa and Others 2009 (3) SA 152 (CC). The words ‘entered into after the commencement of this Act’ were declared inconsistent and invalid with the Constitution. The effect of the judgment was that monogamous customary marriages were to be treated as being in community of property, irrespective of whether they were entered into before or after the commencement of the Act. Unfortunately, the decision restricted to monogamous customary marriages and did not affect the legal consequences of acts or omissions before the order was made.

It is only in more recent times that issues surrounding polygamous customary marriages enjoyed legal scrutiny. As a starting point one should take note of s 7(6) of the Act, which provides that: ‘A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract, which will regulate the future matrimonial property system of his marriages’.

In the case of MN v MM 2012 (4) SA 527 (SCA) the court declared that noncompliance with s 7(6) does not render the subsequent marriage void, but results in the marriage being out of community of property.

Again, as was the case with s 7(2), the phrase ‘entered into after the commencement of this Act’ created a prejudicial situation for spouses, who were married before 15 November 2000. Only after 18 years the CC has given practitioners clarity on the marriage regime applicable to polygamous customary marriages entered into before the commencement of the Act, and the effect thereof on matrimonial property. This relief came in the case of Ramuhovhi and Others v President of The Republic of South Africa and Others 2018 (2) SA 1 (CC). In this case the court, at para 71, made the following order:

(a) Wives and husbands [of polygamous customary marriages] will have
joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows:

(i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the whole family constituted by the various houses.

(ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(b) Each spouse retains exclusive rights to her or his personal property.

With regard to family property, one might be excused from foreseeing the possibility of disputes between families, if they all have equal rights of management and control over such property.

Section 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 provides some relief in the case of deceased estates. This section gives a Master, with jurisdiction, the authority to make a ‘just and equitable’ determination to resolve a dispute regarding the devolution of family property.

According to the Ramuhovhi case, the declaration of constitutional invalidity was suspended for 24 months to afford Parliament an opportunity to correct the defect. In the event that Parliament fails to address the defect as set out above the order above would prevail indefinitely.

What makes this judgment more noteworthy is that the CC (other than in the Gumede case) gave s 7(1) of the Act a retrospective effect. The court declared that the order in the Ramuhovhi case would not invalidate the winding-up of a deceased estate that had been finalised, or the transfer of marital property, that had been effected. The above does not apply to any transfer of marital property where, at the time of transfer, the transferee was aware that the property concerned was subject to a legal challenge on the grounds on which the applicants in the Ramuhovhi case brought the challenge. Because the order may have unforeseen prejudicial repercussions, the CC invited any interested parties to approach the court for a variation of the order if a party suffers harm not foreseen in the judgment.

Conclusion
Practitioners are warned to tread cautiously when entering the customary marriages minefields. One should also take heed of the special customs connected to the culture of the client.

Janus Olivier LLB (NWU) is a candidate attorney at Van Velden-Duffey Inc in Rustenburg.

New legislation
Legislation published from 25 April – 30 May 2018

Philip Stoop is an associate professor in the department of mercantile law at Unisa.

Bills
- Basic Conditions of Employment Amendment Bill B30A of 2017
- Communal Property Associations Bill B12A of 2017
- Critical Infrastructure Protection Bill B22A of 2017
- iKamva National E-Skills Institute Bill B10 of 2018
- Labour Relations Amendment Bill B32A of 2017
- Labour Relations Amendment Bill B32B of 2017
- National Minimum Wage Bill B31A of 2017
- National Minimum Wage Bill B31B of 2017
- National Research Foundation Amendment Bill B23B of 2017
- Plant Breeders’ Rights Bill B11C of 2015
- Plant Breeders’ Rights Bill B11D of 2015
- Plant Improvement Bill B8C of 2015
- Plant Improvement Bill B8D of 2015
- Electricity Act 41 of 1987
- Licence fees payable by licensed generators of electricity. GN474 GG41615/8-5-2018.
- Electronic Communications Act 36 of 2005
- Amendment of the End-user and Subscriber Service Charter Regulations. GenN233 GG41613/7-5-2018.
- Labour Relations Act 66 of 1995
- Variation of designation of certain services as ‘essential services’ and designation of certain services as ‘essential services’. GenN237 GG41621/11-5-2018.
- Landscape Architectural Profession Act 45 of 2000
- Liquor Products Act 60 of 1989

Selected list of delegated legislation
- Agricultural Produce Agents Act 12 of 1992
- Agricultural Pests Act 36 of 1983
- Amendment of rules relating to importation of controlled goods without a permit. GN R482 GG41622/11-5-2018.
- Compensation for Occupational Injuries and Diseases Act 130 of 1993
- Annual increase in medical tariffs for medical service providers. GenN213 to GenN217 GG41596/25-4-2018 (also available in Afrikaans).
- Deeds Registries Act 47 of 1937
- Amendment of regulations. GN R557 GG41669/31-5-2018 (also available in Afrikaans).

Conclusion
Practitioners are warned to tread cautiously when entering the customary marriages minefields. One should also take heed of the special customs connected to the culture of the client.

Janus Olivier LLB (NWU) is a candidate attorney at Van Velden-Duffey Inc in Rustenburg.
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DE REBUS - JULY 2018
Double jeopardy

In Mahlokouane v South African Revenue Service [2018] 4 BLLR 337 (LC), the employee, while living with her husband and two minor children, applied for and received child support grants because she was unemployed. Six years later, the employee was employed by the South African Revenue Service (Sars) and consequently was no longer entitled to receive the grants, this notwithstanding, the employee continued to accept the grants for a further two years in breach of the Social Assistance Act 59 of 1992. When Sars discovered this, the employee was charged with fraud.

At her disciplinary hearing, the employee’s defence was that she had informed the South African Social Security Agency (SASSA) that she no longer qualified for the grants, but nothing resulted from it. In support of her defence, she produced two letters purportedly from SASSA, one in respect of each child, informing her that the grants had ceased. The chairperson did not find the employee guilty of fraud, but only of wrongfully receiving the grants, and issued her with a final written warning.

Two years later, the employee’s husband, who had since separated from the employee, informed Sars that the dates on the SASSA letters, on which the employee had relied during her disciplinary hearing, had been forged. The employee was again charged with fraud, found guilty and dismissed. Aggrieved by the LC’s finding that the charges of misconduct did not arise from the same incident, the employee appealed to the Labour Appeal Court.

On appeal, there were two issues that the Labour Appeal Court was required to consider:

- whether the employee had been subjected to ‘double jeopardy’; and
- whether the dismissal was fair.

The court held that the principle of double jeopardy entails that an employee cannot be charged again with the same misconduct that they were found either guilty or not guilty of. There are, however, exceptions to this rule. The paramount consideration is fairness to both sides. In this case, the court found that the charges of misconduct did not apply. The charges in the first hearing did not relate to the authenticity of the letters or the dates of the letters. The charges in the second hearing centered around the falsification of the dates on the letters. The commissioner had thus erred by finding that the double jeopardy principle applied.

Turning to whether the charges in the second hearing had been proved, the court held that, despicable as the employee’s husband’s act of disloyalty towards his estranged wife might seem, his version was supported by the facts and circumstances. The employee’s claim that she had reported to SASSA that she no longer qualified for the grants was not apparent from the letters, which indicated that SASSA had discovered that she had become employed. The evidence indicated that the grant had ceased when the Special Investigation Unit had completed an investigation into a number of such cases. The probabilities were overwhelming that the date on the letters had been altered and the police stamps on the copies of the letters were falsifications. Accordingly, the court held that the commissioner’s finding that the charges had not been proved was not a conclusion that a reasonable decision-maker would have come to. Furthermore, that the employee had pursued an appeal in the circumstances favoured a costs order against her.

The appeal was accordingly dismissed with costs.

Strike in retaliation against employer

In Borbet South Africa (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA) and Others [2018] 4 BLLR 348 (LC), the company, together with 13 other employers, was party to a demarcation process. The demarcation process involved a decision as to whether the company and other employers should remain in the Metal and Engineering Industry Bargaining Council or be demarcated to fall under the Motor Industry Bargaining Council. The employers supported the demarcation process. NUMSA opposed the demarcation process, as it was of the view that it would be detrimental to their members’ interests.

Amidst the demarcation process, NUMSA presented the company with a set of demands, referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and, after conciliation at the CCMA, issued the company with a strike notice. An interim order was issued prohibiting a strike over the demands concerned. On the return date, the company acknowledged that our courts are slow to intervene in collective bargaining and that NUMSA had complied with the procedural strike provisions required in the Labour Relations Act 66 of 1995 (the LRA). However, the company argued that the NUMSA’s demands and the strike were acts of retaliation against the company for its involvement in the demarcation process. NUMSA denied that there was any connection between the proposed strike and the demarcation process.

Having examined correspondence between the parties, the court found that the demands were contrived to place pressure on the company and formed part of a ‘counter-campaign’ against the company for its part in the demarcation process. This conclusion was reinforced by the following:

- NUMSA’s admission that the demands were compiled without any consultation with its members;
- NUMSA’s refusal to engage with the company during conciliation; and
- NUMSA’s failure to explain why the company was singled out among 13 employers involved in the demarcation process.
Since the demarcation proceedings were nearing completion, it was inconceivable why NUMSA could not await the outcome and only then consider further options. Having found that the demands by NUMSA were contrived as an act of retaliation against the company, the next question the court was required to determine was whether the strike would be protected. The court held that since the true dispute was over that issue, the strike could not be protected because it had not been properly referred for conciliation. Furthermore, if the object of the strike was for purposes of compelling the company to withdraw from the demarcation process, it would have infringed the company’s right not to be discriminated against for exercising its rights under the LRA. The strike would have also contravened s 65 of the LRA as it was a matter that could be referred to arbitration.

In the circumstances, the strike was declared to be unprotected.

Moksha Naidoo BA (Wits) LLB (UKZN) is an advocate at the Johannesburg Bar.

Reinstatement – a judgment debt for future earnings?

Seriti Coal (Pty) Ltd v National Union of Mineworkers obo Moyake and Others (LC) (unreported case no J1425/18, 11-5-2018) (Mashosi J).

In a situation where an employee is awarded reinstatement or retrospective reinstatement and the employer unsuccessfully challenges the award on review, whereafter the employer complies with the award and allows the employee to return to work; can the employee argue that by virtue of the reinstatement or retrospective reinstatement awarded, they are entitled to the remuneration they would have received from date of award to the date they returned to work? On 27 June 2012 the first respondent’s member (the employee) was dismissed. An unfair dismissal dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and, in terms of an award dated 15 April 2013, the employee’s dismissal was found to be substantively unfair and as a result thereof, he was awarded reinstatement effective 2 May 2013. Although not material to the dispute that arose, the employee was not awarded retrospective reinstatement as the arbitrator found the employee’s ‘hands [were not] entirely clean’.

On 18 June 2013, the applicant (the employer) launched an application at the Labour Court (LC) to review and set aside the award. Its application was dismissed on 18 May 2017, so was its application for leave to appeal and its petition to the Labour Appeal Court (LAC) (the order by the LAC was dated 6 December 2017). In January 2018 the employee commenced his employ with the employer as per the April 2013 arbitration award. In February 2018, the first respondent union, wrote a letter to the employer demanding the remuneration the employee would have received from 2 May 2013 (being the date the arbitrator directed the employee to resume duties) to January 2018 (being the date the employee was allowed to resume his duties).

The employer denied it owed the employee any remuneration over this period, which prompted the union to approach the CCMA with an application to certify the arbitration award in terms of s 143 of the Labour Relations Act 66 of 1995 (LRA).

On the strength of the certified award, the Deputy Sheriff demanded payment in the amount of R 1 350 830 and in addition placed the employer’s assets under ‘judicial attachment’. The Deputy Sheriff explained to the employer that should it fail to make the necessary payment; its goods would be sold in execution to satisfy the debt owing.

The employer approached the LC on an urgent basis to set aside the writ and to stay the enforcement thereof.

The issue before the court was whether or not the remedy of reinstatement or retrospective reinstatement obliges an employer to remunerate an employee for the period between the date of the award and the date the employee returns to work in compliance with the award.

The employer argued that once it reinstated the employee, it fully complied with the award and thus the award was certified in error. The employer further submitted that the monetary claim made by the union on behalf of its member was not covered by the award and is a separate issue, which should be dealt with in a contractual claim.

The union argued that the employer must live with the risk it took when reviewing the award. Had the employer initially complied with the award, so said the union, it would not be in the situation it currently finds itself in.

In support of its argument the employer referred the court to the LAC judgment of Coca Cola Sabco (Pty) Ltd v Van Wyk [2015] 8 BLLR 774 (LAC). In that matter the LAC set out the following principles:
• An award of retrospective reinstatement only refers to the period between the date of dismissal to the date of the order and does not include or entitle the employee to remuneration between the date of the order and the date of the actual implementation of the order.
• When there is a dispute about the remuneration for the period between the date of the order and the date of implementation thereof, such a dispute between the parties has not yet been judiciously resolved. It is open for the party claiming the remuneration for that period, to institute a contractual claim at the High Court or LC. Only if the court adjudicating such a claim finds in the employee’s favour, does the employer become a judgment debtor against which a writ can be issued: ‘The order of reinstatement is not a judgment dealing with the consequential damages for the breach of the contract’.
• The financial risk the employer takes pursuant to any review or appeal process has nothing to do with the unfair dismissal dispute against which the order of reinstatement was granted. Should the employer succeed in a contractual claim for their remuneration for the period in question, the employer’s financial risk in taking the award on review and/or appeal, would be realised.

Following the findings of the LAC, the court in casu held:
‘In this case, the arbitrator ordered [the employee’s] reinstatement without back pay. It is clear that the writ is in respect of remuneration that is allegedly due to [the employee] for a period between the date of the award and the actual date of implementation. This period is clearly not covered by reinstatement. Therefore, there is no underlying causa or judgment for the writ. It follows that the writ is defective and should be set aside.’

The writ of execution was set aside with no order as to costs.
Please note that the below abbreviations are to be found in italics at the end of the title of articles and are there to give reference to the title of the journal the article is published in. To access the article, please contact the publisher directly. Where articles are available on an open access platform, articles will be hyperlinked on the De Rebus website at www.derebus.org.za.

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Hutchison, A; Rycroft, A; and Porter-Wright, M 'Private ordering and dispute resolution' (2018) 135.2 SALJ 324.

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Child law


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Van Heerden, C 'The importance of section 127 of the National Credit Act 34 of 2005' (2018) 81.2 THRHR 239.

Criminal law
Fambasayi, R and Koraan, R 'Intermediaries and the international obligation to protect child witnesses in South Africa' (2018) 21 April PER.

Marais, ME 'A constitutional perspective on the Sparrow judgments' (2017) 42.2 JJS 25.

Cultural heritage law
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Bekink, M ‘“Locus standi” of victims concerning victim impact statements during sentencing proceedings – Wickham
Ramblings of a grumpy attorney

By Grumpy Attorney

Oftentimes as a legal practitioners, we are so enmeshed in our daily grind, that we do not see the bigger picture.

What follows, are some concerns I have about various aspects of our daily lives, which we too often take for granted.

Regional court

I would like to start with the regional court. While waiting at a regional court recently, I started chatting to my opponent. I asked her whether she does her divorces via the regional court or the High Court. Her answer, like mine, was that she prefers to use the High Court.

She and I agreed that the regional court is slower, more cumbersome and that the regional court judges are more inclined to be difficult and obstructive, than High Court judges.

Clearly, therefore, the very purpose for which the regional court was set up, namely, to shift divorces and particularly unopposed divorces, and also of course smaller civil claims away from the High Court to thereby free up the High Court roll. This is not being achieved.

While waiting at the regional court and having these chats with my colleague, we were sitting right underneath a board, which proclaimed who the head of the regional court in the Western Cape was. I tried calling the person a few days after being at court and left a message for them, as I wanted to convey my views. The person has not returned my call.

If more attorneys are to start using the regional court, then they will have to become more user-friendly and people who are involved in the administration and running of the regional courts, will have to carefully consider the concerns, which I am raising, and perhaps engage constructively with the organised legal profession, so as to deal with these issues.

For the moment, and unless and until I hear to the contrary, I avoid the regional court if possible.

FICA

What a bureaucratic nightmare. As far as I am concerned, all that the Financial Intelligence Centre Act 38 of 2001 (FICA) has done is to make everyone’s life difficult. The FICA authorities are demanding, obstructive, difficult and worst of all, despite this massive burden of bureaucracy, which they have imposed on us, we never hear about any successes. Is the FICA legislation achieving what it set out to achieve?

Furthermore, in all of my years as an attorney since FICA was brought in, I have never had occasion to make a report in terms of FICA. An additional complaint, which I have is that as the head of the branch office of an attorney’s firm, which has its head office in Johannesburg, and only one bank account, which is administered from Johannesburg, I am nonetheless obliged to comply with onerous requirements as regards our Cape Town office. It is totally unnecessary and achieves nothing for our Cape Town office to be registered with FICA, as all banking is handled via our head office. Try telling that to the bureaucrats at FICA.

Sheriffs

Our entire system of civil procedure, depends on Sheriffs doing their duties timeously and efficiently. Maybe my complaint here should be addressed to the Board of Sheriffs and to those committees within the legal profession that interact with the Sheriffs, but my prima facie view is that the Sheriffs are slow, cumbersome, expensive and that when Sheriffs are struck off or removed from their posts, we never hear about it. They seem to operate behind a veil, which is never lifted. Their accounts are also so complicated, that they seldom get checked and my cynical view is that they overcharge. On the few occasions when I have checked the detail of a Sheriff’s account, there has always been an overcharge.

Master’s Office

Earlier this year, the Master’s Office announced a massive increase in its fees. I do not have the exact figures at hand, but what they will now require is members of the public (often poor persons) to pay for copies of documents, the cost of which has increased.

I am shocked by this. Firstly, most citizens pay tax either in the form of income tax or value added tax. Why, when we deal with a government office, must it charge us fees at all, never mind hike its fees by such amazing amounts, without any prior public participation process that I am aware of?

And, the foregoing begs the question of how incredibly slow the Master’s Office is. Fortunately for my frustration levels, I do not have too much to do with the Master’s Office, but it takes – literally – months to be appointed as an executor or Master’s representative, and months to obtain letters of authority for a trust.

My final complaint:

Issuing magistrate’s court summonses

At the High Court, I can issue a summons over the counter. The officials there do not bother with its contents and it is my problem if the summons turns out to be defective in any way.

At most magistrate’s courts, however, summonses are not only not issued over the counter, but are left to be scrutinised by officials who adopt an incredibly pedantic approach. So, after leaving a summons at a magistrate’s court, it may come back to one after many weeks – if not months – with a requirement that it be amended because of some defect in the small print. Why can there not be consistency in this regard and why can all magistrate’s court summonses not be issued over the counter? If there are defects in the summons, the attorney runs the risk of default judgment not being granted.

For obvious reasons, I would prefer my name not to be published and trust, therefore, that this article will be published under the nom de plume of ‘Grumpy Attorney’.

I look forward to receiving responses from other grumpy or perhaps not so grumpy or maybe even grumpier attorneys.

Grump Attorney is based in Cape Town. The identity of this author is known to the editor and editorial committee.

If you would like to respond to the article, send you letter to: derebus@derebus.org.za
New Releases

**Practitioners Guide to Conveyancing and Notarial Practice**

Author: A West

This title covers the important aspects of conveyancing and notarial practice. In view of the provisions of the Deeds Registries Act 47 of 1937, which places a duty on the Registrar to apply the directives issued by the Chief Registrar of Deeds, this publication is an invaluable and authoritative source when drafting deeds and documents.

**Occupational Health and Safety Act 85 of 1993 and Regulations**

Authors: LexisNexis Editorial Staff

The Occupational Health and Safety Act No. 85 of 1993 and Regulations is published in an easy to carry A5 format. To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.

**OHASA and COIDA Flip Flop Book 2018 edition**

Authors: LexisNexis Editorial Staff

This title consists of the Occupational Health and Safety Act and Regulations and the Compensation for Occupational Injuries and Diseases Act and Regulations in one user friendly A5 book. The Occupational Health and Safety Act serves to provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work. The Compensation for Occupational Injuries and Diseases Act serves to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or to death resulting from such injuries or diseases; and to provide for matters connected therewith.

**Superior Courts Act and Rules and The Magistrates Courts Act and Rules 2nd Edition**

Authors: LexisNexis Editorial Staff

The textbook contains the Superior Courts Act 10 of 2013 and the Rules (still applicable) published under the repealed Supreme Court Act No 59 of 1959 and the Magistrates Courts 32 of 1944 and the Rules. This publication was necessary to provide the often-referred-to and important legislation in a combined, convenient and easy-to-access format. The page layout of the publication is in double column format to allow for easy reading and quick reference in court. The format is key as it contains both Acts and majority of the Rules required by practitioners in one book in a size that is convenient to carry to court. The double column makes it easier to refer to and read out in court. It contains all the important rules a practitioner would require when in Civil Courts as well as the Constitutional Court Rules.

**Labour Law Library 5th Edition**

Authors: LexisNexis Editorial Staff


**Medical Malpractice in South Africa**

Author: J Saner SC

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EDITOR’S NOTES

ChANGES TO THE AIIF POLICIES FOR THE 2018/19 SCHEME YEAR

The 2018/19 AIIF insurance scheme year commences on 1 July 2018.

The Master Policy for PI claims and the terms and conditions under which bonds of security are to be granted in the new scheme year are included in this Bulletin. Practitioners must study both policies carefully and ensure that they fully understand all the provisions thereof.

The considerations taken into account in effecting the amendments include:

(i) An alignment of the policies with the Legal Practice Act 28 of 2014 (the Act);
(ii) An improved definition and management of the risks covered;
(iii) Further articulating the respective obligations and rights of the parties to the insurance relationship; and
(iv) Clarifying some of the queries raised in the two years that the policies have been implemented.

The changes to the policies are set out below.

The Master Policy

The limits of indemnity (amount of cover) and the deductibles (excess) remain unchanged (see schedules A and B respectively).

- **Definition of an insured** - In anticipation of the full implementation of the Act later in this calendar year, the relevant provisions of the policy (clauses 1, XXI and 5) have been amended. Clause 5(d) has been added to the policy in order to include advocates practising with fidelity fund certificates in terms of section 34(2)(b) of the Act. Attorneys and advocates with fidelity fund certificates will, subject to the policy conditions, be provided with PI cover under the AIIF Master Policy (see sections 77(1), 77(2) and 84(1) of the Act). In order to fall within the definition of an insured in the policy, the party applying for indemnity must have a fidelity fund certificate at the time that the cause of action (the circumstance, act, error or omission) giving rise to the claim arose (clauses 5, 6(a) and 6(b)) - in other words, the insured must have had a fidelity fund certificate at the time that the insured event occurred. The restriction on the circumstances under which a liquidator or trustee of an insolvent estate will be covered have been moved from clause 16(d) in the previous policy to clause 6(e) in the new policy. The activities of business rescue practitioners are excluded from the policy (clause 16(f)).

- **The trading debt exclusion** - clauses XXVII and 16(a). The exclusion has been extended to include disbursements in respect of any amount paid to counsel or an expert. The amounts paid to counsel and experts are not compensatory in nature. It will be noted from clause 1 of the policy that the indemnity provided to the insured is in respect of professional legal liability to pay compensation to a third party.

- **The defamation exclusion** - clause 16(n). The exclusion has been ex-
tended to all defamation claims brought against an insured practitioner.

- Claims arising out of dishonesty or fraud - clause 18. The exclusions set out in clauses 16, 19 and 20 will be applied to an insured practitioner.

- Cession - the policy now includes an express prohibition against cession (clause 24.1).

- The provision of assistance to the insurer - the insured must, at its own expense, provide the AIIF with any required information and documents. The assistance required may include the preparation, service and filing of notices and pleadings. Any expense incurred in this regard must be agreed in writing and the AIIF tariff will apply (clause 25).

The Executor Bond Policy

The AIIF will, subject to the policy, continue issuing bonds of security (in favour of the Master of the High Court) to attorneys appointed as executors (not agents or representatives) of deceased estates - see section 23 of the Administration of Estates Act 66 of 1965 read with section 40(1(b) of the Attorneys Act 53 of 1979 - the corresponding section (section 77(3) of the Act refers only to attorneys (not advocates) in respect of the granting of deeds of suretyship). Advocates, even those practising with fidelity fund certificates in terms of section 34(2)(b) of the Act, will thus not be entitled to be granted bonds of security by the AIIF as the scope of the company's mandate is limited by the founding legislation.

The AIIF will, subject to the policy, continue granting bonds of security to executors up to a maximum of R5 million per estate, provided that no firm will have an aggregate exposure in excess of R20 million at any time.

- Underwriting considerations - the prior record of the applicant in administering estates will be one of the factors taken into account in applying the discretion to issue bonds of security (clause 1.2). Subject to clause 3.3.1, no new bonds will be issued to applicants who have outstanding bonds open for longer than 12 months or to applicants who fail to adhere to the policy (clause 4.4).

- Reporting requirements - where the administration of the estate is not completed within 12 months from date of issue of the bond of security, the executor must, no later than 30 days before the expiry of that period, provide the AIIF with a report in this regard setting out the reasons for the delay in the finalisation (clause 3.3.1). Letters of executorship must be sent to the AIIF within 30 days of being granted (clause 3.3.2.1). Copies of the provisional and final liquidation and distribution account must be provided to the AIIF within 6 months of the letters of executorship being granted. In the event of the 6 month period not being met, proof of the application to Master for an extension and the outcome of such application must be submitted to the AIIF - this provision aligns the duties of the executor with section 35 of the Administration of Estates Act. A failure to comply with this requirement will result in the AIIF applying to the Master for the removal of the attorney as executor (clause 3.3.2.3).

- The threshold in respect of outstanding bonds - when R1.5 million in active bonds in reached, the attorney must provide the AIIF with a written plan and evidence on how the firm will reduce its exposure (clause 3.3.6).

- Accounting for estate funds and property - a separate estate late bank account (as required by section 28 of the Administration of Estates Act) must be opened for each estate administered by the firm and proof of such bank account must be provided to the AIIF. The estate funds and property must also be accounted for in the annual application for a fidelity fund certificate. The firm must, on an annual basis, provide the AIIF with the list of estates under administration as attached to its application for a fidelity fund certificate (clause 3.3.2.2). Estates are not to be administered through the attorney's trust account.

Queries in respect of the amendments

Please contact the AIIF should you have any queries on the changes. Those practices which have purchased top-up insurance cover in the commercial market must bring the changes to the policies to the attention of their respective brokers and insurers.

We wish you a claim-free 2018/19 scheme year.

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THE PROFESSIONAL INDEMNITY (PI) MASTER POLICY

PREAMBLE

The Attorneys Fidelity Fund, as permitted by the Act, has contracted with the Insured to provide professional indemnity insurance to the Insured, in a sustainable manner and with due regard for the interests of the public by:

a) protecting the integrity, esteem, status and assets of the Insured and the legal profession;

b) protecting the public against indemnifiable and provable losses arising out of Legal Services provided by the Insured, on the basis set out in this policy.

DEFINITIONS:

I. Act: The Attorneys Act 53 of 1979 (as amended or as replaced by the Legal Practice Act 28 of 2014). Where there is any reference to a specific section of the current Act in this Policy, then such reference will be to a corresponding section in the Legal Practice Act when that section comes into effect;

II. Annual Amount of Cover: The total available amount of cover for the Insurance Year for the aggregate of payments made for all Claims, Approved Costs and Claimants’ Costs in respect of any Legal Practice as set out in Schedule A;

III. Approved Costs: Legal and other costs incurred by the Insured with the Insured’s prior written permission (which will be in the Insured’s sole discretion) in attempting to prevent a Claim or limit the amount a Claim;

IV. Attorneys Fidelity Fund: As referred to in Section 25 of the Act;

V. Bridging Finance: The provision of short term finance to a party to a Conveyancing Transaction before it has been registered in the Deeds Registry;

VI. Claim: A written demand for compensation from the Insured, which arises out of the Insured’s provision of Legal Services; (For the purposes of this definition, a written demand is any written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an Insured);
Claimant’s Costs: The legal costs the Insured is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the Insurer;

Conveyancing Transaction: A transaction which:
   a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
   b) involves the registration or cancellation of any mortgage bond or real right over immovable property; and/or
   c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;

Cybercrime: Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence);

Defence Costs: The reasonable costs the Insurer (or Insured - with the Insurer’s consent) incurs in investigating and defending a Claim against an Insured;

Dishonest: Bears its ordinary meaning but includes conduct which may occur without an Insured’s subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;

Employee: A person who is or was employed or engaged by the Legal Practice to assist in providing Legal Services. (This includes in-house legal consultants, associates, professional assistants, candidate attorneys, paralegals and clerical staff but does not include an independent contractor who is not a Practitioner);

Excess: The first amount payable by the Insured (or deductible) in respect of each and every Claim (including Claimant’s Costs) as set out in schedule B.

Fidelity Fund Certificate: A certificate provided in terms of section 42 of the Act;

Innocent Principal: Each present or former Principal who:
   a) may be liable for the debts and liabilities of the Legal Practice;
   b) did not personally commit or participate in committing the Dishonest, fraudulent or other criminal act and had no knowledge or awareness of such act;

Insured: The persons or entities referred to in clauses 5 and 6 of this policy;

Insurer: The Attorneys Insurance Indemnity Fund NPC, Reg. No. 93/03588/08;

Insurance Year: The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;

Legal Practice: The person or entity listed in clause 5 of this policy;

Legal Services: Work reasonably done or advice given in the ordinary course of carrying on the business of a Legal Practice in the Republic of South Africa. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;

Practitioner: Any attorney, advocate, notary or conveyancer as defined in the Act;

Prescription Alert: The computerised back-up diary system that the Insurer makes available to the Insured;

Principal: A sole Practitioner, partner or director of a Legal Practice or any person who is publicly held out to be a partner or director of a Legal Practice;

Risk Management Questionnaire: A self-assessment questionnaire which can be downloaded from or completed on the Insurer’s website (www.aifi.co.za) and which must be completed annually by the senior partner or director or designated risk manager of the Insured as referred to in clause 5;

Road Accident Fund claim (RAF): A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;

Senior Practitioner: A Practitioner with no less than 15 years’ standing in the legal profession;

Trading Debt: A debt incurred as a result of the undertaking of the Insured’s business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:
   a) a refund of any fee or disbursement charged by the Insured to a client;
   b) damages or compensation or payment calculated by reference to any fee or disbursement charged by the Insured to a client;
   c) payment of costs relating to a dispute about fees or disbursements charged by the Insured to a client; and/or
   d) any labour dispute or act of an administrative nature in the Insured’s practice.

WHAT COVER IS PROVIDED BY THIS POLICY?

1. On the basis set out in this policy, the Insurer agrees to indemnify the Insured against professional legal liability to pay compensation to any third party:
   a) that arises out of the provision of Legal Services by the Insured; and
   b) where the Claim is first made against the Insured during the current Insurance Year.

2. The Insurer agrees to indemnify the Insured for Claimants’ Costs and Defence Costs on the basis set out in this policy.

3. The Insurer agrees to indemnify the Insured for Approved Costs in connection with any Claim referred to in clause 1.

4. The Insurer will not indemnify the Insured in the current Insurance Year, if the circumstance giving rise to the Claim has previously been notified to the Insurer by the Insured in an earlier Insurance Year, on the basis set out in clause 38.

WHO IS INSURED?

5. Provided that each Principal has, or is obliged to have, a Fidelity Fund Certificate at the time of the circumstance, act, error or omission giving rise to the Claim is made, the Insurer insures all Legal Practices providing Legal Services, including:
   a) a sole Practitioner;
   b) a partnership of Practitioners;
   c) an incorporated Legal Practice; and
   d) an advocate referred to in section 34 (2)(b) of the Legal Practice Act.

The following are included in the cover, subject to the Annual Amount of Cover applicable to the Legal Practice:
   a) a Principle of a Legal Practice providing Legal Services, provided that the Principal has, or is obliged to have, a Fidelity Fund Certificate at the time of the circumstance, act, error or omission giving rise to the Claim;
   b) a previous Principal of a Legal Practice providing Legal Services, provided that that Principal had, or was obliged to have, a Fidelity Fund Certificate at the time of the circumstance, act, error or omission giving rise to the Claim;
   c) an Employee of a Legal Practice providing Legal Services at the time of the circumstance, act, error or omission giving rise to the Claim;
   d) the estates or legal representatives of the people referred to in clauses (a) (b) and (c).
   e) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the Insured is a Practitioner and the fees derived from such appointment are paid directly to the Legal Practice.

AMOUNT OF COVER

7. The Annual Amount of Cover, as set out in Schedule A, is calculated by reference to the number of Principals that made up the Legal Practice on the date of the circumstance, act, error or omission giving rise to the Claim.

A change during the course of an insurance year in the composition of a legal practice which is a partnership will
not constitute a new legal practice for purposes of this policy and would not entitle that legal practice to more than one limit of indemnity in respect of that insurance year.

8. Schedule A sets out the maximum Annual Amount of Cover that the Insurer provides per Legal Practice. This amount includes payment of compensation (capital and interest) as well as Claimant’s Costs and Approved Costs.

9. Cover for Approved Costs is limited to 25% of the Annual Amount of Cover or such other amount that the Insurer may allow in its sole discretion.

**INSURED’S EXCESS PAYMENT**

10. The Insured must pay the Excess in respect of each Claim, directly to the claimant or the claimant’s legal representatives, immediately it becomes due and payable. Where two or more Claims are made simultaneously, each Claim will attract its own Excess and to the extent that one or more Claims arise from the same circumstance, act, error or omission the Insured must pay the Excess in respect of such Claim;

11. The Excess is calculated by reference to the number of Principals that made up the Legal Practice on the date of the circumstance, act, error or omission giving rise to the Claim, and the type of matter giving rise to the Claim, as set out in Schedule B.

12. The Excess set out in column A of Schedule B applies: a) in the case of a Claim arising out of the prescription of a Road Accident Fund claim. This Excess increases by an additional 20% if Prescription Alert has not been used and complied with by the Insured, by timeous lodgement and service of summons in accordance with the reminders sent by Prescription Alert; b) in the case of a Claim arising from a Conveyancing Transaction.

13. In the case of a Claim where clause 20 applies, the excess increases by an additional 20%.

14. No Excess applies to Approved costs or Defence costs.

15. The Excess set out in column B of Schedule B applies to all other types of Claim.

**WHAT IS EXCLUDED FROM COVER**

16. This policy does not cover any liability for compensation:
   a) arising out of or in connection with the Insured’s Trading Debts or those of any Legal Practice or business managed by or carried on by the Insured;
   b) arising from or in connection with misappropriation or unauthorised borrowing by the Insured or Employee or agent of the Insured or of the Insured’s predeces-sors in practice, of any money or other property belonging to a client or third party and/or as referred to in Section 78(2A) of the Act;
   c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the Insured, covering a loss arising out of the normal course and conduct of the business or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;
   d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa; e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in: (i) the Banks Act 94 of 1990; (ii) the Financial Advisory and Intermediary Services Act 37 of 2002; (iii) the Agricultural Credit Act 28 of 1996 as amended or replaced; (iv) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder; (v) the Medical Schemes Act 131 of 1998 as amended or replaced;
   f) arising where the Insured is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 78(2A) of the Act, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;
   g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the Insured, or from an order against the Insured to pay costs de bonis propriis;
   h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;
   i) directly or indirectly arising from, or in connection with or as a consequence of the provision of Bridging Finance in respect of a Conveyancing Transaction. This exclusion does not apply where Bridging Finance has been provided for the payment of: (i) transfer duty and costs; (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred; (iii) levies payable to the body corporate or home-owners association relating to the immovable property which is to be transferred;
   j) arising from the Insured’s having given an unqualified undertaking legally binding his or her practice, in matters where the fulfillment of that undertaking is dependent on the act or omission of a third party;
   k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the Insured;
   l) arising where the Insured acts or acted as a business rescue practitioner as defined in section 128 (1) (d) of the Companies Act 71 of 2008;
   m) arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence or about to come into existence, at the time of the receipt or payment and in respect of which the Insured has received a mandate;
   n) arising out of a defamation Claim that is brought against the Insured;
   o) arising out of Cybercrime;
   p) arising out of a Claim against the Insured by an entity in which the Insured and/or related or interconnected persons* has/have a material interest and/or hold/s a position of influence or control** as defined in section 2(1) of the Companies Act 71 of 2008; ** as defined in section 2(2) of the Companies Act 71 of 2008 For the purposes of this paragraph, “material interest” means an interest of at least ten (10) percent in the entity;
   q) arising out of or in connection with a Claim resulting from: (i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;
   (ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;
   (iii) Any act of terrorism regardless of any other
cause contributing concurrently or in any other sequence to the loss;
For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;
r) arising out of or in connection with any Claim resulting from:
(i) ionizing radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;
(ii) nuclear material, nuclear fission or fusion, nuclear radiation;
(iii) explosives or any nuclear weapon;
(iv) nuclear waste in whatever form;
regardless of a representation by way of a certificate, acknowledgment or other document) which was known or ought to have been known to the Insurer of any circumstance, act, error or omission that may give rise to a representation or other criminal act or omission by that Insured;
s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity.

FRAUDULENT APPLICATIONS FOR INDEMNITY

17. The Insurer will reject a fraudulent application for indemnity.

CLAIMS ARISING OUT OF DISHONESTY OR FRAUD

18. Any Insured will not be indemnified for a Claim that arises:

a) directly or indirectly from any Dishonest, fraudulent or other criminal act or omission by that Insured;

b) directly or indirectly from any Dishonest, fraudulent or other criminal act or omission by another party and that Insured was knowingly connected with, or colluded with or condoned or acquiesced in or was party to that dishonesty, fraud or other criminal act or omission.

19. In the event of a Claim to which clause 18 applies, the Insurer will have the discretion not to make any payment, before the Innocent Principal takes all reasonable action to:

a) institute criminal proceedings against the alleged Dishonest party and present proof thereof to the Insurer; and/or

b) sue for and obtain reimbursement from any such alleged Dishonest party or its or her or his estate or legal representatives;

Any benefits due to the alleged Dishonest party held by the Legal Practice, must, to the extent allowable by law, be deducted from the Legal Practice’s loss.

20. Where the Dishonest conduct includes:

a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or

b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;

The Excess payable by the Innocent Insured will be increased by an additional 20%.

21. If the Insurer makes a payment of any nature under the policy in connection with a Claim and it later emerges that it wholly or partly arose from a Dishonest, fraudulent or other criminal act or omission of the Insured, the Insurer will have the right to recover full repayment from that Insured and any party knowingly connected with that Dishonest, fraudulent or criminal act or omission.

THE INSURED’S RIGHTS AND DUTIES

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, but by no later than one (1) week after receipt by the Insured, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the Insured, the Insurer reserves the right not to indemnify the Insured for costs and ancillary charges incurred prior to or as a result of such late notification.

Once the Insured has notified the Insurer, the Insurer will require the Insured to provide a completed Risk Management Questionnaire and to complete a claim form providing all information reasonably required by the Insurer in respect of the Claim. The Insured will not be entitled to indemnity until the claim form and Risk Management Questionnaire have been completed by the Insured, to the Insurer’s reasonable satisfaction and returned to the Insurer.

The Insured:

24.1. shall not cede or assign any rights in terms of this policy;

24.2. agrees not to, without the Insurer’s prior written consent:

a) admit or deny liability for a Claim;

b) settle a Claim;

c) incur any costs or expenses in connection with a Claim unless the sum of the Claim and Claimant’s Costs falls within the Insured’s Excess;

failing which, the Insurer will be entitled to reject the Claim, but will have sole discretion to agree to provide indemnity, wholly or partly.

25. The Insured agrees to give the Insurer and any of its appointed agents:

25.1. all information and documents that may be reasonably required, at the Insured’s own expense.

25.2. assistance and cooperation, which includes, but not limited to, preparing, service and filing of notices and pleadings by the Insurer as specifically instructed by the Insurer at the Insurer’s expense, which expenses must be agreed to in writing.

26. The Insured also gives the Insurer or its appointed agents the right of reasonable access to the Insured’s premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any Claim where the Insurer believes such review or inspection is necessary.

Notwithstanding anything else contained in this policy, should the Insured fail or refuse to provide information, documents, assistance or cooperation, which includes, but not limited to, preparing, service and filing of notices and pleadings by the Insurer as specifically instructed by the Insurer at the Insurer’s expense, the Insurer reserves the right not to indemnify the Claimant in respect of the Claim.

By complying with the obligation to disclose all documents and information required by the Insurer and its legal representatives, the Insured does not waive any claim of legal professional privilege or confidentiality.

Where a breach of, or non-compliance with any term of this policy by the Insured has resulted in material prejudice to the handling or settlement of any Claim against the Insured, the Insured shall be entitled to recovery of all payments and expenses incurred by it.

For the purposes of this paragraph, written notice will be sent to the address last provided to the Insurer by the Insured and will be deemed to have been received five (5) working days after electronic transmission or posting by registered mail.
THE INSURER’S RIGHTS AND DUTIES

31. The Insured agrees that:
   a) the Insurer has full discretion in the conduct of the Claim against the Insured including, but not limited to, its investigation, defence, settlement or appeal in the name of the Insured;
   b) the Insurer has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the Claim;
   c) the exercise of the Insurer’s discretion in terms of a) will not be unreasonable.

32. The Insurer agrees that it will not settle any Claim against any Insured without prior consultation with that Insured. However, if the Insured does not accept the Insurer’s recommendation for settlement:
   a) the Insurer will not cover further Defence Costs and Claimant’s Costs beyond the date of the Insurer’s recommendation to the Insured; and
   b) the Insurer’s obligation to indemnify the Insured will be limited to the amount of its recommendation for settlement or the Insured’s available Annual Amount of Cover (whichever is the lesser amount).

33. If the amount of any Claim exceeds the Insured’s available Annual Amount of Cover the Insurer may, in its sole discretion, hold or pay over such amount or any lesser amount for which the Claim can be settled. The Insurer will thereafter be under no further liability in respect of such a Claim, except for the payment of Approved Costs or Defence Costs incurred prior to the date on which the Insurer notifies the Insured of its decision.

34. Where the Insurer indemnifies the Insured in relation to only part of any Claim, the Insurer will be responsible for only the portion of the Defence Costs that reflects an amount attributable to the matters so indemnified. The Insurer reserves the right to determine that proportion in its absolute discretion.

35. In the event of the Insured’s material non-disclosure or misrepresentation in respect of the application for indemnity, the Insurer reserves the right to report the Insured’s conduct to the regulator and to recover any amounts that it may have incurred as a result of the Insured’s conduct.

36. If the Insurer makes payment under this policy, it will not require the Insured’s consent to take over the Insured’s right to recover (whether in the Insurer’s name or the name of the Insured) any amounts paid by the Insurer;
   a) the Insured will first be reimbursed for the amount by which its liability in respect of such Claim exceeded the Amount Of Cover provided by this policy;
   b) the Insurer will then be reimbursed for the amount of its liability under this policy, if any.

37. If the Insured gives notice during an Insurance Year, of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a Claim or Claims, then any Claim or Claims in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the Insured, will for the purposes of this policy be considered to fall within one Insurance Year, being the Insurance Year of the first notice.

38. This policy does not give third parties any rights against the Insurer.

HOW THE PARTIES WILL RESOLVE DISPUTES

40. Subject to the provisions of this policy, any dispute or disagreement between the Insured and the Insurer as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:
   a) written submissions by the Insured must be referred to the Insurer’s internal complaints/dispute team at disputes@osti.co.za or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the Insurer which has given rise to the dispute;
   b) should the dispute not have been resolved within thirty (30) days from the date of receipt by the Insurer of the submission referred to in a) then the parties must agree on an independent Senior Practitioner, to which the dispute can be referred for a determination. Failing an agreement, the choice of such Senior Practitioner must be referred to the President of the Law Society (or his/her successor in title) having jurisdiction over the Insured;
   c) the parties must make written submissions which will be referred for determination to the Senior Practitioner referred to in b). The costs incurred in so referring the matter and the costs of the Senior Practitioner will be borne by the unsuccessful party;
   d) the unsuccessful party must notify the successful party in writing, within thirty (30) days of the determination by the Senior Practitioner, if the determination is not accepted;
   e) the procedures in a) b) c) and d) above must be completed before any legal action is undertaken by the parties. Complaints may be lodged with the:

   Short Term Insurance Ombudsman
   Tel: 011 726-8900
   Fax: 011 726-5501
   Share call: 0860 726 980
   E-mail info@osti.co.za
   Web: http://osti.co.za
   Physical Address: Sunnyside Office Park, 5th Floor, Building D, 32 Princess of Wales, Terrace, Parktown
   Postal Address: PO Box 32334, Braamfontein, 2017

SCHEDULE A
PERIOD OF INSURANCE: 1ST JULY 2018 TO 30TH JUNE 2019 (BOTH DAYS INCLUSIVE)

<table>
<thead>
<tr>
<th>No of Principals</th>
<th>Annual Amount of Cover for Insurance Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>R1 562 500</td>
</tr>
<tr>
<td>2</td>
<td>R1 562 500</td>
</tr>
<tr>
<td>3</td>
<td>R1 562 500</td>
</tr>
<tr>
<td>4</td>
<td>R1 562 500</td>
</tr>
<tr>
<td>5</td>
<td>R1 562 500</td>
</tr>
<tr>
<td>6</td>
<td>R1 640 625</td>
</tr>
<tr>
<td>7</td>
<td>R1 875 000</td>
</tr>
<tr>
<td>8</td>
<td>R2 109 375</td>
</tr>
<tr>
<td>9</td>
<td>R2 343 750</td>
</tr>
<tr>
<td>10</td>
<td>R2 578 125</td>
</tr>
<tr>
<td>11</td>
<td>R2 812 500</td>
</tr>
<tr>
<td>12</td>
<td>R3 046 875</td>
</tr>
<tr>
<td>14 and above</td>
<td>R3 125 000</td>
</tr>
</tbody>
</table>

SCHEDULE B
PERIOD OF INSURANCE: 1ST JULY 2018 TO 30TH JUNE 2019 (BOTH DAYS INCLUSIVE)

<table>
<thead>
<tr>
<th>No of Principals</th>
<th>Column A Excess for prescribed RAF and Conveyancing Claims**</th>
<th>Column B Excess for all other Claims**</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>R35 000</td>
<td>R20 000</td>
</tr>
<tr>
<td>2</td>
<td>R63 000</td>
<td>R36 000</td>
</tr>
<tr>
<td>3</td>
<td>R84 000</td>
<td>R48 000</td>
</tr>
<tr>
<td>4</td>
<td>R105 000</td>
<td>R60 000</td>
</tr>
<tr>
<td>5</td>
<td>R126 000</td>
<td>R72 000</td>
</tr>
<tr>
<td>6</td>
<td>R147 000</td>
<td>R84 000</td>
</tr>
<tr>
<td>7</td>
<td>R168 000</td>
<td>R96 000</td>
</tr>
<tr>
<td>8</td>
<td>R189 000</td>
<td>R108 000</td>
</tr>
<tr>
<td>9</td>
<td>R210 000</td>
<td>R120 000</td>
</tr>
<tr>
<td>10</td>
<td>R231 000</td>
<td>R132 000</td>
</tr>
<tr>
<td>11</td>
<td>R252 000</td>
<td>R144 000</td>
</tr>
<tr>
<td>12</td>
<td>R273 000</td>
<td>R156 000</td>
</tr>
<tr>
<td>13</td>
<td>R294 000</td>
<td>R168 000</td>
</tr>
<tr>
<td>14 and above</td>
<td>R315 000</td>
<td>R180 000</td>
</tr>
</tbody>
</table>

**The applicable Excess will be increased by an additional 20% if Prescription Alert is not used and complied with.

*The applicable Excess will be increased by an additional 20% if clause 20 of this policy applies.
1. GENERAL PROVISIONS

1.1 The AIIF will provide a bond only to the executor of a deceased estate, the administration of which is subject to the provisions of South African Law, and who is an attorney practising in South Africa with a valid Fidelity Fund Certificate.

1.2 The AIIF will in its sole discretion assess the validity of and risk associated with the information supplied in the application, and any other relevant information at its disposal which includes the manner in which the administration of previous estates in respect of which bonds have been issued, in deciding whether or not to issue a bond to an applicant.

1.2.1 If the applicant disputes the AIIF’s rejection of the application, such dispute will be dealt with in the following order:

1.2.1.1 Written submissions by the applicant should be referred to the AIIF Executive Committee at disputes@aiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the communication from the AIIF rejecting the application;

1.2.1.2 Should the dispute not have been resolved within thirty (30) days, then such dispute will be referred to the Sub-Committee appointed by the AIIF’s board of directors for a final determination.

2. EXCLUSIONS

Before completing the application, please note that a bond will NOT be issued where:

2.1 the applicant would be appointed in any capacity other than as the executor;

2.2 the day to day administration of the estate would not be executed by the applicant, partners or co-directors or members of staff under the applicant’s, partners or co-directors’ supervision, within the applicant’s offices;

2.3 the administration of the estate would be executed by any entity other than the legal firm of which the applicant is part;

2.4 the co-executor is not a practising attorney;

2.5 any claim involving dishonesty has been made against the applicant or any member of his or her firm. The AIIF reserves the right not to issue any bonds to the applicant or any firm in which the applicant is/ was a partner or director or member of staff at the time of the alleged dishonesty or thereafter;

2.6 the applicant or his or her firm has not provided the AIIF with all updates or the required information in respect of previous bonds, or complied with the Terms and Conditions in 3 below;

2.7 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;

2.8 the applicant is an unremunerated insolvent, suspended or interdicted from practice, or where proceedings have commenced to remove him or her from the roll of practising attorneys;

2.9 the applicant has either been found guilty by a court or a professional regulatory body of an offence or an act involving an element of dishonesty, or by reason of a dishonest act or breach of a duty, been removed from a position of trust.

3. TERMS AND CONDITIONS

3.1 An applicant must complete the prescribed application form, and provide the AIIF with all the relevant supporting documents. A copy of the application form is attached as annexure “A”.

3.2 In the case of an application for co-executorship, each applicant must sign and submit a separate application form and also sign the Undertaking (Form J262E). Each applicant will be jointly and severally responsible for adhering to all the terms and conditions contained in this application.

3.3 The applicant undertakes:

3.3.1 to finalise the administration of the estate for which the bond is requested, within twelve (12) months from date of issue. In the event that the administration takes longer than twelve (12) months, the executor shall provide written reasons for the delay and evidence thereof, not later than thirty (30) days before the expiry of the twelve (12) month period.

3.3.2 to provide the AIIF with information and access to records and correspondence relating to each estate for which the AIIF has issued a bond, as if the AIIF were in a similar position to the Master of the High Court or any beneficiary. In this regard:

3.3.2.1 a copy of the letters of executorship must be provided to the AIIF within thirty (30) days of being granted by the Master. Failure to provide the letters of executorship or any written reasons and evidence why the letters cannot be provided within the thirty (30) days will result in no further bonds being issued and an application to the Master of the High Court to have the applicant removed as an executor;

3.3.2.2 a separate estate bank account must be opened as required in terms of Section 28 of the Administration of Estates Act 66 of 1965 and proof of such account must be submitted to the AIIF within thirty (30) days of being appointed as executor. When completing the application for a Fidelity Fund Certificate, all funds and property held in respect of estates must be accounted for and a detailed list setting out the particulars thereof must be provided to the AIIF;

3.3.2.3 copies of the provisional and final liquidation and distribution accounts must be provided to the AIIF within six (6) months from the granting of the letter of executorship. Alternatively, proof of an application for and the granting of an extension or condonation by the Master of the High Court must be provided. Failure to comply with this provision will result in an application to the Master of the High Court to have the applicant removed as executor;

3.3.2.4 if applicable, within 30 days of the final liquidation and distribution account having being approved, the executor must formally apply to the Master of the High Court for a reduction of the value of the bond and provide proof of such application to the AIIF within 30 days of doing so.

3.3.2.5 the Master’s filing slip or release must be provided to the AIIF within 30 days of issue by the Master;

3.3.3 to ensure that within 24 hours of receipt of the letters of executorship, all insurable assets in the estate are sufficiently and appropriately insured, and to provide the AIIF with proof of such insurance within 30 days of such appointment. The insurance must remain in place for the duration of the administration of the estate, failing which the applicant and his firm will be personally liable for any loss or damage that may result from the absence of such insurance;

3.3.4 to keep the AIIF fully informed of progress of the administration of the estate - in the same way as he or she would inform the Master of the High Court or any beneficiary, of the progress of the administration;

3.3.5 to inform the AIIF within 30 days of becoming aware of a change in his or her status as a practitioner or of any application for removal or suspension as attorney or executor or any similar office;

3.3.6 If an applicant or a firm reaches 75% of the R20 million limit (that is, R15 million) as specified in clause 4 and clause 3.1.1 as applicable, the applicant or firm shall provide the AIIF, within thirty (30) days from request, with a written plan demonstrating how the reduction of
3.4 After a bond has been issued, the applicant will not seek to reduce its value, unless the Master of the High Court is satisfied that the reduced security will sufficiently indemnify the beneficiaries and has provided written confirmation of such reduction. A copy of such written confirmation must be provided to the AIIF within thirty (30) days thereof.

3.5 The applicant consents to the AIIF making enquiries about his or her credit record with any credit reference agency and any other party, for the purposes of risk management.

3.6 The applicant consents to the relevant law society or regulator giving the AIIF all information in respect of the applicant’s disciplinary record and status of good standing or otherwise.

3.7 The applicant undertakes to give the AIIF all information, documents, assistance and co-operation that it may reasonably require, at the applicant’s own expense. If the applicant fails or refuses to provide assistance or co-operation to the AIIF, and remains in breach for a period of thirty (30) days after receipt of written notice from the AIIF to remedy such breach, the AIIF reserves the right to:

3.7.1 report the applicant to the law society or regulator having jurisdiction over the executor; and/or;

3.7.2 request the Master to remove him or her as the executor.

3.8. The applicant accepts personal liability for all and any acts and/or omissions, including negligence, misappropriation or maladministration committed or incurred whether personally or by any agent, consultant, employee or representative appointed or used by the applicant in the administration of an estate.

3.9 In the event of the AIIF having made a payment in respect of a claim arising out of a fraudulent act or misappropriation of any kind or in respect of any act of maladministration, it reserves the right to:

3.9.1 institute civil and/or criminal proceedings against the applicant; and/or;

3.9.2 report the applicant to the law society or regulator having jurisdiction over the executor.

3.10 The other partners or directors of the firm must sign a resolution acknowledging and agreeing to the provisions set out in that resolution. A copy of such resolution is attached as annexure “B”.

3.11 If there is any dispute between the AIIF and the executor as to the validity of a claim by the Master of the High Court, then such dispute will be dealt with in the following order:

3.11.1 written submissions by the executor should be referred to the AIIF’s internal dispute team at dispute@aiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the written communication from the AIIF, which has given rise to the dispute;

3.11.2 should the dispute not have been resolved within thirty (30) days from the date of receipt by the AIIF of the submission referred to in 3.11.1, then the parties must agree on an independent senior estates practitioner, with no less than 15 years standing in the legal profession, to which the dispute can be referred for a determination. Failing an agreement, the choice of such senior estates practitioner will be referred to the president of the law society (or his/her successor in title) having jurisdiction over the executor.

3.11.3 the parties must make written submissions which will be referred for a determination to the senior estates practitioner referred to in 3.11.2. The costs incurred in so referring the matter will be borne by the unsuccessful party;

3.12 A copy of the executor’s current Fidelity Fund Certificate must be submitted annually within (thirty) 30 days of issue, but no later than the end of February each year.

4. LIMITS

4.1 The value of any bond is limited to R5 million per estate. The cumulative total of all bonds issued to any one firm will not exceed R20 million at any given time.

4.2 If a practitioner is part of, or holds himself out to be part of, more than one firm simultaneously, such practitioner and all the entities associated with that practitioner will hold a maximum cumulative total of R20 million in bonds at any given time.

4.3 In the case of co-executorship, each executor needs to meet the criteria as specified in this document. The limits detailed in 4.1 and 4.2 above will apply as if there were no co-executorship(s).

4.4 No new bonds will be issued where the applicant or the firm has failed to adhere to any of the provisions of this policy.

5. SOLE RECORD OF THE AGREEMENT

5.1 This document constitutes the sole record of the agreement between the AIIF, the firm and the applicant in relation to the bond to which this document applies.

5.2 This document supersedes and replaces all prior commitments, undertakings or representations, whether oral or written, between the parties in respect of this application.

5.3 No addition to, variation, novation or agreed cancellation of any provision of this document shall be binding upon the AIIF unless reduced to writing and signed by or on behalf of both parties, by authorised persons.

5.4 If there are any material changes to the information contained in this application, the applicant undertakes to inform the AIIF in writing within fifteen (15) days of such change.

6. DOMICILIJM

The parties choose as their domicilia citandi et executandi for the service of notices given in terms of this agreement and all legal processes, the following addresses:

6.1 AIIF: 1256 Heuwel Avenue
Centurion
0157
Email: courtbonds@aiif.co.za

6.2 The Applicant: The address referred to in the application
form

6.3 Notices or legal processes may be delivered by hand or sent by electronic mail to the above addresses. The date of receipt by the addressee will be the date of hand delivery or transmission.

6.4 Either party may change its domicilium by giving the other party written notice of such change.

7. DECLARATION

If the bond is granted, I agree:

(i) to fully comply with the terms and conditions contained in clause 3;

(ii) that all estate funds will be invested strictly in terms of the Administration of Estates Act 66 of 1965, the Attorneys Act 53 of 1979 or the Legal Practice Act 28 of 2014 and the rules and regulations as promulgated in respect thereof;

(iii) to furnish the AIIF with the annual audit certificates completed by my or our external auditors, verifying the continued existence of the property or funds under my control as executor, within thirty (30) days of such certificate being issued;

I hereby confirm that I have read, understand and agree to be bound by the terms and conditions contained in this document.

DATED AT ………………………… ON THIS ……………………..

DAY OF ……………………… 20…………………

______________________________________________

WITNESS (Full names & signature)

______________________________________________

APPLICANT (Full names & signature)

______________________________________________

WITNESS (Full names & signature)
<table>
<thead>
<tr>
<th>1. APPLICANT</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1 Surname :</td>
<td></td>
</tr>
<tr>
<td>1.2 Full names :</td>
<td></td>
</tr>
<tr>
<td>1.3 Identity number :</td>
<td></td>
</tr>
<tr>
<td>1.4 Practitioner number :</td>
<td></td>
</tr>
<tr>
<td>1.5 Fidelity fund certificate number :</td>
<td></td>
</tr>
<tr>
<td>1.6 Residential address :</td>
<td>Code :</td>
</tr>
<tr>
<td>1.7 Cell number :</td>
<td></td>
</tr>
<tr>
<td>1.8 Work telephone number :</td>
<td></td>
</tr>
<tr>
<td>1.9 Work email address :</td>
<td></td>
</tr>
<tr>
<td>1.10 Are you a practising attorney?</td>
<td>YES__NO__</td>
</tr>
<tr>
<td>1.11 When were you admitted as an attorney?</td>
<td></td>
</tr>
<tr>
<td>1.12 Have you previously been appointed as an executor, curator, liquidator or trustee?</td>
<td>YES__NO__</td>
</tr>
<tr>
<td>(a) If YES, please provide a list for the past 3 years :</td>
<td></td>
</tr>
<tr>
<td>1.13 Have you ever been removed from office in respect of an appointment referred to in 1.12?</td>
<td>YES__NO__</td>
</tr>
<tr>
<td>(a) If YES, please provide details :</td>
<td></td>
</tr>
<tr>
<td>1.14 Has the Master ever disallowed your fees relating to an appointment referred to in 1.12?</td>
<td>YES__NO__</td>
</tr>
<tr>
<td>(a) If YES, please provide details :</td>
<td></td>
</tr>
<tr>
<td>1.15 Number of years’ experience as an executor :</td>
<td>__________ years __________ months</td>
</tr>
<tr>
<td>• If less than 2 years’, provide proof of experience, education or mentorship.</td>
<td></td>
</tr>
<tr>
<td>1.16 PLEASE ATTACH APPLICANT’S ABRIDGED CURRICULUM VITAE</td>
<td></td>
</tr>
<tr>
<td>1.17 Are you being appointed as an agent or executor?</td>
<td>Agent ____ Executor ____</td>
</tr>
<tr>
<td>1.18 By whom are you nominated?</td>
<td>In terms of a will ____ Family ____ Master ____ Court Order ____ Other ____ Details ____</td>
</tr>
<tr>
<td>1.19 Are you the SOLE executor of this estate?</td>
<td>YES__NO__</td>
</tr>
<tr>
<td>• If NO, the co-executor, who must be a practising attorney, should complete a separate application form.</td>
<td></td>
</tr>
<tr>
<td>• J262 E must be co-signed by both applicants.</td>
<td></td>
</tr>
<tr>
<td>1.20 Are you / is your firm personally responsible for the day to day administration of the estate?</td>
<td>YES__NO__</td>
</tr>
<tr>
<td>1.21 Has a claim been made against you or the firm relating to a previous estate administered by you or the firm?</td>
<td>YES__NO__</td>
</tr>
</tbody>
</table>
### 1.22 Do you have any direct or indirect interest in this estate other than executor fees?

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

(a) If YES, please provide details:

### 1.23 Have you made application for an executor bond with an institution other than the AIIF in the past three years?

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

(a) If YES, state name of institution (s) and estate name(s):

### 1.24 Has any previous application for an executor bond with the AIIF or other institution been declined?

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

(a) If YES, please provide details:

### 1.25 Have you ever been declared insolvent or has your personal estate been placed under administration?

- YES | NO

* If YES, please provide proof of rehabilitation or release from administration.

### 1.26 Have you (or the person who will be assisting with the estate within your firm):

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

1.26.1 ever been found guilty (by a court of law or professional regulatory body) of an offence involving an element of dishonesty?

1.26.2 been struck off the roll of practising attorneys or suspended or interdicted from practice?

1.26.3 any outstanding criminal cases or civil lawsuits or any regulatory disciplinary matters pending?

(a) If YES, please provide details:

### 1.27 Is there any other material factor that you wish to bring to the AIIF’s attention?

### 2. FIRM

2.1 Name of firm:

2.2 Firm number:

2.3 Number of partners/directors:

2.4 Physical address:

Code:

2.5 Postal address:

Code:
The following documents are required for a bond to be issued:

1. A covering letter on the applicant's official company letterhead;
2. Proof of practice or firm number;
3. Proof of practitioner or member number;
4. The original form J262E (Bond of Security) which must be completed and signed by the applicant, whose signature must be attested to by two witnesses;
5. Copy of the will (if applicable);
6. Copy of certified death certificate (a copy of the death notice, if there is no death certificate);
7. Copy of court order (if applicable);
8. Inventory or statement of assets & liabilities of the estate;
9. Copy of any directions from the Master as to the security required;
10. Proof of Master's estate reference number;
11. Nomination forms by the beneficiaries/person appointing the applicant as executor;
12. The executor's acceptance of trust as executor;
13. A certified copy of the executor's identity document;
14. The executor's current fidelity fund certificate;
15. If applicant is not a director/partner a letter on the firm's letterhead signed by one of the partners confirming that the appointee is employed by the firm and has been authorised to apply for bonds of security in the name of the firm and to administer the estate on behalf of the firm. This letter must be accompanied by the certified current fidelity fund certificate of the partner/director;
16. Applicant's abridged curriculum vitae (CV);
17. A resolution as contemplated in clause 3.10 of the terms and conditions, where applicable.

- The application documents may not be faxed or emailed.
- The application forms and requirements are available on our website www.aiif.co.za.
- *This may be obtained from your law society.

Alternatively you may contact:
- Ms Haniffah Mbela on 012 622 3926
  - email haniffah.mbela@aiif.co.za
- Ms Patricia Motsepe on 012 622 3927
  - email patricia.motsepe@aiif.co.za
- Mr Mpho Shibambo on 012 622 3939
  - email mpho.shibambo@aiif.co.za
- Mr Sifiso Khuboni on 012 622 3935
  - email sifiso.khuboni@aiif.co.za

I hereby declare that to the best of my knowledge and belief, the information provided in this application is true in every respect, and will form the basis of the agreement between myself and the AIIF. If any information herein is not true and correct, or if any relevant information has not been disclosed, the AIIF will be entitled to make use of all rights and remedies available to it in terms of the law.

DATED AT __________________ ON THIS _____ DAY OF _________ 20.

WITNESS (Full names & signature)

APPLICANT (Full names & signature)

WITNESS (Full names & signature)
RESOLUTION IN TERMS OF CLAUSE 3.10 (ANNEXURE B)

In the matter of: Estate Late

[the firm of attorneys]

herein represented by:

1. __________________________________________________________________________;
2. __________________________________________________________________________;
3. __________________________________________________________________________;
4. __________________________________________________________________________;
5. __________________________________________________________________________;

Full names of directors or partners signing. (Attach a list if necessary.)

who warrant/s that they or she or he are/is duly authorised to act on behalf of the firm and to bind it in terms of this resolution;

and who, by signing this document, undertake/s and agree/s unequivocally that the firm of attorneys together with each and every director or partner listed above, will be jointly and severally liable to the Attorneys Insurance Indemnity Fund NPC (AIIF) for the fulfilment of the terms and conditions set out in 1 and 2 below.

1. The firm and its directors or partners will provide full co-operation to the AIIF in the event of any claim being made against the AIIF in respect of any fraudulent act, misappropriation or maladministration committed by the firm, or its present or former director or partner or present or former employee, arising out of the administration of an estate in respect of which the AIIF has issued an executor bond.

2. The firm and its directors or partners will provide full assistance to the AIIF:

   2.1 to institute and prosecute to completion any criminal or civil proceedings brought against any person referred to in 1 above or any individual or entity connected to any fraudulent act, misappropriation or maladministration resulting in a claim for which the AIIF may have to pay compensation;

   2.2 to report any attorney or candidate attorney to the relevant law society or regulator on the request of the AIIF within thirty (30) days;

3. The directors or partners renounce the legal benefits of “order”, “excussion”, “division”, “cession of action”, “non numeratae pecuniae”, “non causa debiti”, “errore calculi”, “revision of accounts” and all or any exceptions which could or might be pleaded to any claim.

Director/Partner 1 Signature

____________________________

Director/Partner 2 Signature

____________________________

Director/Partner 3 Signature

____________________________

Director/Partner 4 Signature

____________________________

Director/Partner 5 Signature

____________________________