

NOVEMBER 2016

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credit transaction?

Profession adds its **voice to concerns** over
SABC Board

Women in Law Dialogue

Attorneys' profession offer mediation services
in education crisis

Young attorneys as **brands**

Estate planning and divorce:
Making a spousal donation

Detention without consent:
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Letters of engagement – documenting the
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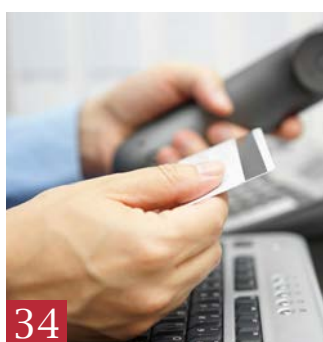
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32 The effect of the 'once empowered always empowered' rule on the mining industry

The debate around the 'once empowered always empowered' rule arose once again following the publication of the draft Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) on 15 April 2016. The purpose of the reviewed Mining Charter is to align it with the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act) and its Codes of Good Practice. The effect of this rule on the Constitution, the BEE Act and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires much attention in light of South Africa's constitutional democracy and further achieving equality and economic transformation in the mining industry, writes **Dineo Peta**.

34 When does it amount to a credit transaction?

Some months ago, **Jonathan Robert Hol**, came across an interesting decision of the Supreme Court of Appeal (SCA) in *Vesagie NO and Others v Erwee NO and Another* (SCA) (unreported case no 734/2013, 19-9-2014) (Gorven AJA), while assisting a colleague on a matter he was faced with. Notwithstanding the importance of the decision, there is much unfamiliarity with the decision. The decision deals with the sale of shares and the application of the National Credit Act 34 of 2005 (NCA) to such transactions. Mr Hol writes that the SCA was fully correct in their decision and reasoning for such decision, but, the substantive effect thereof will be as hard felt as with the well-known *Ndlovu v Ngcobo*, *Bekker and Another v Jika* 2003 (1) SA 113 (SCA) decisions in respect of Prevention of Illegal Eviction applications, which decisions have been the bane of most property owners.

36 Estate planning and divorce: Making a spousal donation

Estate planning is a comprehensive exercise and should generally incorporate an investigation into the bequests of the assets of an estate planner in order to ensure that they accomplish their personal goals (usually catering for their family) while also ensuring that the estate will be left solvent and it is a common misconception that estate planning only relates to the situation which arises once the estate planner has passed away. **Edrick Roux** writes that in reality, this process must be instituted as early as possible as it will often involve regular amendments to Wills and Trust Deeds, as well as the transfer of assets. From time to time the situation may arise where an estate planner may wish to transfer some of their assets from their personal name to that of their spouse by way of a donation and discusses how donations are used as a method of protecting assets.

40 Detention without consent: Protection of mentally ill person's financial interest

Section 9(1)(c)(iii) of the Mental Health Care Act 17 of 2002 (MHCA) provides that a health care provider or a health establishment may provide care, treatment and rehabilitation services to or admit a mental health care user, inter alia, only if – due to mental illness, any delay in providing care, treatment and rehabilitation services may result in the user causing serious damage to or loss of property belonging to him or her or others. Section 32 of the MHCA provides for involuntary services in certain carefully delimited circumstances. **Moffat Ndou** writes that once these requirements are met, it is lawful and justifiable to provide mental health care services to a mental health care user. In considering whether the detention of mentally ill persons in instances where the detention is necessary for the protection of financial interest, one is required to look at the concept of mental illness and that of financial interest or reputation.

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A new home for legal practitioners: What's in it for you?

On 1 February 2018 the Legal Profession in South Africa will enter a new era and will be regulated in terms of the Legal Practice Act 28 of 2014 (LPA), through the Legal Practice Council (LPC). The purpose of the LPA is to create a single national statutory body. All legal practitioners will be subject to the regulatory authority of the LPC.

As a result of the LPA coming into full operation, the statutory provincial law societies and Law Society of South Africa (LSSA) will fall away.

The formation of a broad-based professional interest association is imperative to represent the interests of practitioners and to position and promote the legal profession as the rule of law champion, protector and promoter of constitutional rights.

In 2015, the constituent members of the LSSA were consulted on whether there was a need for such an association. This led to the unanimous resolution this year to establish an independent professional association to –

- represent;
- add value to; and
- speak on behalf of legal practitioners.

The LSSA has a Task Team working on this.

The representative body will need to be established and be in place before the implementation of the LPA in early 2018.

The LSSA constituents have approved a working document to serve as the basis for discussions. This is not the constitution of the association as that will be developed.

The guiding principles are the core principles that will guide the association throughout its life in all circumstances, irrespective of changes in its goals, strategies, leadership and type of work. These are:

- Ensure independence of the profession.
- Recognise the status, dignity, value and role of legal practitioners in creating a just society (advocacy).
- Promote high standards of practice.
- Promote a culture of professional development.
- Commit to a code of ethics.
- Respect for transformational imperatives.
- Promote and protect constitutional values.
- Strengthen regional and international engagement.

- Respond dynamically to change.
- Ensure best practice in governance.

The organisation, members and brand need to be developed in consultation with the profession. These three aspects are separate but interlinked to each other.

The **organisational aspects** will relate to:

- Vision and mission.
- Value proposition (this is the value that members will derive from their membership, including the portfolio of programmes, services and initiatives to be delivered and undertaken).
- Leadership and governance.
- Sustainability of the association and business processes.

The **members** – this relates to you as members:

- Most important – member needs need to be ascertained and sensitivities taken into account.
- Perceptions among and behaviours of members that underlie the service offerings to be provided.
- Engagement and consultation with members.
- The benefits that members will derive, as well as their experiences in interacting with the Association.

The **brand** – this will be:

- The means of identification (the logo and name) and recognition by outside stakeholders.
- Positioning and ideology of the association.
- Building relationships and goodwill with members, stakeholders and the public.
- The public image and reputation of the association.

The association will **represent** you by –

- having influence with regard to legal and other issues;
- speaking nationally and with a united voice;
- representing and promoting practitioners' rights and the value of their work;
- identifying and serving their common interest; and
- ensuring liaison with the LPC.

The association will **promote** you by –

- promoting a constructive, powerful image for the profession;
- promoting the value of services rendered by practitioners;
- providing affiliation at international, national and regional levels; and



Mapula Thebe – Editor

- providing professional networking and liaison opportunities.

The association will **support** you by –

- providing accessible and affordable professional education and development: Vocational and continuing professional development;
- providing business and practice support;
- providing agency services for the profession (where the LPC or others will outsource work to the association); and
- ensuring research, investigation and input to legislation.

Practitioners have a small window of opportunity to shape the future of the profession now. The next step will involve ongoing information-sharing and consultation with the profession. Practitioners will be consulted through online surveys and some direct contact, both through the LSSA and the provincial law societies. The feedback received from these information-sharing and consultation sessions will help develop the value proposition to best suit the needs and requirements of the profession. This much needed 'new home for legal practitioners' will only be established through the help of all legal practitioners.

For more information see www.LSSA.org.za under the section 'Legal practitioners' and follow the link 'A new home for legal practitioners'. Alternatively e-mail LSSA@LSSA.org.za and the Task Team members steering this process, will respond to your questions.

- Upcoming deadlines for article submissions: 21 November 2016 and 23 January 2017.

LETTERS

TO THE EDITOR

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Letters are not published under *noms de plume*. However, letters from practising attorneys who make their identities and addresses known to the editor may be considered for publication anonymously.

Lawyers need to understand technology

The article 'A scientist and a Lawyer walk into a courtroom ...' authored by Dr David Klatzow and Peter Otzen 2016 (Aug) DR 26, raises important issues pertaining to the need for a deeper understanding by lawyers of the workings of science at a time of explosive technological development. It highlights that a failure to understand technology may lead to misplaced reliance on the evidence of expert witnesses and result in bad law and injustice.

While the authors address this issue in broader scope and their views deserve serious consideration, it is crucial that the profession views the failings commented on in a far narrower context. At the core of scientific advances is the revolution in information and communications technologies. The use of these technologies is fundamental to the practice of law, the lifeblood of which is information. Not only does the information revolution hold profound implications for the manner in which the practice of law will change with alarming rapidity, but, as importantly, so too it will necessitate changes in substantive law as our society and economy are disrupted by novel technologies that enable previously unthought-of practices. This demands

of lawyers a significantly greater level of understanding of the information and communications technologies widely in use by them and by our society and business in general, than is currently evident.

While over centuries an intuitive understanding of information in physical and analogue form, as well as its legal status evolved, there are very few attorneys that can honestly profess even a cursory understanding of how the 'digital' information that they and their client's use is communicated and processed. In my experience only a handful of lawyers have read, let alone understood, Chapter III of the Electronic Communications and Transactions Act 25 of 2002. Without this understanding the legal status of electronic communications and records is simply not possible.

Regrettably the profession - not renowned for embracing change - has been extremely slow to react to the far-reaching consequences that the relentless march of technological development holds. Rather many in the profession mistakenly have seen themselves above these changes. They believe that the changes will not affect 'lawyers' work, to which some have a deeply rooted sense of entitlement and have held a selfish disregard for how important embracing rather than resisting change will be to the future of young lawyers.

Regrettably this dangerous mistake has already been and will in the future be, enormously detrimental to the profession and how it is perceived by the public. The truth is that this 'Luddite' attitude is no different to that of metered taxi drivers petulantly proclaiming their entitlement to provide a service in the face of the revolutionary change wrought by Uber.

Mark Heyink, attorney,
Johannesburg

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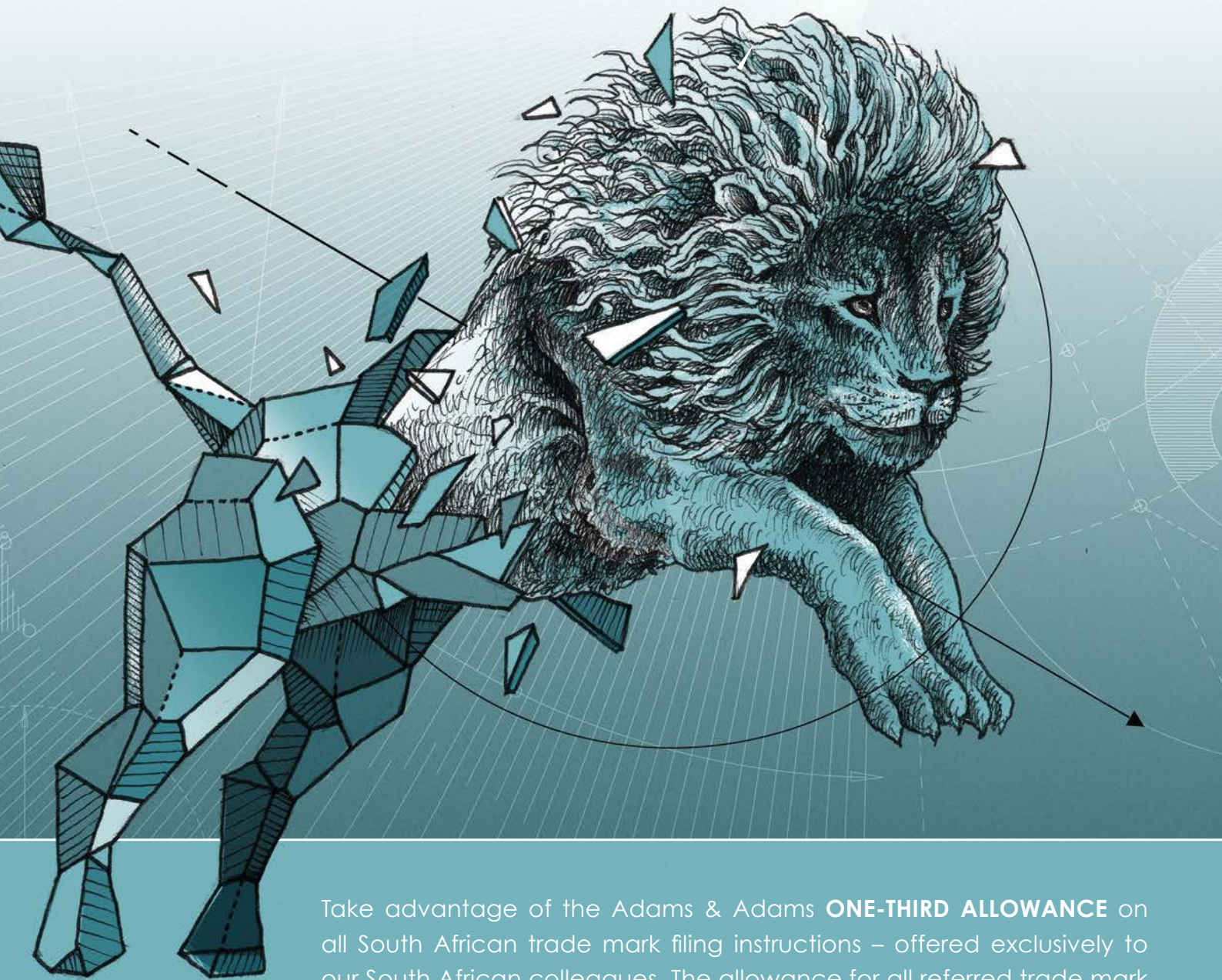


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Conference tackles issues facing SADC region

The Southern African Development Community Lawyers' Association (SADC LA) held its 17th annual conference and general meeting in Cape Town on 17 to 19 August. The well attended conference tackled issues such as –

- harmonising trade and investment in the region;
- construction law: Claims for delay on international construction projects;
- environmental challenges: Wildlife poaching;
- developments in commercial arbitration;
- economic protection and the role of African multilateral institutions;
- finding a balance between the free movement of persons (immigrants, asylum seekers, migrants) and combatting human trafficking; and
- the appointment of judicial officers.

The proceedings began with a welcome function where Judge of the High Court of the Western Cape Division (Cape Town) and past president of the SADC LA, Vincent Saldanha, delivered the keynote address. Judge Saldanha noted that looking back at the past 17 years, the challenges in the region have remained the same, if not, become more urgent and increasingly complex. '... Over the next three days you will be required to deal with those challenges, head on and with the characteristic robustness and seriousness that this association is known for,' he added.

Judge Saldanha went on further to say: 'In the light of the changing international landscape and in particular the developments in Europe with the Brexit vote, the ongoing international financial crisis, the challenging political and economic instability in many parts of the world and not least of all, right here in some parts of Africa. All of this has impacted on the difficult and challenging questions of regional integration especially in the global South. As the Sustainable Development Goals of the United Nations are implemented, much closer attention and assessment is needed of the successes and failures of development in Africa. The global financial crisis has, as African commentators and academics correctly raise, brought with it new theoretical and practical concerns about the value of economic integration. They pose the question "if integration is not a panacea for weaker economies and can expose those economies to greater economic loss (an issue seen both in Africa and in Europe) new attention must be focused



From left: Co-chairperson of the Law Society of South Africa, Mvuzo Ntyesi; Chief Justice, Mogoeng Mogoeng; Co-chairperson of the Law Society of South Africa, Jan van Rensburg; and outgoing President of the SADC LA, Gilberto Correia, during the opening ceremony of the conference.

on the questions of when, whether, and how to pursue regional integration?"

Harmonising trade and investment in the region

On the second day of the conference, Chief Justice Mogoeng Mogoeng delivered the opening address under the topic 'Promoting the harmonisation of trade and investment laws and legal practice standards for regional development and effective integration in SADC'.

Chief Justice Mogoeng noted that the world is confronted by profound challenges, some of which include underdevelopment, lack of peace and stability, poor governance corruption and discrimination. 'So many problems that one would be excused for feeling helpless in the normalcy, but that should not be allowed for peaceful existence to become a reality,' he added.

Chief Justice Mogoeng said that in his view what complicates the situation that has resulted in the challenges in the world is the human uncontrollable desire to take advantage of others so that they can manipulate and maintain an underserved position of wealth, control, power and privilege. 'When a person manipulates society to stay in power, human beings are not fools, spin doctoring can only last a while.'

Chief Justice Mogoeng went on to speak about cross-border practice and said that before it can take place the quality of the law degree should be looked at. 'We owe it to the future lawyers, judges and the respective nations to ensure that our law degree is of a high standard. We should interact with academia to ensure the quality is of a high standard. We also need to look at South Africa's basic edu-

cation because students struggle when they reach university,' he added.

Commenting on corruption in the legal profession, Chief Justice Mogoeng said: 'Because the legal profession consists of the pool judges and magistrates are appointed some corruption from the profession finds its way to the judiciary. I challenge the organised profession to do whatever possible to ensure that those that bring the profession into disrepute are dealt with firmly, we know each other. We should not allow a person in wrongdoing to go on and on practicing. Let us be vigilant ... it is an honour to be a lawyer.'

Construction law: Claims for delay on international construction projects

Advocate of the Cape Bar, Johan Beyers, opened his address by referencing a quote by the World Bank which states: 'The cost of redressing Africa's infrastructure deficit is estimated at US\$ 38 billion of investment per year, a further US\$ 37 billion per year in operations and maintenance; an overall price tag of US\$ 75 billion. The total required spending translates into 12% of Africa's GDP.'

Mr Beyers added that construction law expertise is vital to allow Africa to realise its infrastructure needs and yet, construction law courses are hard to come by in Africa, most construction lawyers in Africa are qualified by experience so this creates a significant barrier to entry for African lawyers who wish to specialise in this field.

Mr Beyers noted that infrastructure projects are notorious for overrunning on time and cost, with serious economic



From left: Legal counsel at the Network Information Center in Tanzania, Sarah Mhamilawa; Director Dispute Resolution/International Trade at ENSafrica, Grant Herholdt; SADC LA Executive Committee Member from Botswana, Binta Tobedza; and Legal Services Manager at AHL Group in Malawi, Tadala Chinkwezule, during the 'Development in commercial arbitration' session.

and political consequences. He said: 'The PWC November 2014 report key finding was that there is a need for better planning, procurement, project management and controls to reduce number of delays and size of cost overruns. It is an international problem, which has major costs implications on large projects and has national economic and political effect.'

International delay and quantum expert and Managing Director of Navigant's Global Construction Practice in United Kingdom, Dr Tony Farrow, said that in construction contracts, the focus on the penalty clause is to identify the circumstances the company owner is late in delivering the information, which will lead to the contractor being entitled to the extension of time on the construction project, to tell the parties how to calculate the extension of time and receive a reasonable extension time. However, what may be reasonable time extension could be unreasonable to one party, which then leads to disputes.

Dr Farrow's prepared a comprehensive presentation, which can be found at www.lssa.org.za.

Developments in commercial arbitration

'Developments in commercial arbitration' was one of the topics discussed towards the end of the first day of the conference. Speakers during this session were: Legal Counsel at the Network Information Centre in Tanzania, Sarah Mhamilawa; Legal Services Manager at AHL Group in Malawi, Tadala Chinkwezule; and director, Dispute Resolution/International Trade at ENSafrica, Grant Herholdt.

Ms Mhamilawa noted that when clients need arbitrators, they tend to go online and Google for arbitrators. She added that arbitrators that are most accessible online are the ones from South Africa. According to Ms Mhamilawa, SADC countries need to set down the features that attract arbitration procedures in their countries since the region still has challenges of embracing this area. 'Lawyers need to look at what consumers of arbitration look for when they are looking forward to starting a proceeding. ... We also need to look at the issue of cost of arbitration,' she said.

Ms Chinkwezule covered the topic 'Examining the benefits of commercial arbitration in Southern Africa' in her presentation. She noted that commercial arbitration is a process for resolving business disputes between two parties outside the conventional court system. She added: 'According to a PWC 2013 survey, the industries that prefer arbitration are the energy - power and construction industry; 73% Energy, Construction 84% and 69% Financial Sector.'

Ms Chinkwezule noted that arbitration is vital to attract foreign investment in southern Africa and that the benefits in complex commercial arrangements such as being cost effective and neutrality outweigh the benefits of litigation. 'We all have a role to promote the use and knowledge of commercial arbitra-

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From left: International Delay and Quantum Expert and Managing Director of Navigant's Global Construction Practice in the United Kingdom, Dr Tony Farrow; incoming Deputy President of SADC LA, Max Boqwana; and advocate at the Cape Bar, Johan Beyers at the 'Construction law: Claims for delay on international construction projects' session.

tion, mostly in centers within Africa and not far afield,' she said.

Mr Herholdt spoke on 'International arbitration for African lawyers'. He said that the overwhelming majority of the average South African lawyer's practice is limited to domestic arbitration and domestic court proceedings and that only a handful of lawyers have experience in international arbitrations. He added: 'Arbitration in SA is currently governed by outdated legislation from 1965. The International Arbitration Bill has only very recently been presented to Parliament. In the meantime, the other African jurisdictions have taken significant strides towards establishing a presence in international arbitration. However, these efforts are still far behind those of the established centers such as Paris, London, Singapore, etcetera.'

Mr Herholdt said that the negative perception that African lawyers are not as capable as lawyers from the bigger legal jurisdictions is due to relative lack of experience, not ability. 'Doubt in one's own ability as an African lawyer also adds to the negative perception, this can be improved with experience,' he added.

Mr Herholdt noted that many African jurisdictions have realised that it is necessary to take advantage of the boom in investment into Africa to expand the legal market by introducing arbitration centers. 'Africa is now part of a global legal village. Multinational law firms are expanding into Africa in various ways. This is slowly exposing African lawyers to international arbitration, which will bring experience. The quality of legal skills in Africa is improving with the exposure to the international market. Large corporates are becoming more comfortable with working directly with African lawyers.'

Mr Herholdt said that although there is a global resistance to change, African lawyers need to compete at the international level as this is necessary to match

or surpass the standard set by international competition. 'This would mean that African lawyers have to improve their turnaround time, quality of work, commitment, and sacrifice personal time. Matching international standards does not mean matching international charge out rates. Larger, more complicated matters may allow for a reasonable premium, but do not be greedy,' he said.

Speaking on statistics of arbitration matters, Mr Herholdt said that the average costs for claims are in the region of 5 million dollars per arbitration. 'The longest arbitration took just over ten years and the average case takes two to three years,' he added.

Economic protection and the role of African multilateral institution

On the second day of the conference, a plenary session was held to discuss 'Economic protection and the role of African multilateral institution.' One of

the speakers of the session was Country Representative - Zambia/Regional Policy Lead - Food/Trade Eastern and Southern Africa, Development Alternatives Incorporated, (previously economist at COMESA), Daniel Njiwa. Mr Njiwa said that Africa has made substantial economic growth in the past few years despite the fact that the growth does not translate to the results African's want.

'Africa is now the destination of choice for many multinational companies; however, we still have some challenges. We need to do something to ensure that these benefits go down to the majority poor Africans. Half a billion Africans live below the poverty line. We have to look into the issue of inclusiveness, less than 10% of the wealth in Africa is held by Africans,' Mr Njiwa said.

Africa to harmonise

Minister in the Presidency for Planning, Performance, Monitoring, Evaluation and Administration, Jeff Radebe, delivered the closing address at the conference. Mr Radebe said that at no point in recent history have calls for Africa to harmonise been stronger than they have been lately and the importance of the conference and general meeting cannot be overstated.

Mr Radebe added that across Africa, regional integration and industrialisation is arguably the most talked about subject among policymakers. Mr Radebe said that through his position, he has come into close contact and proximity to the challenges faced by the SADC region. 'These are challenges in relation to building, and implementing transformative transboundary infrastructure projects in the region, and more overarchingly, in leading the continental charge for a better Africa, at the highest African Union level,' he said.

Even though Africa is faced with many



From left: Consultant at Gumbi, Dechambenoit & Associates, advocate Mojanku Gumbi; and Country Representative - Zambia/Regional Policy Lead - Food/Trade Eastern and Southern Africa, Development Alternatives Incorporated, (previously economist at COMESA), Daniel Njiwa.



From left: Co-chairperson of the Law Society of South Africa, Mvuzo Notyesi; President of the South African Women Lawyers Association and South African Council Member of SADC LA, Noxolo Maduba; incoming President of SADC LA, James Banda; Minister in the Presidency for Planning, Performance, Monitoring, Evaluation and Administration, Jeff Radebe; outgoing President of the SADC LA, Gilberto Correia; and Co-chairperson of the Law Society of South Africa, Jan van Rensburg, pictured during the closing ceremony of the conference.

challenges, Mr Radebe said that the narrative of a rising Africa is now widely recognised. 'This has replaced the discourse of "the hopeless continent". Africa's economic fortunes have become more hopeful as the global trade architecture has changed dramatically in the new millennium,' he said.

Speaking on harmonising trade, Mr Radebe said: 'It goes without saying that harmonising trade, investment and legal practise laws is important for economic development not just across the world, but perhaps more importantly, for us in Africa, more generally, and in SADC more particularly. The same applies what lawyers often refer to as "*pari passu*" (side by side) to our regional integration efforts. These are primary and fundamentally instruments of economic development. ... There is a need to better harmonise the trade, investment and legal practise dispensation across the SADC region. This need must be positioned in such a way that it will take account of, and ensure, that we tackle impediments to more prodigious inter and

intra Africa trade, which includes the stated problem of diversity of laws. We all know the numbers, 12% intra Africa trade is simply an intolerable statistic in this day and age.'

In closing, Mr Radebe gave the following recommendations to address the issues in the SADC region:

'One: An amendment to the SADC Treaty - this in order to make the harmonisation of laws one of the critical objectives.

Two: Provide for the procedures and mechanisms to adopt harmonised community laws that are directly applicable in the SADC region.

Three: Consider a regional legislative body, which can enact laws that are directly applicable in the SADC region.

Four: The SADC Tribunal could be adequately capacitated to ensure effective application and implementation of the harmonised law.

In this way, the legal profession would help unleash the full potentials of the sub region, to meet its growth needs in respect of skills development, employ-

ment creation and a better life for all the region's people. It is important that governments, businesses and all the related stakeholders join hands and collaborate with that of the legal profession, as we advance on our roadmap - Agenda 2063.'

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Picture source: Gallo Images/Stock

LOOKING FOR A CANDIDATE ATTORNEY?

Legal Education and Development, Law Society of South Africa renders a free service which is beneficial to both prospective principals and prospective candidate attorneys.

This free of charge service operates as follows:

- Information regarding prospective candidate attorneys (law graduates) is gathered and kept in a databank. This information includes personal particulars, degree(s), working experience etcetera.
- Prospective principals contact Legal Education and Development (LEAD) if they need to appoint a candidate attorney.
- The data service will provide the prospective principal with the information required.
- The prospective principal then contacts the candidates of his/her preference to arrange interviews.

This project is made possible through the subvention by the Attorneys Fidelity Fund.

**Should you wish to participate in this project, please feel free to contact:
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2016 review of the attorneys' profession

The Law Society of South Africa (LSSA) in conjunction with LexisNexis conducted a national survey of the attorneys' profession. Drawing comparisons against a 2014 survey, the survey analysed the evolution of South African law firms as they responded to the challenges facing the profession in 2016.

The sample of 746 respondents genuinely reflected the geographical and gender demographics of attorneys practising in South African law firms, the bulk of respondents were situated in small law firms. The results indicated that while more than half of the respondents possessed an equity stake in their business, the majority work in small firms with five or fewer fee earners. With 336 sole practitioners, 287 incorporated companies and 82 partnerships surveyed, it is clear that the country's landscape is shaped by a few large law firms and many smaller practices.

It is interesting to note that just over 60% of the survey respondents have ten or more years' experience in their respective legal fields with conveyancing, commercial and family law appearing to be the top three focus areas for most law firms.

The survey results showed that, as with global trends, the legal fraternity has embraced the online world, especially when it comes to research. Online marketing, service provision and the use of social media are now regarded as priority for many firms. Networking remains a firm focus for business growth strategies.

Demographics

• Location

The sample demographics roughly mirrors the GDP of the economy with almost 50% of the respondents based in Gauteng. Northern Cape had the lowest concentration of respondents.

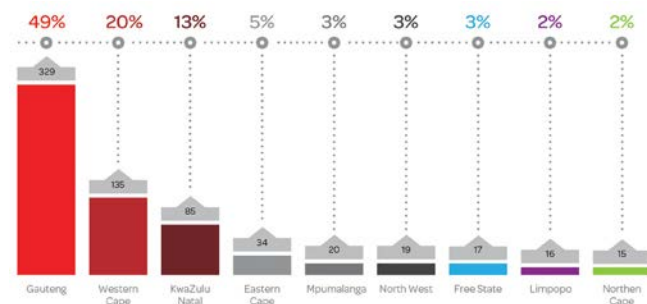


Figure 1 - Location

• Age

In terms of age, the respondents showed a fairly wide age range of between 23 and 84 years, with 32 and 35 being the most prevalent ages.

• Gender

While still a male dominated industry, almost 40% of the respondents were female.

• Race

Although 60% of attorneys are white, 71% of survey respondents were white.

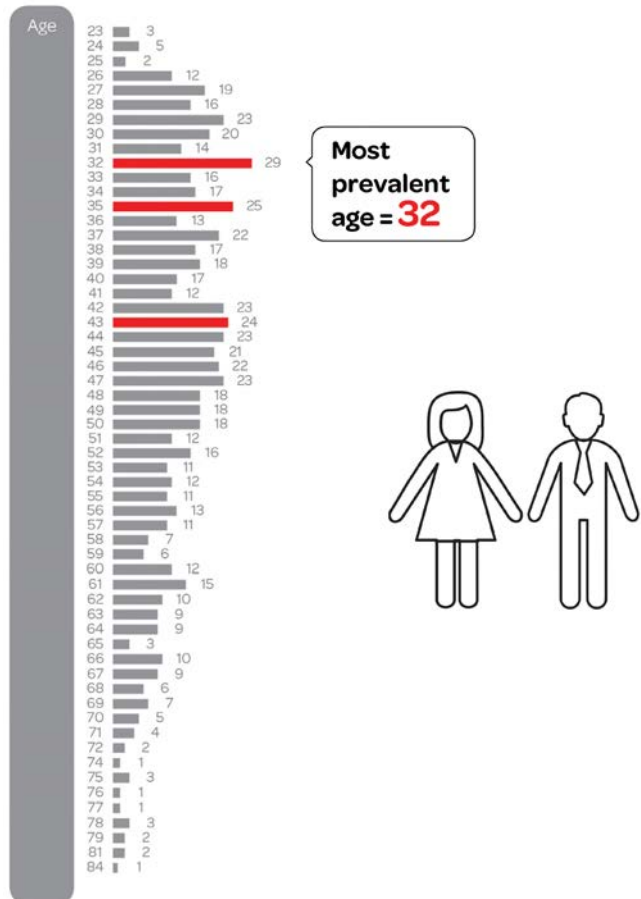


Figure 2 - Age

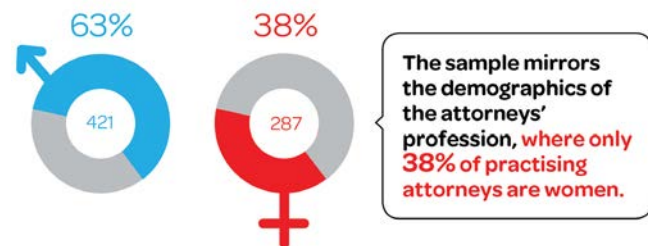


Figure 3 - Gender

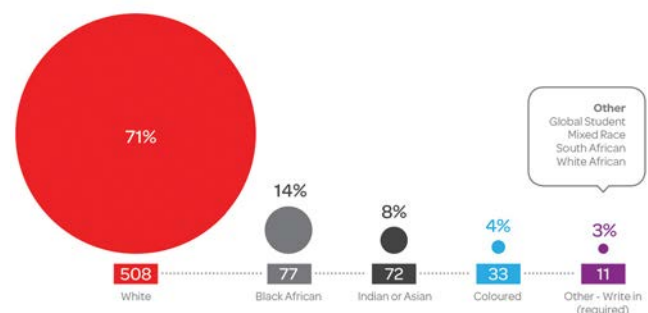
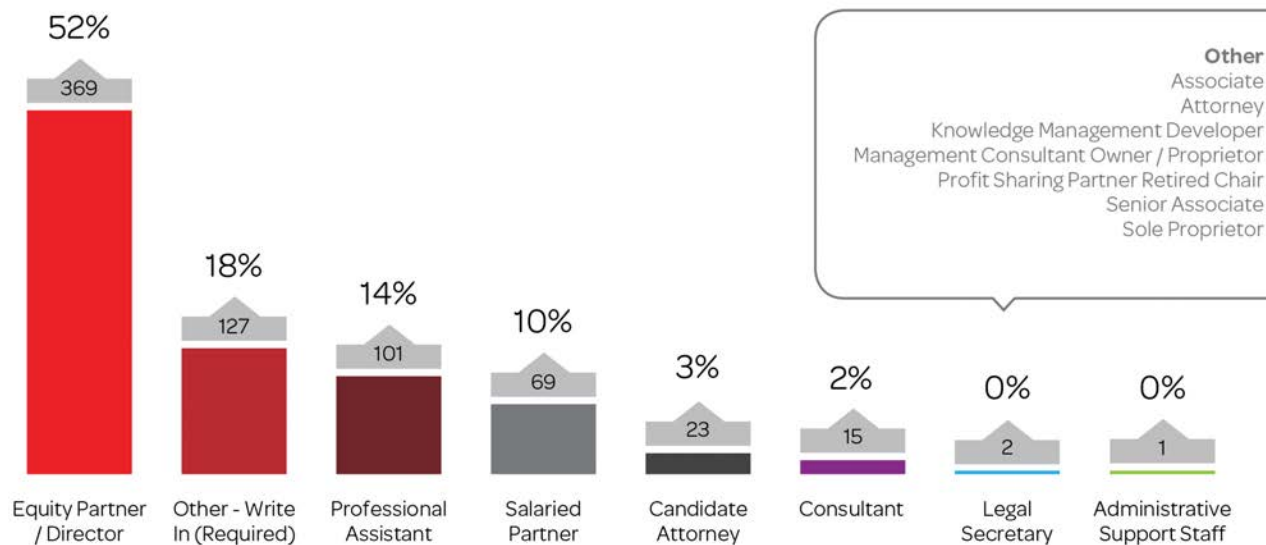
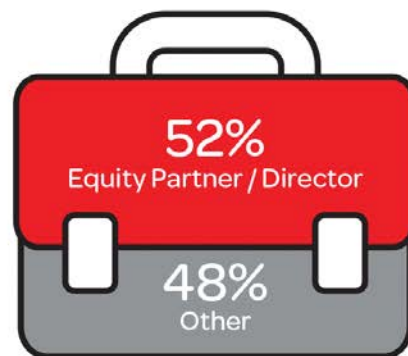


Figure 4 - Race

Professional segmentation

• Roles

Over **half** the respondents surveyed had an equity stake in their business.

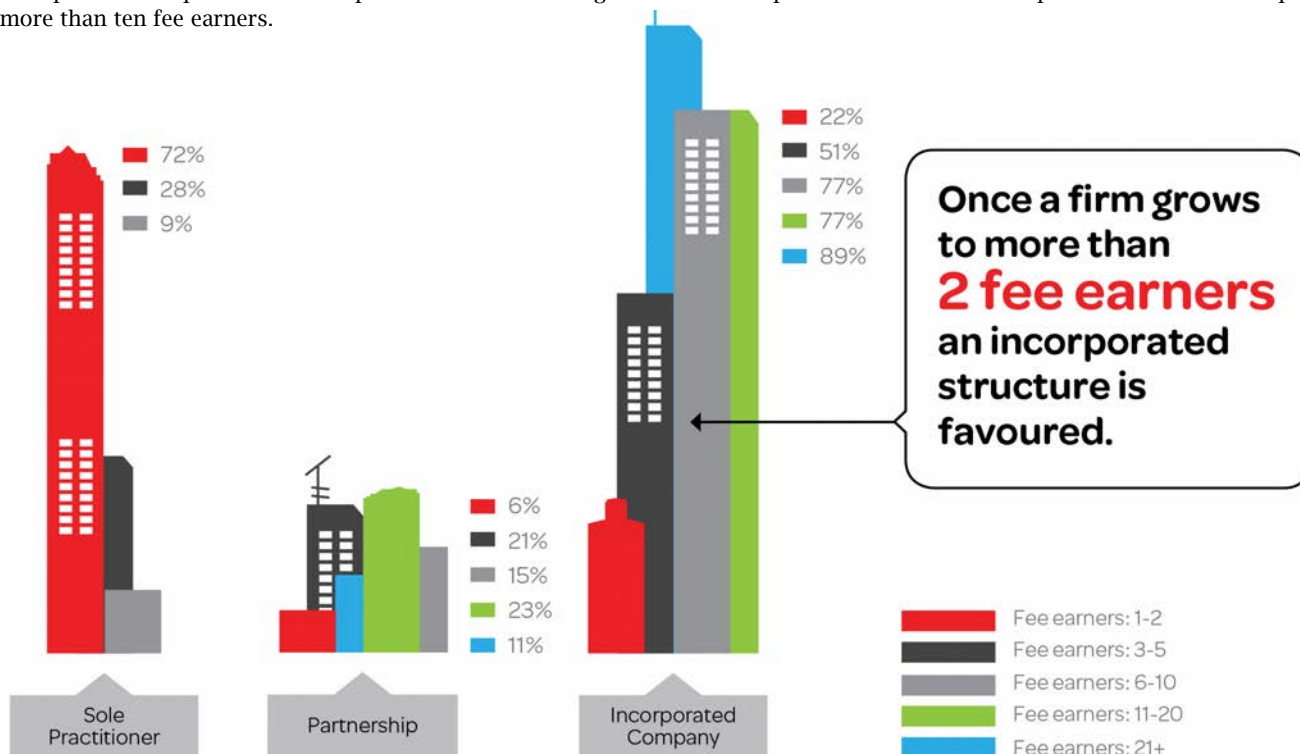


Other
Associate
Attorney
Knowledge Management Developer
Management Consultant
Owner / Proprietor
Profit Sharing Partner
Retired Chair
Senior Associate
Sole Proprietor

Figure 5 - Roles

• Practice type/fee earners

Incorporated companies tend to represent firms with a larger number and spread of fee earners. Sole practitioners do not employ more than ten fee earners.



Once a firm grows to more than **2 fee earners** an incorporated structure is favoured.

Figure 6 - Practice types/fee earners

• Practice categories/fee earners

Boutique or niche firms have the highest concentration of one to two fee earners, while larger firms are more generalist.

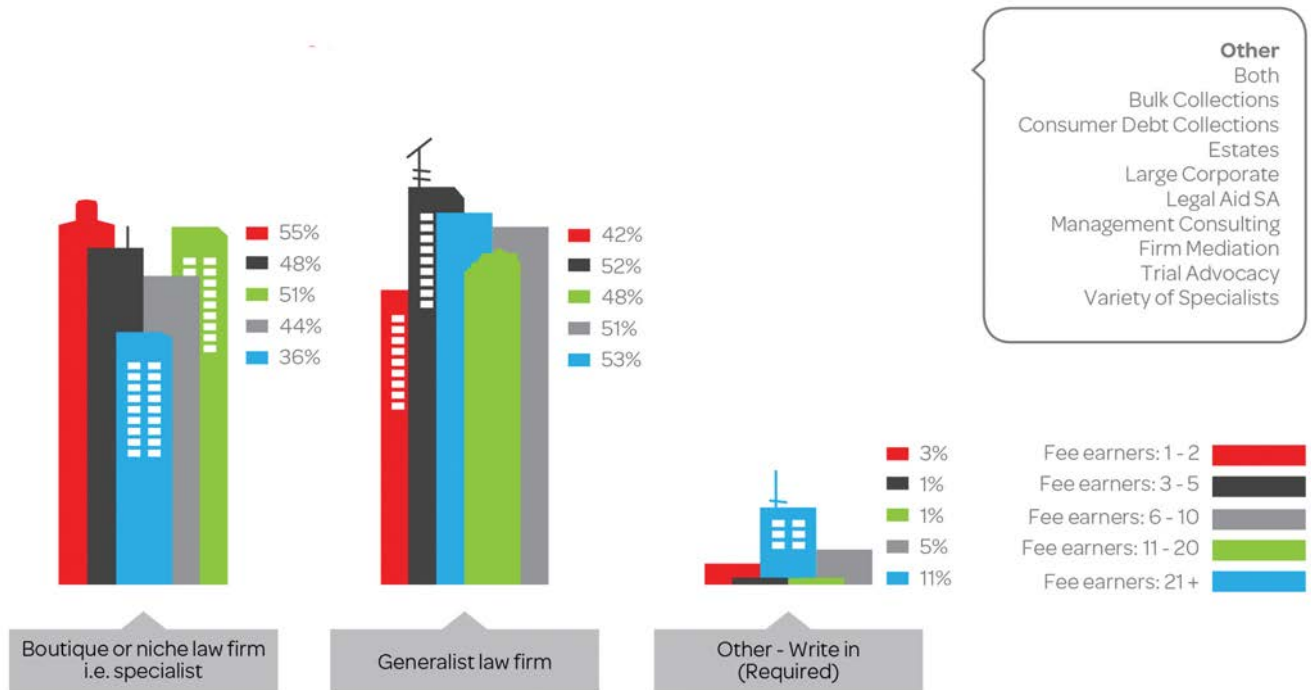


Figure 7 - Practice categories/fee earners

Transformational issues

• Ownership by race

The majority of survey respondents work in fully white-owned firms. Forty percent of the sample work in firms with more representative shareholding structures. Only 11% of firms sampled are wholly black owned.

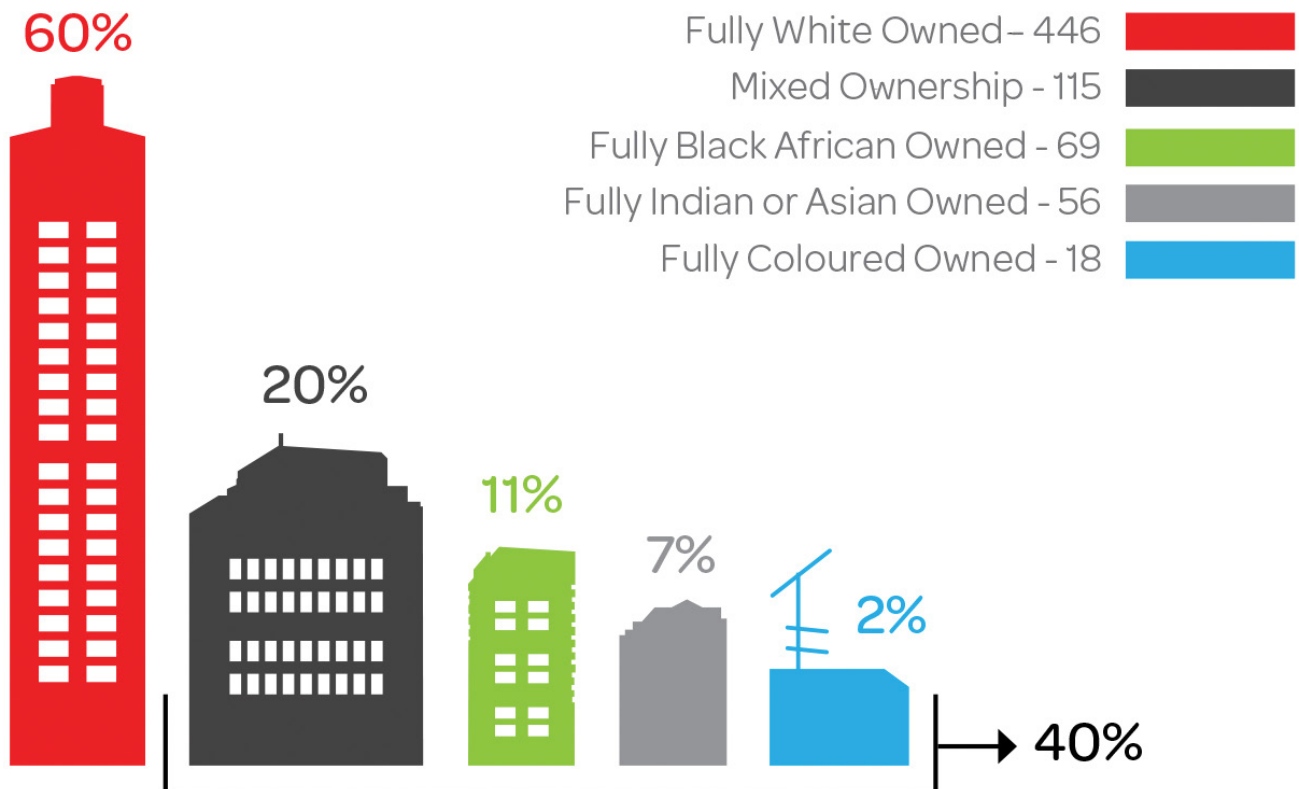


Figure 8 - Ownership by race

• Mixed ownership/race

Only 20% of firms in the sample have mixed ownership. Where there is black ownership in mixed-ownership schemes, black owners are in the minority with 25% equity or less. Likewise there is a high concentration of Coloured and Indian minority shareholders. Only 10% of mixed ownership schemes have majority black ownership as opposed to 69% white majority stake in mixed ownership.

Ownership by race has changed significantly in the past eight years. Since 2008 there are 20% less fully white-owned firms and 14% more mixed-ownership firms. Fully black-owned firms have only grown by 3% according to the sample.

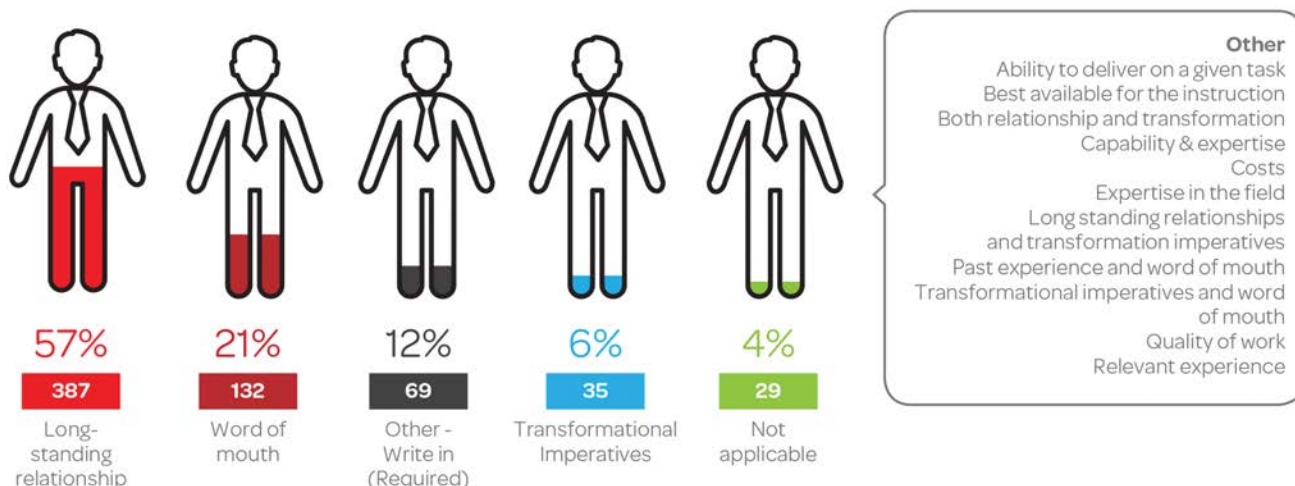
Twenty-seven percent of the sample have mixed gender own-

ership structures. Women are in the minority in mixed-ownership firms. Since 2008 there are 14% less fully male-owned firms in South Africa and 5% less fully female-owned firms. Gender-mixed ownership, however, has increased by 18%.

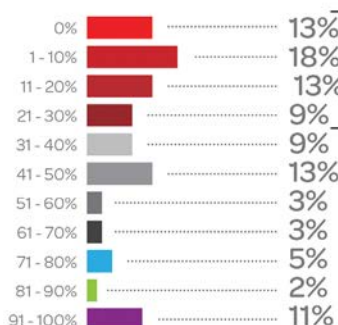
The survey results show that in female-owned firms there is little male input. Whereas in fully male owned firms there is an attempt to include female decision makers. In the majority of mixed ownership firms 50% or less of the decision makers are female.

Briefing patterns

According to the sample, personal relationships and referrals are the key drivers when choosing an advocate.

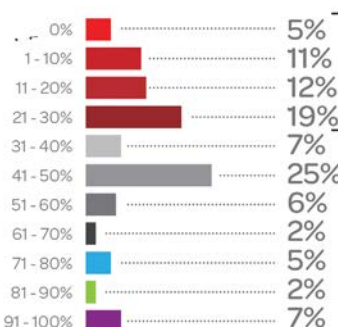


Only **24%** of the sample brief black advocates most frequently.



53% of the sample brief less than 30% to black advocates.

Only **22%** of the sample brief female advocates most frequently.



47% of the sample brief less than 30% to female advocates.

Figure 9 - Briefing patterns

• The full survey can be found on the LSSA website at www.LSSA.org.za and on www.derebus.org.za under 'resources and documents'.

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Sunday Times successfully appealed Press Ombud's ruling over 'The tragic tale of a penniless SA millionaire' article

The *Sunday Times* newspaper has emerged victorious, after appealing the decision that was taken by the Press Ombudsman, Johan Retief, on an article that was published on 17 January, Sabelo Skiti and Monica Langanparsad 'The tragic tale of a penniless SA millionaire' *Sunday Times* 17-1-2016 at 1 (see 2016 (May) DR 11). In *Sunday Times v Zuko Nonxuba* (unreported case no 1587/02/2016, 24-6-2016) the Ombud had found in favour of Eastern Cape attorney, Zuko Nonxuba, that the article written by journalists Sabelo Skiti and Monica Langanparsad, had breached s 1.1 of the Code of ethics and conduct for South Africa print and online media, that states: 'The media shall take care to report news truthfully, accurately and fairly'. The article reported that Avela Mathimba (26) was awarded a total of R 9,6 million in two separate damages claims against the Road Accident Fund (RAF) and the Eastern Cape Department of Health. The claims were paid to his lawyer in 2013. According to the article Mr Mathimba apparently never received a cent. The article quoted Mr Mathimba as saying that, when he 'grilled' his lawyer about the money, Mr Nonxuba 'rushed to court' to have a curator appointed for Mr Mathimba.

Mr Nonxuba complained that -

- the story was selective in that it failed to reflect the contents of existing court reports (which confirmed that his conduct in maintaining the proceeds of a damages award in his trust account was in accordance with a valid court order);
- delays occurred primarily because of Mr Mathimba's new attorneys (not because of his own actions); and
- no expert evidence had been produced to suggest that he had acted wrongfully.

According to the Press Ombud, Mr Nonxuba's complaints boiled down to being misleading and unfair (and not to inaccurate) reporting.

According to the ruling, the legal editor of the newspaper, responded by saying that the article was not a court report, but rather a human interest story about a young man who was surviving on a pittance when he, at least on paper, was a millionaire.

Mr Retief found that it was unfair to Mr Nonxuba not to balance out Mr Mathimba's statement about 'rushing to court' with Mr Nonxuba's argument that his ac-

tions were determined by a court order - which may have left the impression that he had acted in haste to cover for himself. He added: 'If this was true, *Sunday Times* should have produced evidence to provide reasonable substantiation for such a potentially damaging allegation (which it did not do).'

Section 8 of the Complaints procedures distinguishes between minor breaches (tier 1), serious breaches (tier 2) and serious misconduct (tier 3). The *Sunday Times* was in breach of level two in this case.

The *Sunday Times* was directed to publish this outcome on the same page on which the offending story was placed. 'The text, which should be approved by [the ombud], should start with the sanction; and end with the sentence, "Visit www.presscouncil.org.za for the full finding", he said. He added: 'The headline should reflect the content of the text. A heading such as *Matter of Fact*, or something similar, is not acceptable. If the story appeared on the newspaper's website, this text should be published there as well.'

The *Sunday Times* appealed the ruling based on the Press Ombud's findings. According to the decision of the Appeal's Panel, acting on behalf of the respondent, advocate Matthew Mpahlwa, argued that what was reported was a so-called hard story, the correctness of which had to be established by the appellant, which was not done. In other words, he took the Ombud's view. On the other hand, Willem de Klerk, of Willem de Klerk Attorneys, argued for the appellant that the story was a mixed bag: A comment to some extent; and a 'so-called' hard story. He also argued that it was based on court documents, which had been filed by the respondent and Mr Mathimba. 'There was also some argument about whether or not the story was a so-called human interest one. Of course, if it was a comment or an opinion by Mathimba, that would be the end of the matter,' he said.

The panel was tasked with determining whether the basis of the Ombud's finding was correct. They had to determine whether -

- the reporting was not balanced; and
- the appellant failed 'to balance out Mathimba's statement about "rushing to court" with Nonxuba's argument that his actions were determined by a court order.'

The Appeals Panel headed by Judge Bernard Ngoepe, found that two points negate the Ombud's findings. Judge Ngoepe said: 'In the same paragraph in which the story says [that the] respondent "rushed to court" to have a curator appointed, the following sentence immediately follows: "The attorney cited the possibility of brain damage, his client's "tender years" and "limited education" and fears that his money would be mispent by his family.' From these sentences three different reasons are given not only explaining why the respondent would go to court, but also be justified in doing so without delay. These reasons being, at least *prima facie*, sound. The statement that the respondent rushed to court cannot, in light of these three reasons, therefore, be said to be 'potentially damaging allegation' or be seen to be 'in haste to cover' the respondent. Any responsible attorney would be entitled to act swiftly under the circumstances. The Ombud said that, as a balancing out act, the story should have mentioned 'Nonxuba's argument that his actions (to keep the money and not pay out) were determined by a court order'. The problem being is that such an argument by the respondent could not be true. As at the time he went to court for the appointment of a curator, there was no court order stating that he should keep the money in his trust account and not pay it over to Mr Mathimba. The only court order in existence was one dated 5 June 2013, ordering the RAF to pay Mathimba the money awarded as damages. There was no additional order for the respondent to keep the money in his trust account; that is, it cannot be correct of the respondent to argue that his 'actions were determined by a court order' as there was no such order. It, therefore, seemed that the Ombud was given the wrong impression, that there was such an order, said Judge Ngoepe. The Appeal Panel's decision states: 'Whether one sees what was reported as a comment by [Mr] Mathimba or as human element story or as based on court papers or as a hard story, the appeal must, for the reasons given about, succeed because, in any case, the appellant adequately mentioned the respondent's reasons for going to court, rushing or otherwise.'

Sunday Times journalist Sabelo Skiti said that, he was very disappointed about

the ruling of the Press Ombud. 'When we (the publication) read the ruling we found that the Ombudsman was misled by the attorney, about a court order that did not exist,' he said. Mr Skiti said that he felt that the story was and still is important in regard to people placing their

trust in lawyers, but some of the lawyers do not do right by their clients.

Mr Skiti added that they (the publication) knew that they would be justified when they decided to go to the Appeals Panel of the press counsel and that Mr Nonxuba did not have a case, because

the article he and his colleague wrote was a balanced article, and that Mr Nonxuba was given a chance to comment.

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Individual litigants and law firms can now access litigation funding in South Africa (SA). This comes after the launch by the Jericho Litigation Fund, on 8 September in Johannesburg. Chief Executive Officer of the Jericho Litigation Fund, Brandon Irsigler, said the costs of accessing competent legal advice was out of reach to almost all individuals, and added that larger companies, insurers, banks and state owned enterprises are aware of this.

Mr Irsigler said litigation funding levels the playing field for the plaintiff, allowing their claims to be taken seriously and to proceed to finality. 'Litigation funders have been extremely successful in other jurisdictions, and we see no reason for it to be different in South Africa,' he said.

Mr Irsigler announced that the Jericho Litigation Fund is backed by a private equity fund. He explained at the launch, that the fund will pay the plaintiff's litigation costs for the duration of the dispute. He said that should the claim succeed, the funder will then share in the award amount. 'The legal fees are paid at the risk, if the claim fails, the plaintiff makes no repayment and the funder covers any adverse cost order,' he said.

Mr Irsigler added that, claim funding is a different model to the purchasing of claims, as the award amount is not yet determined, and is shared by the litigation funder. He said the interest of the claim-holder and the funder are completely aligned. He gave an example of how internationally, litigation funds have prevented large companies, insurers and state owned enterprises who previously cynically relied on the fact that few counterparts could afford to litigate to achieve a fair result.

Mr Irsigler added that without access

to the litigation funding resources, plaintiffs with excellent claims are often bullied into settling for a fraction of the real claim value. Additionally, even plaintiffs who can afford litigation are turning to litigation funders to conserve cash flow. 'The biggest area of growth seen by funds abroad, is in the de-risking of litigation by medium to large companies,' he said.

Mr Irsigler added that it is cash constrained times. 'Many finance teams are willing to forgo a full award in exchange for saving current cash flow when paying lawyers and not having to budget for a potential costs award in the event of a loss is an added benefit,' he said.

Mr Irsigler also explained that claims eligible for funding are commercial claims, with awards valued in excess of R 3 million, brought against a solvent counterpart. According to the Jericho Litigation Fund website, their claim-holders have sought legal advice before contacting them, and that claim-holders are aware that, if they lose a case, they will be liable for both their legal costs, as well as approximately 65 to 70 percent of their opponents' legal costs.

According to its website, the Jericho Litigation Fund, funds the following:

- Cases in any industry sector which have potential damages or money out-

come in excess of R 3 million, excluding their costs.

- Cases that are to be heard under well-established rules (Arbitration Foundation of Southern Africa/International Criminal Court/London Court of International Arbitration).
- Cases to be heard under SA law, or the law of England and Wales.
- Tender irregularities.
- Breach of contract, typically:
 - unfulfilled contractual obligations;
 - premature and unilateral contract termination;
 - unilaterally applied 'discounts';
 - late payments; and
 - unilaterally imposed instalment payment.
- Claims arising from liquidation or business rescue proceedings.
- Claims against international trading partners.
- Claims against banks/insurers and finance providers.

Information about Jericho Litigation Fund, can be found at www.jerichofund.co.za

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Litigation fund, now available in South Africa

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Taking legal practice into the future

On 26 and 27 September legal practitioners attended the practice management conference in Midrand. The theme of the conference was 'Taking your practice into the future', whereby different speakers touched on topics that are linked to practice management.

The legal practice of the future

In the keynote address, Head of strategy at Møller PSF Group, UK, Robert Millard, spoke about the future of legal practice. He said that in his opinion the topic is a difficult one to develop a view on, especially while technology is changing so quickly. He said that not only is technology changing for lawyers and law firms, but it is also changing for their clients.

Mr Millard, said some commentators say the legal profession is doomed and that lawyers will – in due course – be replaced by computers. He said according to research conducted three years ago by Oxford University, many professional occupations are going to be replaced by computers. He added that many legal occupations such as, judicial law clerks and paralegals, are some of the roles that are on the list to be replaced by computers. He said research showed the need for an interface between complex client environments and even more complex client's needs, he added that legal solutions to those needs will continue to need the assistance of a lawyer.

Mr Millard noted that lawyers may need to think carefully when thinking about how the legal profession may change in future, in the context of the fourth industrial revolution the world is facing. He said the World Economic Forum, spoke about the fourth industrial revolution and how disruptive it is going to be. He referred to the industrial revolution that took place in the 18th and 19th century, when handmade manufacturers were replaced by machine manufacturers and with that massive society ills evolved, such as child labour and pollution on a great scale.

Mr Millard said the fourth industrial revolution will be a combination of humans and cyber physical systems that are emerging and are categorised by humans into humans, mechanical and



Partner at Snail Attorneys, Sizwe Snail ka Mtuze, spoke about social media and attorney's practice and their clients at the Practice Management Conference.

digital systems. 'We have to think to ourselves what impact this is going to have on our economies, our politics, on the nature of business, on the nature of professions, on the nature of legal services,' he said.

Social media and attorney's practice and their clients

Partner at Snail Attorneys, Sizwe Snail ka Mtuze, spoke about the right to privacy on the Internet, which comes from the declaration of human rights. He said the right to privacy has been enshrined in different jurisdictions, with different norms and different definitions.

Mr Snail ka Mtuze said it is not only about the right to privacy, but also about the right to freedom of expression, like press freedom, freedom of speech on the Internet and safe guards for journalists to publish on the Internet and social media. He noted that freedom of expression should be used responsibly. 'You cannot just say what you want to say, whenever you want to say it and however you want to say it,' he said.

Mr Snail ka Mtuze said whatever people write, must have context and not be

defamatory, he asked why there are so many issues in regard to privacy and freedom of expression on the Internet and said that the common problem people have is trust. Trust that if someone sends their pleadings and they are filed with the register, that they will have a proper e-justice system, trust that the government is not unlawfully surveilling citizens, and trust that if someone goes to a health provider, their health records will not be distributed to anybody in electronic format.

Mr Snail ka Mtuze, referred to the case of *National Coalition for Gay and Lesbian Equality and Another v the Minister of Justice and Others* 1999 (1) SA 6 (CC), he said the judgment does not entail what the right to privacy is and that it is more confusing than before, even to legal practitioners. He said it is not just difficult for legal practitioners to understand what the right to privacy entails, but even more difficult having to explain it to a young person. He said legal practitioners are going to have big problems defining 'this' right to privacy

Legal training and education: Effectively managing candidates

Director at Hooyberg Attorneys, Pierre du Toit, spoke about the value young candidate attorneys can have at a law firm. He said candidate attorneys are



Director at Hooyberg Attorneys, Pierre du Toit, speaking at the Practice Management Conference. Mr du Toit spoke about the value young candidate attorneys can have at a law firm.



Lead Financial Forensic Investigator, at the Attorneys Fidelity Fund, Simthandile Myemane, speaking at the Practice Management Conference. Ms Myemane spoke about trust account management and how to reduce liability by implementing good trust accounting.

more valuable in billing than the ratio of their salaries. He said if attorneys asked themselves, what is effective management, their answer would be that, effective management will result in more profit and in young candidate attorneys to be inspired to bring more clients to the firm. He added that firms have an underlying duty to develop, grow and make candidate attorneys ready for the role of being an attorney in South Africa.

Mr du Toit admitted that through that process, there are, however, many challenges, and a firm's reputation could potentially be at stake, if an error occurs on the candidate attorney's side, which may result in cost implications to the firm's client. 'This fear, however, should not limit the freedom allocated to candidate attorneys,' he said.

Trust account management: How to reduce liability by implementing good trust accounting practices

Lead Financial Forensic Investigator at the Attorneys Fidelity Fund (AFF), Simthandile Myemane, said that she established through interaction with some of the practitioners at the conference that some confuse the AFF, with the Attorneys Insurance Indemnity Fund NPC (AIIF NPC). She said that the AFF is there to protect the public from the misappropriation of trust money by practitioners and those in their employment, while the AIIF NPC insures attorneys for professional negligence.

Ms Myemane said in the period from January to August 2016, the AFF received approximately 311 claims, and that the AFF have already paid over R 73 million in claims over the same period. She referred to statistics of defaulters between the years 2010 to 2016 for all four provincial law societies with defaulters recorded in the current year up to August standing at a combined number of 98. Ms Myemane explained that, a defaulter, is an attorney against whom a claim has been lodged and paid by the AFF. She said it was not a good reflection on the profession to see such numbers.

She referred to claims that have been notified to the AFF in the current year to August 2016, and explained that those are claims that have been lodged with the AFF. She explained that when claims are notified to the AFF, they are investigated before they get paid to ensure that only valid claims are paid. She said that the highest claims they receive, both in number and value, are from conveyancing, followed by Road Accident Fund, then deceased estate matters.

Ms Myemane, gave a few examples of how trust funds are misappropriated in conveyancing transactions. She advised that the money that is deposited in the trust account in conveyancing matters

usually belongs to the purchaser until transfer, and it becomes the seller's money once transfer has taken place. She said that the legal practitioner is entitled to take a fee on these matters once transfer has taken place. She added that the AFF has seen instances where the purchaser would pay money into the trust account and a few days later, out of the money that was paid in, the seller is advanced some cash without the purchaser's knowledge.

Ms Myemane said the problem is that the owner of the money, in this case the purchaser, has not consented to the advance. She added that at times legal practitioners take the fees prematurely, before transfer is finalised. She said the main question is, what if the deal falls through? Then what is going to happen? She said that this is how misappropriation of trust funds may start.

Ms Myemane said, some legal practitioners go as far as lending themselves money from the trust account with the hope that there is going to be some money flowing in, and then it becomes a recurring issue and in the end, the legal practitioners find themselves in trouble as they cannot repay the money. These attorneys will either be reported to the provincial law society or the AFF will receive a claim.

Ms Myemane said that there are people who do not know about the existence of the provincial law societies or the AFF and go to the police to open cases against legal practitioners who misappropriated their money. The AFF identified that these institutions did not necessarily know how to deal with such cases, how the trust account should operate and the regulations surrounding these. For this reason, the AFF conducted training with these institutions in the period from 2014 to 2015 to ensure that reported cases of trust misappropriation are properly handled.

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First African lawyer to win IBA Pro Bono Award

Webber Wentzel's, Odette Geldenhuys, was named the *Pro Bono* Award 2016 winner, by the International Bar Association (IBA). She is the first lawyer on the African continent to win the award. The award ceremony was held in Washington DC, on 19 September.

Ms Geldenhuys said her nomination was based on three criteria, namely –

- being the founder of the ProBono.Org;
- her overall general work as a *pro bono* lawyer; and
- for the emolument attachment orders (EAOs) case that the Constitutional Court had ruled on and changed the law that enabled credit providers to access wages and salaries for money owed to them through garnishee orders.

According to the press release, earlier in September, the Constitutional Court ruling in the EAOs case potentially affects an approximate 2,5 million active EAOs, equating to between 10 – 12% of South Africa's workforce. As a result of this victory, EAOs will no longer be issued by a clerk of the court, but will be granted by a magistrate on being satisfied that it is just and equitable to do so and that the amount is appropriate. The Constitutional Court also closed a loophole, which had been abused by clerks. Debtors are now assured that only the court closest to where they live or work may issue an EAO against them, thereby ensuring that the debtor can place his or her circumstances before the court.



Webber Wentzel's Odette Geldenhuys, won the Pro Bono Award 2016 by the International Bar Association, at an awards ceremony held in Washington DC, on 19 September.

The IBA *Pro Bono* Award, was established in 2010 by the *Pro Bono* Committee and, honours lawyers who have shown an outstanding commitment to *pro bono* work as part of their legal careers. Following a large number of entries, the judging panel of this year's IBA award (sponsored by LexisNexis) selected seven nominees of which Ms Geldenhuys was the overall winner. The award is bestowed annually in recognition of *pro bono* work that exhibits an exceptional level of commitment and

dedication to the provision of free legal services and access to justice. It recognises work, including legislative reform, litigation and transactional representation, that has brought about a significant impact – to an individual, community, group, or country, or to the provision of *pro bono* services in general.

Ms Geldenhuys said she was in disbelief when she was told that she was shortlisted with six other lawyers in the bid to win the IBA *Pro Bono* Award. 'My law firm had first asked me if they could nominate me for the awards and I said yes, but I was really shocked when I was told that I was shortlisted for the award,' she said.

The international award is a fitting close to one of the cases that was the basis for Ms Geldenhuys' nomination and also won her the title of 'Attorney of the Year' at the 2016 African Legal Awards held in early September.

Ms Geldenhuys said she is grateful for the award, that, not only her work was acknowledged but also the work of other *pro bono* attorney's throughout the African continent. 'I am humbled because there are thousands of *pro bono* attorneys but I was chosen,' she said.

She dedicated her award to all the lawyers who do *pro bono* work and help individuals' to be able to access legal justice.

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On 27 August, the Cape Town Candidate Attorneys Association (CTCAA) committee spent its day at Maitland High School with dedicated pupils for its education day.

Headed by the CTCAA's Social Responsibility Executive Member, Lebohang Modise, the education day was aimed at preparing Grade 11 pupils of Maitland High School for their nearly approaching post high school experience. The programme was structured to cover topics such as tertiary study options, funding options, CV training and interview skills. It also included a practical professional engagement session that allowed pupils to engage directly with professionals from various industries. It was well attended by pupils in higher and lower grades other than the targeted Grade 11s.

The committee was highly impressed by the character of the pupils of Maitland High School. The learners put every

CTCAA holds education day



Education day professionals and CTCAA committee members with some learners at the education day held at Maitland High School on 27 August.

minute to good use in gaining insights about their academic journey ahead. It was evident that many of the learners had already started applying to universities or colleges and applied for funding as well. Their proactive nature and inquiring minds kept the committee on

its toes, while the professionals were positively inundated with queries and requests for career advice.

*Kim Pietersen, Head of Communications,
The Cape Town Candidate
Attorneys Association*



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Women in Law Dialogue

Female lawyers gathered for the Women in Law Dialogue in Johannesburg on 26 and 27 August for a rare opportunity to celebrate achievements and to strategise on overcoming barriers for female lawyers. The Department of Justice and Constitutional Development (DOJ&CD) hosted the Dialogue to bring women in law together from across the spectrum, as well as aspiring women lawyers to assess progress in line with the Constitution and to propose interventions that will lead to gender equality.

Delegates and presenters came from various sectors of society, including: Academia, Chapter Nine institutions, provincial law societies, the legal profession, media houses, non-profit organisations, private practice and state departments. A number of dignitaries were present, including: The Minister of Justice and Correctional Services, advocate Michael Masutha; Deputy Minister of Justice and Constitutional Development, John Jeffery; representatives from the Black Lawyers Association (BLA); the Commission for Gender Equality; Foundation for Human Rights; the General Council of the Bar; National Association of Democratic Lawyers (NADEL); the Law Society of South Africa (LSSA); and Southern African Development Community Lawyers' Association (SADC LA).

Director of the DOJ&CD's Gender Directorate, Ntibidi Rampete, captured the key objectives of the dialogue as taking stock of progress made, the challenges experienced in mainstreaming women's involvement in the legal profession and seeking out meaningful processes that will offer due recognition of the role played by women in the South African society.

BLA member and LSSA Councillor, Denise Lenyai, commented that strides, even though few in number, have been made for women in the legal profession. This has ultimately been for the betterment of the entire country. She remarked that it is important for women to encourage one another to do better adding that the legal profession has introduced *pro bono* initiatives to assist indigent members of society and women lawyers have made a significant contribution in this regard. She reflected that transformation is not only about changing laws, but also about changing minds.

Guest speaker, Mr Masutha, commented that the dialogue also marked the 60th anniversary of the women's march that took place on 9 August 1956 when more than 20 000 women marched to the Union Buildings in protest of the



Minister of Justice and Correctional Services, Michael Masutha, was a guest speaker at the Women in Law Dialogue held in August.

extension of the Pass Laws to women. The march happened one year after the adoption of the Freedom Charter. It demonstrated the innate awareness of women to strike at the heart of a system that used an identity instrument to profile human beings. The dialogue, according to the Minister, provided an opportunity for delegates to reflect on the challenging lives of many women. With the focus being on the legal profession.

The Minister indicated that, since he took office, he had met with various professional bodies to understand transformation in the legal profession – or the lack thereof. Unfortunately, he found the statistics disheartening. South Africa's constitutional imperatives are undermined by the under-representation of women, referred to him as 'endangered species'. He remarked that 'no economy can function without high-end skills'. A high number of women must be involved in order to secure a functional commercial system. It is important to change mind-sets. The department has, in light of this, embarked on the establishment of a comprehensive framework in its state litigation framework to promote gender transformation within the legal profession,' he said.

Mr Masutha also expressed the view that it is important to refocus the entire value chain of the criminal justice system. The victim has to be brought back to the centre of the criminal justice system through restorative justice. The department will, for example, not consider any application for parole unless there is evidence that some efforts have been made to involve the victim in the process.

The afternoon session of the first day started with general discussions facilitated by Dr Linda Meyer from the DOJ&CD. This session was filled with poignant reflections by women of the challenges experienced and their triumphs. Some of the key issues emanating from this discussion were:

- encouraging female legal stalwarts to mentor the younger generation;
- condensing the disconnect between theory taught at universities and practical realities being faced at legal practice;
- engaging with women lawyers who are employed in sectors outside of private legal practice;
- embracing and assisting human rights organisations and other non-profit organisations that are assisting women and children faced with unjust conditions; and
- coordinating interventions and resources to more effectively promote transformation on women's rights.

Executive Secretary and Chief Executive Officer of the SADC LA, Makanatsa Makonese, facilitated the closing session of day one on Integrated Comparisons of the Legal Profession. This session explored regional experiences from Nigeria, Tanzania and Zimbabwe pertaining to litigation on women's rights in Africa.

Researcher at the South African Institute of International Affairs at the University of Witwatersrand, Johannesburg, Winnie Mutungi, presented on the challenges faced by women in Tanzania, including: Child marriages, the killing of elderly women on suspicion of witchcraft and female genital mutilation. Currently Tanzanian laws are inadequate to deal with the challenges faced by wom-



BLA member and LSSA Councillor Denise Lenyai at the Women in Law Dialogue. Ms Lenyai said it was important for women to encourage one another.

en. However, the proposed Constitution has a number of provisions that will come to the aid of women in Tanzania. For example, s 22(2)(d) of the proposed Constitution provides that: 'All land will be owned, used and managed as prescribed by a law enacted by Parliament to consider ... every woman shall have the right to acquire, own, use, develop and manage land on the same conditions as for a man.'

Solicitor of the Supreme Court of Nigeria, Yewande Abiodun, observed the ongoing challenges faced by women in Nigeria, which are similar to those in Tanzania. Even though the law is inadequate to deal with those challenges, she highlighted the contributions made by various human rights organisations toward mainstreaming women's rights in Nigeria. The Nigerian government has established the Federal Women Ministry of Affairs and Social Development and established women's development centres in all 36 states and, in 2007, adopted a gender policy.

Zimbabwe Women Lawyers Association's (ZWLA), Mildred Mubaiwa, reflected on the role of litigation in the promotion of women's rights in Zimbabwe. ZWLA consists of over one hundred litigating lawyers advancing justice for women. The 2013 Zimbabwean Constitution has embraced women's rights. For example, s 80(1) of the Constitution provides that: 'Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.' Section 80(3) provides that, 'All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.' She elaborated on three recent public interest matters affecting the rights of women. She concluded that the interventions of various human rights organisations have contributed significantly towards gender transformation in Zimbabwe.

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On the second day of the conference, Deputy Minister of the DOJ&CD, John Jeffery, delivered the keynote address. He began his address by recounting the history of female lawyers in the profession.

Mr Jeffery said that in President Nelson Mandela's cabinet there were two female ministers – Minister Nkosazana Dlamini-Zuma and Minister Stella Sigcau. He added: 'In 1999, President Mbeki appointed 4 women to his cabinet and what was interesting was the response from



Deputy Minister of Justice and Constitutional Development, John Jeffery, speaking at the Women in Law Dialogue held in August.

certain quarters on their appointments. For example, the *LA Times* questioned the appointment of Minister Dlamini-Zuma as foreign minister, saying that she had a "fiery, divisive style." But at the heart of it lies this – would any of the critics have complained about a so-called "fiery style" if she was male? For example, in the article mentioned none of the male appointments' personalities were discussed. Or, if she were male, would they have referred to her fiery style in more complimentary terms, using terms such as charismatic, or spirited or determined or resolute instead?

Mr Jeffery said that women are often referred to as 'princesses' or 'prima donnas'. 'The term prima donna is usually used as an insult, while the male version of the term is never used. Also, the term prince is usually used in a positive connotation,' he added.

Mr Jeffery said the majority of law graduates are women, however, as one goes higher up the scale of women in the profession becomes less, adding that there is a greater problem in the Bar as there are currently nine female silks. 'The stakeholders of the profession have become complacent and are taking no action on this matter. We also see the same problem in the Constitutional Court, women are under-represented. The four candidates shortlisted for the vacant position at the court are all men. The state is doing what it can to transform the legal profession. Government has met its target of giving value briefs to previously disadvantaged individuals,' he said.

'We have lots of dialogues, but do we get results? How far has women representation in the law and politics come, what can we do to speed things up? We would have to go sector by sector to check the progress to assess what are the issues and barriers to the advancement of women. These dialogues usually bring about radical resolutions with no programme of action. We will come back here next year and discuss the same

things again. Let us be goal orientated,' Mr Jeffery said.

Gender transformation in the legal profession commission

During the 'Gender transformation in the legal profession commission' presentation, council member of the LSSA, Mimie Memka, asked why is transformation taking such a long time in South Africa? She added that the Constitution gives the rights for transformation and that it was up to South Africans to implement the process and ensure equality in the workplace. 'In spite of all the available legislation, the bottleneck occurs in the implementation of the legislation. In order to fulfil this process, we need to have a mind shift,' she said.

Ms Memka said that the slow pace of transformation in the legal profession can be attributed to the way female practitioners are perceived by their peers. 'The perception is that the legal playground was never intended for women even though women practitioners have the same abilities to execute the same mandates as our male counterparts. Women must not be apologetic, it is our right to be in the profession,' she said.

Linda Nyathi from the Commission for Gender Equality (CGE) explained that the CGE is a Chapter 9 institution tasked with the promotion and protection of gender rights and one day attaining gender equality. She added that the CGE works on gender related problems and monitors gender equality in order to make recommendations.

Ms Nyathi said that in 2012 CGE engaged professional bodies, including the Office of the Chief Justice. She added that during the engagement, CGE found that there were no concerted efforts to help women attain positions in the judiciary. 'The CGE attended the Judicial Service Commission interviews to gauge the deliberations and to see who gets to be recommended. We saw that during the interviews, female candidates were asked how they will cope with the workload, whereas the male candidates were not asked that question,' she said.

Advocate Thandi Norman SC, from Advocates for Transformation, said that becoming a judge is not as easy as it appears. She added: 'No one teaches you to be a judge, you need to experience it, it only gets easier with experience. As women, we need to establish our own pool of candidates that can be appointed as judges. We then take it upon ourselves to interview these candidates before they even appear before the Judicial Service Commission.'

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Department of Justice and Constitutional Development, Chief Financial Officer, Lorraine Rossouw, speaking at the Women in Dialogue.

The challenges law students face

Female candidate attorneys said that they feel let down by the other women in the legal profession. They were having a discussion on the topic 'Current state of affairs in law schools'. Candidate attorneys were given an opportunity to voice their concerns about the challenges they come across in the legal profession. The majority of them shared similar experiences that they are faced with in their law studies and the profession itself.

Candidate attorney at the University of Johannesburg and a member of the Black Lawyers Association Student Chapter, Rutendo Chapwanya, said it is disappointing that the women they look up to, are not availing themselves to mentor. Ms Chapwanya said some female students get discouraged to pursue their legal studies because of the treatment they receive from their seniors in the profession. She said that although men in the profession offer to mentor them, some of them expect a favour for a favour. 'When you ask men in the legal profession to help out, some of them have intentions beyond just mentoring, some end up wanting to benefit from female students in an inappropriate way,' she said.

Ms Chapwanya also said women in the legal profession are at a disadvantage, because they do not get treated the same way as their male counterparts. She agreed with her fellow law students in saying that they are not taken seriously as women in the profession, and that black women are labelled as incompetent and emotional.

Another issue that was raised was about the quality of law curriculum, candidate attorneys said the quality of the curriculum is poor, and added that some

of the universities do not offer practical legal training. They said the training should be compulsory at university level.

Attorney and founder of the Stand Up! Foundation, Shabnam Mohamed, said that the foundation has been discussing the issues of the poor quality of legal education for the past ten years. She added that government needs to legislate the issue of the law curriculum, for it to have impact. She said if they do not legislate it, there is no way legal students are going to have accountability and that another generation of law students will have the same discussions.

Attorney and Chairperson of the Personal Injury Committee of the LSSA, Lindy Langner, who was facilitating the 'Current state of affairs in law schools' discussion said the LSSA is in talks with some law firms, to help with the legal practical training issue. She also told candidate attorneys that the LSSA has a department called Legal Education and Development (LEAD), which is an educational training department for candidate attorneys, as well as where practising attorneys can enhance and promote themselves.

Ms Langner said that in the many programmes LEAD offers, they are promoting more female participation. She said statistics showed that there are more female law students than male and that it showed that female law students were engaging the profession, however, she added that as time goes on female candidate attorneys exit the profession once they start to practice.

Ms Langner said the commercial law arena does not cater for women's needs, and added that government and the LSSA are trying to find ways to rectify this to ensure women remain in the profession.

NADEL representative, Ugeshnee Naicker, said government separated basic



Attorney and Chairperson of the Personal Injury Committee of the Law Society of South Africa, Lindy Langer, was facilitating the 'Current state of affairs in law schools' discussion at the Women in Law Dialogue.



Attorney and founder of the Stand Up! Foundation, Shabnam Mohamed, giving feed-back from the 'Current state of affairs in law schools' discussion at the Women in Law Dialogue.

education from higher education, however, equality in the system cannot be looked at piecemeal because one system is conveyable to the next system. She said the current status of the law degree falls in the fragmented system that was created by Bantu education.

Ms Naicker asked what the purpose of the current law degree is? She also asked if universities have had dialogues to change the system? She further asked if universities looked at African jurisprudence and if they developed the African women jurisprudence? She referred to the 'Rhodes must fall' incident and said it all started because there is an ideological struggle for the decolonisation of education. Ms Naicker added if the law degree is not decolonised then law students are being failed. She noted that from an economic perspective, women come from severely affected economic conditions. She said females experience more poverty than males.

Ms Naicker said there are women coming from disadvantaged backgrounds and they are marginalised students. They were marginalised in a public education system that did not serve them. She said that when some of these women get to tertiary institutions, they face abuse from residency and struggle to pay fees and end up giving into the life of the 'blesser' syndrome. Ms Naicker said statistics showed that a number of law students dropped out because the public education system failed them at a junior level. In conclusion, Ms Naicker announced that NADEL is going to start student chapters at universities, she said the student chapters will be human rights based and that they want to create human rights lawyers and encourage them to do community projects.

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Profession adds its voice to concerns over SABC Board

The Law Society of South Africa (LSSA) issued a press release early last month adding its voice to the calls for an investigation into the fitness of the Board members of the South African Broadcasting Corporation (SABC) to hold office in the public interest.

This came after the SABC appointed its former Chief Operations Officer (COO), Hlaudi Motsoeneng, as its Group Executive of Corporate Affairs. The decision by the SABC came a few days after the Supreme Court of Appeal had dismissed, with costs, the application for leave to appeal against the Western Cape High Court decision. The High Court decision set aside as invalid Mr Motsoeneng's appointment as the public broadcaster's COO.

In the press release, LSSA Co-chairpersons Jan van Rensburg and Mvuzo Ntyeseni, said: 'We believe that the arrogant and irrational actions by the SABC Board in appointing Hlaudi Motsoeneng to another position within the SABC, disregard the remedial action recommend-

ed by the Public Protector. The findings by the Public Protector against Mr Motsoeneng remain binding until such time as they are challenged in and set aside by a court of law. This has not been done yet and the SABC Board is breaching its fiduciary duties in addition to appearing to be contemptuous to the rule of law, as well as of the Constitutional Court judgment in the case of *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC).'

The LSSA also noted, 'with serious concern, that Communications Minister, Faith Muthambi, has been silent and has taken a back seat throughout this controversy in the face of the contemptuous behaviour by the SABC Board.' The LSSA has called on the Minister to show leadership and to take the appropriate decisive action in accordance with her political responsibilities. 'We will further engage with both the Minister and with the relevant state functionaries on the matter. A credible public broadcaster is key to our constitutional democracy as is the underlying principle of transparency,' said Mr Van Rensburg and Mr Ntyeseni.

The National Association of Democratic Lawyers (NADEL) also issued a press release stating that it was 'extremely displeased with the decision by the SABC ...'. NADEL added: 'The actions of the SABC amount to a continual dragging of its name into the mud and shows that the public broadcaster has no respect for the rule of law, the Constitution and the principles of good corporate governance.'

NADEL stated that the public broadcaster plays a pivotal role in the promotion of democracy in South Africa and that it must be treated with the seriousness required, and called on the SABC to take itself seriously as 'it has lost the public's trust'.

NADEL urged the Minister of Communications to conduct an inquiry on the fitness of the SABC Board to continue with the functions assigned to it.

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Attorneys' profession offer mediation services in education crisis

At its meeting on 29 September the Council of the Law Society of South Africa (LSSA) expressed serious concern at the developments at tertiary institutions. It resolved to offer mediation services by experienced attorney mediators to all the parties involved in the education dispute in an effort to resolve the impasse.

In a press release, LSSA Co-chairpersons, Mvuzo Ntyeseni and Jan van Rensburg said: 'We offer the skills and expertise of our attorney mediators on a *pro bono* basis in an effort to get representa-

tives of universities, student formations and relevant government departments around the table in dialogue.'

According to the press release, the LSSA Council expressed its serious distress at the violent and destructive nature of the student protests and stressed that it cannot condone violent behaviour and the destruction of property and infrastructure.

The LSSA also emphasised that it does not support the stance of any specific party in this dispute. 'We believe that the lack of communication between the parties, the positional stances adopted, the

closure of some educational institutions and suspension of classes at others, jeopardises the current academic year for many, many students - including law students that may be preparing to join the profession next year - and the outcome will have a knock-on effect on the intake of students in 2017,' said Mr Van Rensburg and Mr Ntyeseni.

They added: 'We are at a tipping point for our educational institutions. We are confident that with constructive dialogue we can coax the parties back from an abyss that, once we are all cast into it, will have serious repercussions for the

entire country and for the rule of law. We cannot afford to compromise our educational institutions to the point where they can no longer recover and we cannot afford to compromise the education and development of another generation of young adults.'

The LSSA engaged with all the provincial law societies to set up panels of mediators to provide *pro bono* mediation services to the affected parties at tertiary institutions in their areas of jurisdiction.

The Cape Law Society initiated this project when its Council unanimously resolved to utilise its resources, as well as establish a team of mediators from among its members with a view to offering mediation services to all concerned parties, in particular the universities, student formations and relevant government departments. The resolution took place at its council meeting on 25 September.

Meanwhile, the National Association of Democratic Lawyers (NADEL) offered legal assistance to students who had been arrested during the protests.

In a press release, NADEL said that it

was 'deeply disturbed' by the downward spiral that the protests for free, quality higher education had taken.

NADEL said that there was merit in the demands made by the students, as s 29 of the Constitution speaks on the right to education. 'The state must make higher education progressively available and accessible through reasonable measures. President of the Republic of South Africa, Jacob Zuma, on 18 January 2015 ratified the International Covenant on Economic Social and Cultural Rights by which the state is bound to make higher education equally accessible to all, on the basis of capacity, by every means and in particular by the progressive introduction of free education,' NADEL said in the press release.

NADEL noted, however, 'with great concern that a legitimate struggle is now being compromised by the closure of universities, violence and the burning of important infrastructure and buildings. This infrastructure is required for the full enjoyment of the right itself and for the prosperity of future generations. Much needed financial capacity will be

diverted to repair and rebuild such infrastructure.'

'It is, therefore, the responsibility of NADEL, as public interest lawyers, to now intervene for the promotion of social justice. NADEL has taken the decision to provide legal assistance to students who have been arrested during the protests. This is based on students' rights to legal representation and in the pursuit of access to justice for everyone,' it stated.

NADEL said it would take a more constructive role in assisting students to explore and exhaust all legal measures available to them in the pursuit of greater democracy in general and the realisation of the right to free, higher education in particular.

NADEL also seriously cautioned students to respect the rule of law and to avoid further arrests.

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LSSA Briefing Pattern Action Group forges links with Justice Department, judiciary and SASSETA

Justice Department Director General, Vusi Madonsela, attended a meeting of the Briefing Patterns Action Group, coordinated by the Law Society of South Africa (LSSA), at the end of September. Fruitful discussions were followed by a commitment to close cooperation between the Action Group and the Justice Department, particularly with regard to the sharing of relevant information and input into various policies and protocols that are being drafted by the parties.

Representatives of the Action Group had met earlier with Judge President of the Gauteng Division of the High Court, Dunstan Mlambo, to engage on the important perspectives of the judiciary regarding briefing patterns in the courts. The Judge President provided important insight into trends in representation in the Gauteng courts. Action Group representatives also met with the Administrator of the Safety and Security Seta (SASSETA), Jennifer Irish-Qhobosheane, to discuss access to research and funding. A workshop was planned for October, to agree on a framework for cooperation between SASSETA and the Action Group.



LSSA Briefing Pattern Action Group members were joined at their meeting in September by Justice Department Director General Vusi Madonsela. Front: Anthea Platt SC; Mr Madonsela; LSSA Co-chairperson Mvuzo Notyesi; Action Group chairperson, Busani Mabunda; LSSA Chief Executive Officer, Nic Swart. Back: Ishmael Semenya SC, Richard Scott, Varsha Sewlal from the Justice Department; Briefing Pattern Action Group project leader, Dr Tsili Phooko; and Legal Education and Development senior manager, Ogilvie Ramoshaba. Dion Masher, Thandi Norman SC and Sam Mufamadi SC were not able to attend the meeting, but are also members of the Action Group.

Barbara Whittle, Communication Manager, Law Society of South Africa, barbara@lssa.org.za

People and practices

Compiled by Shireen Mahomed

Herold Gie Attorneys in Cape Town has new appointments and promotions.



Standing from left: JP Carstens has been appointed as an associate in the wills and estates division, Phillip Sampson was appointed as an associate in the property department, Karen Horstman was appointed as an associate in the family law department, Nico Walters was promoted to senior associate in the litigation department and Taryn Loynes has been promoted to senior associate in the commercial department.

Seated: Simone Wolfvaardt has been promoted to senior associate in the commercial department and Romeo Tsusi has been appointed as an associate in the commercial department.



Jeremy Klerck has been appointed as chief executive officer.



Shekesh Sirkar has been appointed as a chairperson.



Etienne Swanepoel has been appointed as a consultant in the commercial department. He specialises in mergers and acquisitions.

Erratum: Mervyn Taback Inc in Johannesburg has two new promotions.



David Woodhouse has been promoted as chairperson.



James Cross has been promoted as chief executive officer.



Ashley Meyer has been appointed as a director in the litigation and insurance department.

Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. Please also note that *De Rebus* does not include candidate attorneys in this column.

All People and practices submissions are converted to the *De Rebus* house style.

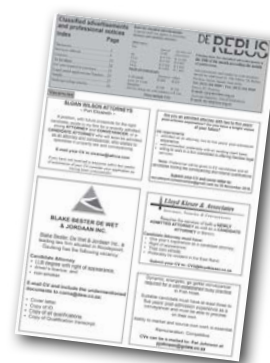
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By
Thomas
Harban

Letters of engagement – documenting the ambit of the instruction given to the attorney

In previous articles that have been published by the Attorneys Insurance Indemnity Fund NPC (the AIIF) in the Risk Alert Bulletin and elsewhere, we have set out the importance of practitioners using letters of engagement to document the terms of their relationships with their clients. Many of our previous articles have focussed on setting up the engagement. This article will address the importance of recording where the practitioner's mandate ends, namely, what services does the client expect the attorney to render and at what stage will the mandate in respect of a particular matter or instruction be fulfilled?

It is important that practitioners document the scope and extent of the mandate as an unclear or open-ended mandate could attract many potential risks for the practitioner. Even where the practitioner acts for the particular client in a number of different matters, it is important that the extent of the mandate in respect of each matter be documented. In fact, the proper recordal of the extent of the mandate in instances where you act for a client in more than one matter may be more important. Do not assume that an instruction given to you in respect of one matter will necessarily apply across all matters you are dealing with for a particular client.

To some, the documentation of the mandate may seem rather trite, but the reality is that many potential risks can be avoided if the extent of the mandate is properly documented in each matter. Do not rely on what, in your understanding, is the implied boundary of the mandate or assume (without clarifying with the client) that there is a meeting of your respective minds on where the mandate will end. Also, in the unfortunate event of a professional indemnity claim against your firm, the allegation may be that you failed to properly carry out your mandate and the letter of engagement will assist in assessing whether or not there is any liability on the part of your firm. A properly documented mandate will thus

assist the AIIF (and your top-up insurer, where applicable) in successfully pursuing your defence. This documentation of the instruction may also assist you in the event that the client were to lodge a complaint against you with the law society for an alleged failure to properly carry out your mandate. A properly defined and documented agreement will assist in proving what the mandate was exactly.

A properly defined mandate will also assist you in managing your client's expectations. This will, furthermore, assist in clarifying to your client and agreeing with the latter if certain of their expectations fall outside of your specific area of practice. There may be some aspects of the matter that fall outside of the conduct of an attorney's profession (or in respect of which, you may need to refer to another attorney) and it is important that these are brought to the client's attention as early as possible. The instruction may, for example, have an element that needs some or other specialist element where you may not necessarily have the expertise or resources (such as conveyancing, notarial work, taxation or even an intellectual property). Be careful not to hold yourself out as (or give the client the expectation that you are) a one stop shop for all the issues (legal or otherwise) that your client needs addressed. It is also important to remember that, in the unfortunate event of a professional indemnity claim being brought against your firm, the AIIF policy will only respond in respect of claims arising out of the provision of legal services (see clause XX and clause 1 of the AIIF policy), subject to the application of the exclusions set out in clause 16 – a copy of the current and previous AIIF policies can be accessed on our website www.aiif.co.za. In the event that your firm has top-up cover, please have regard to the wording of your specific policy in order to ascertain in which circumstances that policy will respond and speak to your broker or the top-up insurer should you require any clarification in this regard.

Disputes regarding the extent of the

mandate can arise from almost any area of practice. A common example of a situation – where a claim against an attorney arises out of a failure to clearly set out the extent of the mandate – is where a practitioner is instructed to pursue a claim on behalf of a client arising out of a motor vehicle accident. The practitioner may understand that the mandate is only to pursue a claim against the Road Accident Fund (RAF) in respect of the personal injuries suffered by the client. The client, on the other hand, may be under the impression that the practitioner will pursue claims for all the damages suffered, including a claim against the third party for the damages to the vehicle involved in the collision. Very often, by the time the RAF claim is finalised, the claim in respect of the damages to the vehicle has prescribed. The client then institutes a professional indemnity claim against the practitioner in respect of the claim arising out of the damages to the motor vehicle and in defending that claim, the issues to be decided may turn on what the agreement between the parties was and where the mandate ended. If your client is facing criminal charges (or is expected to attend an inquest) arising from the collision, is the common understanding that you will/will not conduct the defence in the criminal trial (or represent the client at the inquest) as well? We have been notified of claims arising out of circumstances where members of a family are injured in the same collision and the attorney consults with one member of the family and pursues a claim for that person only. An action is later instituted against the attorney on the basis that the instruction (as the client alleges) was for the attorney to pursue the RAF claims of all the members of the family injured in the accident. The other claims may have prescribed at that stage and the allegation is that they prescribed in the hands of the attorney.

In context of divorce proceedings the practitioner may, for example, act for one of the parties up to the stage where a divorce decree is granted. The client's

expectation or understanding may be that the practitioner will attend to all the related/ancillary matters involved in the dissolution of the estate, including pursuing a claim for part of the pension fund (if applicable), maintenance, the transfer of ownership or some other real right in immovable property or even shares in a company that may form part of the order or settlement. In the event that the practitioner's understanding is that the mandate was only to act for the client until the divorce decree was granted, whereas the client's understanding was different, there is a risk of a dispute arising later should the client suffer a loss.

The extent of the mandate must be agreed with the client and properly documented in the letter of engagement. Ensure that you communicate this to the client in a clear manner that the client will understand and, where necessary, the services of an interpreter should be used. Once you have explained the terms of the mandate and your relationship as set out in the letter of engagement to the client, get the latter to sign in acknowledgement of their agreement with the terms set out in the letter. Always remember to give the client a copy of the document. If or when necessary, the letter of engagement can be updated or amended as the parties may vary their initial agreement or where circumstan-

es dictate that the mandate be amended – each and every change should, likewise, be properly documented and agreed between the parties. The documentation will also make it easier for a colleague in your firm to easily glean from the file what is expected of your firm, should the matter need to be dealt with in your absence. The person in the firm who initially consults with the client and takes the instruction may not be the person who deals with the matter until finalisation and a proper record of the instruction will be important in this context. Where your firm is acting on the basis of a contingency agreement with the client, the terms of the contingency agreement can also be included in the letter of engagement.

With the full implementation of the Legal Practice Act 28 of 2014 (LPA) – set to come into effect soon – practitioners should note the provisions of s 35 in relation to the documentation of the financial aspect of a mandate and the discussions that must be held with the client in respect of the fees for services to be rendered. The LPA prescribes that the cost estimate notice must be in writing and must include an outline of the work to be done in respect of each stage of the litigation, where applicable (s 35(7)). Non-compliance with the provisions of s 35 will constitute misconduct (s 35(10)).

For more information, please consult

the Risk Management tips published on the website of the AIIF (www.aiif.co.za), which contain a comprehensive section on letters of engagement and what practitioners should consider including in such documents. Copies of past editions of the Risk Alert Bulletin can also be accessed on our website.

Thomas Harban BA LLB (Wits) is the General Manager of the Attorneys Insurance Indemnity Fund NPC in Centurion.

Practice management additional note:

Please see the clarification, which pertains to the practice management article 'Applying for a Fidelity Fund Certificate' 2016 (Sept) DR 15:

Clarity is hereby provided that in terms of s 42(3)(a), the Attorneys Fidelity Fund does not issue the Fidelity Fund Certificates but the provincial law societies do. The Attorneys Fidelity Fund provided an automated system to the provincial law societies in order to carry out their mandate more efficiently.

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By
Kim
Pietersen

Young attorneys as brands

The expression, ‘starting at the bottom of the food chain’, is a familiar tune to any candidate attorney. Having just graduated from law school, one steps into the workplace with scattered recollections of legal knowledge, which proves insufficient. If young attorneys can realise that their lack of book knowledge at that time is okay; and they focus their efforts on gaining legal experience, while building a meaningful professional network during their articles, they can be sure to move up the corporate ladder.

Working your way up the corporate ladder today, however, means more than just gaining workplace experience and building an impressive professional network. Soft skills are shaping the future of young attorneys more so than ever before. Hence, being intentional about something like personal branding, and being social media savvy in the fourth industrial revolution, may just be a young attorney’s ticket to the top.

Personal branding

Personal branding is typically described as the ongoing process of establishing a particular image or impression in the mind of others. Although this term is most often thrown around in the field of marketing, it is a concept that applies to the legal profession alike. Simply put, young attorneys should be intentional and consistent about the image they portray, both in the workplace and beyond. Similarly to your firm having a value proposition, which appeals to its clientele, you have your own skills and expertise which appeals to your colleagues and clients as well. Hence, in climbing the corporate ladder, you are required to consciously work at your unique selling points, and promote same, just like any firm does in its race to the top.

Brand vs reputation

Though this concept often conjures up ideas of a person’s reputation, these two concepts are distinct. Very well put, Jay Harrington, a writer on the legal site *Attorney at Work*, distinguishes these two concepts by noting that while your reputation is something that happens to you, your brand is something you make happen (J Harrington ‘Substance and form: The Elements of a Lawyer Brand’ www.attorneyatwork.com, accessed 29-

9-2016). It is often a young attorney’s understanding, or misunderstanding, of this distinction that leads to his or her fortune or misfortune in the workplace.

With the above said, young attorneys should note that climbing the corporate ladder essentially means being aware of both substance (expertise) and form (brand). Because most of your colleagues will be able to get the job done, it has become increasingly important to know how you may be able to get the job done uniquely. And bearing in mind the distinction between reputation and brand, it is similarly important to ensure that others know this too.

Use social media to your advantage

In building your personal brand, you should realise that your social media accounts are ideal for marketing yourself to the world at large. Just like you may invest your time in gaining hard skills in the workplace and professional settings alike, you may want to invest some of your time in relaying those hard skills on your professional LinkedIn page as well. Again, given the competitive environment young attorneys find themselves in, being competent is not enough if the right people are not aware of such competence. LinkedIn, thus, provides you with a good platform to both showcase your skills and connect with people professionally. Engagement in this way does not only motivate you to further improve and increase your range of skills, as you see how your colleagues and other connections are building their value propositions, but it also allows you to grow your professional network on a larger scale than mere workplace engagement.

Be social media savvy

Now just as social media can be used to advance your journey up the corporate ladder, we all have seen stories in the media, which have painted a different picture as well. And though we may have debated these stories in light of the law around defamation, the right to privacy, and so on, too few of us translate these valuable insights into the way we manage our personal social media accounts, such as Facebook and Instagram. As noted, young attorneys should also be intentional and consistent about the im-

age, they portray beyond the workplace. This applies to your image on social media as well.

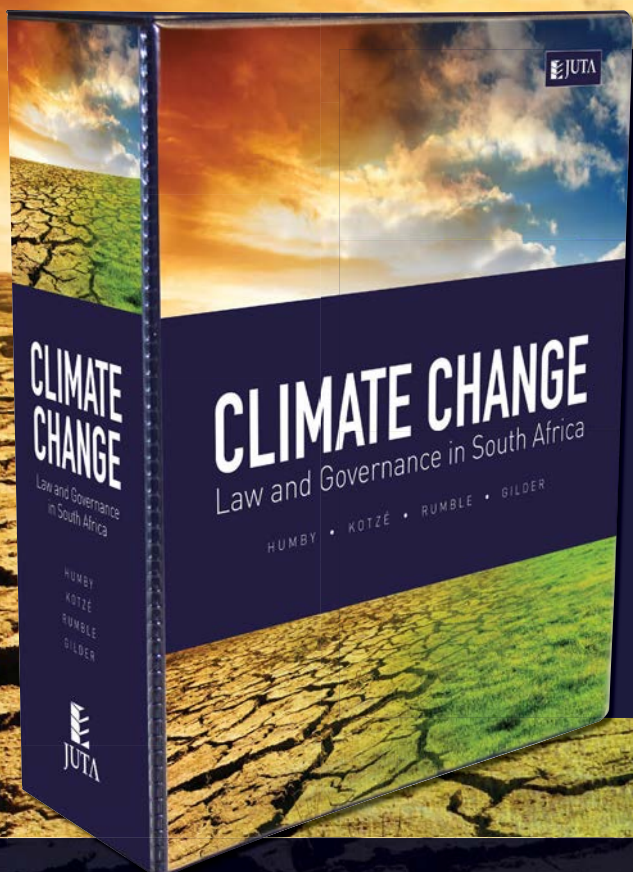
It is not often that you socialise with your colleagues over the weekend, but given that we are in the fourth industrial revolution, face to face contact is not required for your colleagues to know what you were up to over the weekend. Hence, a proactive approach to the way you portray yourself in the workplace should continue in the way you manage your personal social media accounts. This simply means that you should be mindful of the way you engage on social media in general, just like you would be mindful of your engagement in the workplace and other professional settings.

As Sherly Sandberg, Chief Operating Officer of Facebook, says in her book *Lean In: Women, Work, and the Will to Lead* (New York: Alfred A Knopf 2013), there really is no such thing as a ‘workplace you’ and a ‘weekend you’. Even though different parts of your personality will come to the fore in the respective settings, you should always remember that there is ultimately only one of you. Hence, on the premise that you have made a good impression in the workplace, best you realise the value of that impression and not taint it unintentionally in the belief that you are acting as the ‘weekend you’ when engaging on your social media accounts.

Branding your way to the top

Evidently, even though all young attorneys start ‘at the bottom of the food chain’, only some make their way to the top. The legal environment is fiercely competitive with many competing with the same skills and expertise. To stand any chance of success as a young attorney in the fourth industrial revolution, best you work on your personal brand consciously and consistently, while using social media to your advantage. The sooner you do this, the better.

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Protection of ‘minority shareholders’ from oppressive or prejudicial conduct under s 163 of the Companies Act: Has anything really changed?

By
Siphephelo
Mbuli

The Companies Act 71 of 2008 (the Act) regulates the legal relationship between the company, as a separate legal entity with its own legal persona (s 19(2)) on the one hand, and the company’s shareholders on the other hand. However, within the company’s structure itself internal politics and conflicts often occur – not only at a board level – but also within the different ranks of its shareholders.

Section 66 of the Act, for the first time, gives formal recognition of the board of directors and places a statutory obligation on the board to manage the affairs of the company. A shareholder, therefore, does not participate in the management of the day-to-day business affairs of the company. Nor does the shareholder have an entitlement to the assets of the company as the company is the owner of the assets. A shareholder merely acquires a proprietary interest in the company by virtue of his or her shareholding in the company (K van der Linde ‘The regulation of share capital and shareholder contributions in the Companies Bill 2008’ *TSAR* 2009 at 39).

In this article, I will examine the nature of minority shareholder’s rights in the case of oppression and what the courts consider as relevant in determining whether a shareholder has made out a case for relief under s 163 of the Act (the oppression remedy). I will also consider how the protection under the oppression remedy has been enhanced in contrast to the position that prevailed under s 252 of the Companies Act 61 of 1973 (the old Act).

Protection of minority shareholders’ rights

The protection of minority shareholder’s rights must be understood within the context of the rules set by the Act, the common law, the Memorandum of Incorporation (MOI) of the Company and the Shareholders Agreement, in the event that a company has a shareholders’ agreement. The MOI will set out the class of shares and preferences, rights and limitations and other terms associated with a class of shares.

• *The position under the old Act*

Section 252(1) stated the following:

‘Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, ... make an application to the Court for an order under this section.’

Under the old Act, the minority shareholder was often in a precarious position in instances where the majority of the company decided to follow a specific course. Often they would be discontent with a decision made by the board of directors or majority shareholders but have little or no recourse under s 252. The requirements of s 252 – because of the wording – limited the protection to minority shareholder as they had to prove that the conduct by the board or majority was ‘unfairly prejudicial, unjust or inequitable’ towards them as the minority.

In the event that a minority shareholder was to be successful in convincing the court that the conduct complained of in terms of s 252(1) was ‘unfairly prejudicial, unjust or inequitable’, the court could make an order that it deemed appropriate in the circumstances, which could include an order that the majority must buy the shares of the minority shareholder who were aggrieved, at a fair value (*Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) at para 24).

• *The position under the Act*

Section 163 provides that:

‘(1) A shareholder or a director of a company may apply to a court for relief if –

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.’

A shareholder or a director of a company may apply to court for relief in the event of oppressive or unfairly prejudicial conduct, or conduct that unfairly disregards the interest of a minority shareholder. The prejudicial conduct can be in the form of an act or omission in the part of the company, alternatively the business of the company or a related person is being conducted or carried on in an oppressive or prejudicial manner, or the powers of a director, prescribed officer of the company, or a related person of the company have been exercised in an oppressive or prejudicial manner.

A director has *locus standi* to enforce the remedy on behalf of a minority shareholder. This is particularly relevant in practice as some directors are appointed to the board of directors to safeguard the interest of certain specific shareholders.

Section 163(2) provides that the court could make various orders it deems fit to remedy the oppressive or unfairly prejudicial conduct on application by a shareholder or director. Section 163 has widened the scope of the relief in the event of oppressive or unfairly prejudicial conduct in two ways. It makes provision for not just shareholders but also directors to complain and access the remedy in respect of oppressive conduct. Section 163(2) also provides a far more extensive list of remedies than the remedies provided for in s 252(1).

Some of the remedies provided for in s 163(2)(a)-(l) include the following interim and final orders, an order –

- restraining the conduct complained of;
- placing the company under supervision and commencing business rescue proceedings;
- directing the company to amend its MOI or to create or to amend its shareholders agreement;
- directing an issue or exchange of shares;

- appointing directors in addition to existing directors;
- directing the company or any person to pay a shareholder any part of the consideration paid for shares or the equivalent value thereof;
- setting aside a transaction to which the company is a party and payment of appropriate compensation; or
- for the trial of an issue as determined by the court.

However, I submit that the court will not lightly grant relief to a minority shareholder in the event of alleged oppressive or unfairly prejudicial conduct, or conduct that unfairly disregards the interest of the minority shareholder.

In the matter of *Garden Province Investment and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) the respondent company owned a building that was its only real asset. The shareholders of the company, by majority vote, resolved to sell the building and it was sold to a third party at a fair and reasonable price. The minority shareholders sought to retain their investment and, accordingly, sought relief in terms of s 252 of the old Act, claiming that the transaction was unfairly prejudicial, unjust and inequitable to them. The court dismissed the application, stating that when a person acquires shares in a property-holding company as a minority shareholder, he or she knows that he or she is a minority shareholder and it is not unfairly prejudicial, unjust or inequitable to him or her if his or her investment is sold against his or her wishes, provided that it is sold at a fair and reasonable price. Further, the court stated that the only thing that the majority had done was to decide against the wishes of the minority, which conduct cannot be said to be unfairly or unreasonably prejudicial, unjust or inequitable. Finally, it was stated that, in order to be successful, an applicant had to establish a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely on, or unfair discrimination against the minority.

This principle was further affirmed by the Supreme Court of Appeal (SCA) in the matter of *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) at para 27 when the court commented on the wide ambit of s 163 of the Act. The conduct complained of must not merely be prejudicial or disregarding of the minority shareholders' interest but must do so unfairly. The court had to determine whether the appellant, a minority shareholder, had made out a case for relief under s 163. The court held that in determining whether the conduct complained of was oppressive, unfairly prejudicial or unfairly disregarded the interests of the applicant it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company. The court has a wide discretion in determining if the conduct complained of is oppressive, unfairly prejudicial or unfairly disregarded the interests of the applicant. On the particular facts of the case the court found that the directors and majority shareholders, had misappropriated large sums of money from the company in the form of directors' remuneration and fees, and various unauthorised payments were made to the majority shareholders, to the exclusion of the appellant who was the minority shareholder. The court took into consideration the fact that the company's internal auditors had reported certain irregularities and the directors could not provide a cogent explanation as to why such payments were made in the first place. The lack of openness justified the appointment of independent directors to investigate and report thereon. According to the court the report may even be relevant to make a final determination on such issues at a trial court. I submit that the court's finding and reasoning in the *Gardens Province* and *Grancy* matter is correct. Therefore, a minority shareholder has to prove a lack of probity or fair dealing on the part of the company or the majority, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play, or

unfair discrimination against the minority in order to succeed in terms of s 163.

How has s 163 enhanced minority protection?

Section 163 makes provision for a director of the company to apply to court for relief. This is particularly relevant where the director has been appointed by the minority shareholders. This was not the case under s 252, which only permitted a member, being a shareholder, of a company to approach the court for relief. The director in this situation is placed in a unique position as they are privy to information and discussions that the shareholder(s) are not necessarily aware of that affects their interest in the company. They can bring an application in terms of s 163 to protect the interest of the minority shareholder in the case of oppressive or unfairly prejudicial conduct, or conduct that unfairly disregards the interest of a minority shareholder by the company, majority shareholder or any other director.

The court in the *Grancy* judgment cited with approval the views expressed by FHI Cassim (managing ed) in *Contemporary Company Law* 2ed (Cape Town: Juta 2012), wherein he states that the provisions of s 163 are of a wide import and constitute a flexible mechanism for the protection of a minority shareholder from oppressive or prejudicial conduct. The list of orders under s 163(2) is non-exhaustive and open ended. The court may in terms of s 163(2) make any interim or final order it considers fit including a variety of orders listed in s 163(2) (a)-(l), as the circumstances and facts of the case dictate. This flexibility was lacking under s 252.

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What we do for ourselves dies with us. What we do for others and the world remains and is immortal – Albert Pine

www.salvationarmy.org.za



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By
Dineo
Peta

The effect of the 'once empowered always empowered' rule on the mining industry

The debate around the 'once empowered always empowered' rule arose once again following the publication of the draft Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) on 15 April 2016. The purpose of the reviewed Mining Charter is to align it with the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act) and its recently amended Codes of Good Practice (the codes). This review happened while the industry was awaiting a High Court ruling for a determination on the 'once empowered always empowered' rule, more specifically whether the ownership element of the Mining Charter should be a continuous compliance requirement for the duration of the mining right as argued by the Department of Mineral Resources, or a once-off requirement as argued by the Chamber of Mines representing mining companies. The effect of this rule on the Constitution, the BEE Act and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires much attention in

light of South Africa's (SA) constitutional democracy and further achieving equality and economic transformation in the mining industry.

The preamble of the Constitution recognises the injustices of SA's past. The achievement of equality is one of the values and founding provisions of the Constitution in terms of s 1(a). Section 9 provides for the right to equality. In terms of s 9(2) it states: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

The preamble of the BEE Act recognises that SA's economy still excludes the vast majority of its people from ownership of productive assets. In terms of s 2(a) and (b) thereof, the objectives of the BEE Act are to promote economic transformation to enable meaningful participation by black people in the economy; and further to 'achieving a substantial change in the racial composition of ownership ... of ... enterprises.' Section 3 thereof provides that in applying the BEE Act it should be interpreted

to give effect to its objectives and further to the Constitution. It, therefore, follows that as the Mining Charter is a code of good practice as contemplated in s 9 of the BEE Act, it must also be interpreted and applied in accordance with s 3 thereof, and also in accordance with the Constitution.

The preamble of the MPRDA reaffirms the state's commitment to reform to bring about equitable access to SA's mineral resources. Importantly, it considers the state's obligation under the Constitution to take measures to address the results of past discrimination. In terms of s 2(d) and (h) respectively the objectives of the MPRDA are to, among others, substantially and meaningfully expand opportunities for HDSA's and further to promote justifiable social and economic development.

Notwithstanding that international law instruments such as the Rio Declaration on Environment and Development and its Agenda 21 constitute soft (non-binding) international law, SA has adopted their principles into its national legislation. Of significance to the issue at hand is principle 3 of the Rio Decla-

ration, which provides that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'. This principle is incorporated in the MPRDA through the definition of sustainable development. Of further significance is principle 5 which provides that: 'All States and all people shall co-operate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, *in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world*' (my italics). This principle is given effect to in the objectives of the BEE Act.

In Agenda 21 of the Rio Declaration, it is provided in para 3 (Combating Poverty) that factors creating policies of development, resource management and poverty should be integrated. It is stated therein that this objective is to be sought by among others the empowerment of disadvantaged and indigenous people. In para 5, governments are urged to develop and implement policies integral with their economic developments.

The effect of 'once empowered always empowered' rule is that a mining company will still be deemed to be in compliance with transforming its ownership structure even if that company does not currently have the required level of historically disadvantaged South African (HDSA) ownership. A Mining Charter audit conducted for that year of assessment would find unsuitable and non-compliant levels of HDSA ownership. Most importantly, in broader context, the ownership levels of SA's mineral wealth would still remain with those who were historically advantaged. In light of the aforementioned laws, the effect of the 'once empowered always empowered' rule is then contrary to the constitutional right to equality, the BEE Act's objective to achieve substantial change in the racial composition of ownership of enterprises and further the MPRDA's function to achieve equal distribution of SA's mineral wealth. It is further contrary to the international law principle of sustainable development.

Based on the Department of Mineral Resources (DMR) statistic's, the ownership of SA's mineral wealth and more particularly ownership of mining companies still lies in the hands of those who were historically advantaged by Apartheid. For as long as this grave in-

equality remains, it would be contrary to SA's constitutional values and to its objectives to interpret any element of the Mining Charter, including ownership, as once-off compliance requirement.

Both the MPRDA and the BEE Act provide that there must be substantial change. Change refers to a difference. It is common cause that if a situation reverts back to what it was, there was no change. In the context of the Mining Charter ownership element, it cannot be said that a company has complied with the element of ownership if it acquired black ownership but subsequently lost it and on that element has reverted to its previous non-compliant position. There is then no substantial change.

In this regard it is important that there be due consideration to the principle of sustainable development. In its broadest sense, sustainable development means 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations.' The principle inter-generational equity embedded therein requires sustainability and continuation or a standing requirement. The attainment of substantial change in the racial composition of ownership of enterprises can, therefore, not be a once-off requirement if we apply the principle of inter-generational equity. It is my opinion that inter-generational equity does not only refer to environmental protection for future generations, but also to socio-economic development. Therefore, compliance to the ownership element in the Mining Charter necessitates – in my view – a continuation to benefit future generations in light of the BEE Act's objective of achieving substantial change in the racial composition of ownership of enterprises.

In further considering the effect of the 'once empowered always empowered' rule it begs the question as to how this substantial change is measured by the DMR. The current process of conducting Mining Charter audits, which measures compliance to the elements of the Mining Charter, is purely based on the information submitted by mining companies to the DMR in terms of s 28(2)(c) of the MPRDA. It is my opinion that this process lacks consideration of socio-economic factors and current circumstances of HDSA's operating in the min-

ing industry, which the Mining Charter is intended to benefit. The DMR should also consider whether additional information should be assessed from HDSA's. This could, among others, include assessing the number of active HDSA companies operating in the industry, and how many of those have been meaningfully empowered as a consequence of implementation of the Mining Charter. In certain instances where there were previous empowerment transactions which have since terminated, the HDSA shareholder is sometimes in a worse off position by being indebted in financial arrangements to acquire shareholding in mining companies which has since been lost. Such socio-economic factors and circumstances must be considered, addressed and managed accordingly in policy formulation.

The principles of international law to which SA subscribes, obligates the consideration of socio-economic factors in policy formulation and consequently in implementation together with the review of such policies. Assessment of information submitted by mining companies alone does not give effect to this international law obligation. Socio-economic factors such as those mentioned above (the further impoverishment of HDSA's) should not only be considered on policy formulation but also on its improvement too.

In light of the aforementioned national and international laws, it is my opinion the rule of 'once empowered always empowered' can have no legal standing in a constitutional democracy with a founding value of equality. Perhaps what needs to be revisited is the legal obligations imposed on mining companies in giving effect to the ownership element, however, the 'once empowered always empowered' rule cannot be an option in light of SA's respective legislative mandates to meaningfully and substantially achieve economic transformation.

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When does it amount to a credit transaction?

By
Jonathan
Robert
Hol

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Some months ago I came across an interesting decision of the Supreme Court of Appeal (SCA) in *Vesagie NO and Others v Erwee NO and Another* (SCA) (unreported case no 734/2013, 19-9-2014) (Gorven AJA), while assisting a colleague on a matter he was faced with. Notwithstanding the importance of the decision, there is much unfamiliarity with the decision. The decision deals with the sale of shares and the application of the National Credit Act 34 of 2005 (NCA) to such transactions. While I must stress that the SCA was fully correct in their decision and reasoning for such decision, I feel the substantive effect thereof will be as hard felt as with the well-known *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) decisions in respect of Prevention of Illegal Eviction applications, which decisions have been the bane of most property owners. (See also, letters 2014 (Dec) DR 4; practice note 'Step-by-step guide to residential housing eviction proceedings in the magistrate's court' 2016 (July) DR 26; and feature article 'Having a slice of PIE – understanding the Act' 2016 (Oct) DR 24.)

The Vesagie matter

In the *Vesagie* matter the appeal turned

on whether an agreement of purchase and sale, which provides for interest to be payable on deferred payments amounted to a credit transaction under s 8(4)(f) of the NCA. In such a case, unless the party extending the credit is registered as a credit provider in terms of s 40 of the NCA, the agreement is unlawful. The consequence of such a finding was that the court would be required to declare the agreement null and void *ab initio*.

The facts surrounding the case were as follows: The first two appellants, as trustees of the BEN Trust, were nominated by the third appellant as the purchasers under an agreement for the sale of shares and loan accounts in various companies. The third appellant concluded an agreement to this effect with the respondents as trustees of the ACE Trust. The third appellant, in his personal capacity, guaranteed the performance of the trustees of the BEN Trust. The shares and loan accounts were transferred to the first and second appellants. Payment of R 750 000 was made under the agreement. However, no further payments were made. The respondents sued the appellants for the balance of R 14 250 000, interest and costs. By the time of the trial, the only live issue between the parties was whether

the agreement constituted a credit transaction as envisaged by s 8(4)(f) of the NCA. It was agreed that, if the court found that the agreement fell within the ambit of s 8(4)(f) of the NCA as a credit transaction, the claim should fail because the ACE Trust had not registered as a credit provider in terms of s 40 of the NCA. Conversely, if the court found that the agreement did not amount to a credit transaction, the ACE Trust would be entitled to judgment as prayed.

Section 8(4)(f) reads as follows: 'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –

...
(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

- (i) the agreement; or
- (ii) the amount that has been deferred.'

The parties were *ad idem* that the agreement was not one contemplated in s 8(2) of the NCA, nor was it a credit facility or a credit guarantee and did not attract a charge or fee. The only issue

was whether it provides that interest is payable in respect of the amount for which payment has been deferred.

The trial court found that the agreement did not provide for interest to be paid in respect of the amount for which payment was deferred and that the agreement was, therefore, not a credit transaction. As a result, the court held that it was enforceable by the respondents. On appeal it was held that the agreement provided for the payment of interest on the deferred payments in terms of the agreement.

The SCA interestingly dealt with the caution of the court *a quo* in declaring such transactions within the ambit of the NCA and capable of being set aside as null and void *ab initio*. The SCA held that the finding of the '... court *a quo* that to interpret the agreement "in such a manner that it would be rendered invalid due to the fact that it is struck by the provisions of section 8(4)(f) of the National Credit Act, will lead to unbusinesslike or oppressive consequences". Far from leading to unbusinesslike consequences, the payment of interest on a deferred payment is a routine provision in business agreements. This is all the more so when the merx has been transferred and the purchaser has the use and enjoyment thereof without full payment having been made, as is the case in the present matter. As to oppressive consequences, the learned judge held that such an interpretation would require the respondents to refund the R 750 000 paid to them without recovering the shares transferred by them to the appellants. One cannot, without more, make a finding that this would be oppressive. The respondents have had the benefit of the use of the shares and loan account. There is no evidence as to what that benefit might have been worth. I can therefore find no warrant for such a conclusion. It is so that s 89(5)(b) in terms provides for the refund of any money received by the credit provider. The section which previously provided that the credit provider could not recover any performance made under the agreement has been struck down as unconstitutional.'

The SCA concluded that the agreement in question was a credit transaction as envisaged by s 8(4)(f) of the NCA and was accordingly void *ab initio*. The parties were required to make restitution of any performance, which took place pursuant to the agreement. Section 89(5) of the NCA required a court to order that an agreement is void as from the date it was concluded if it is rendered unlawful by the NCA. The appeal was upheld with costs and the agreement was declared null and void *ab initio*.

Possible exclusions

While the *Vesagie* decision appears to

raise many concerns for those involved in the commercial realms, the position is not as dire as it appears in the above decision. The NCA does assist and provide certain exceptions to the application of the NCA to certain transactions or consumers. In this respect, some exclusions can be found in s 4 and it provides:

'4(1) ..., this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except –

(a) a credit agreement in terms of which the consumer is –

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);

...

(b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1).'

Therefore, in terms of s 4(1)(a)(i) of the NCA; if the consumer (or purchaser under a sale and purchase agreement) is a juristic person whose asset value or turnover, apart or together exceeds the threshold (presently R 1 million), the NCA will not apply to such party and accordingly the NCA will be excluded from the transaction and the supplier (or seller under a sale and purchase agreement) will not be required to register as a credit provider. Therefore, the agreement will not be void *ab initio* for failure to register as a credit provider under the NCA.

Section 4(1)(b) provides a further exclusion; that where the consumer (or purchaser under a sale and purchase agreement) is a juristic person whose asset value or turnover, apart or together does not exceed the threshold of R1 million and the agreement entered into amounts to a large credit agreement (being a mortgage agreement; or any other credit transaction except a pawn transaction or a credit guarantee) and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds, presently R 250 000, the NCA will not apply to such transaction and the supplier (or seller under a sale and purchase agreement) will not be required to register as a credit provider nor will the agreement be void *ab initio* for failure to register as a credit provider under the NCA.

A further exception is contained in wording of s 4(1), being a transaction 'at arm's length' will not be subject to the NCA. The NCA sets out in s 4(2)(b), when parties are not dealing at arms length and provides as follows:

'4(2)(b) in any of the following arrangements, the parties are not dealing at arm's length:

(i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;

(ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;

(iii) a credit agreement between natural persons who are in a familial relationship and –

(aa) are co-dependent on each other; or (bb) one is dependent upon the other; and

(iv) any other arrangement –

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.'

Therefore, and provided the above main exceptions are present, the concern of applicability of the NCA and registration as a credit provider should not be evident and the seller (in terms of the sale and purchase agreement, especially in relation to shareholding) would not be required to register as a credit provider should the sale and purchase agreement make provision for deferred payment and should such deferred payments attract any interest, fee or charge (as defined in the NCA).

The *Vesagie* decision has all but ensured that in order to avoid registration as a credit provider when disposing of shareholding in an entity and the application of the NCA to such a transaction, that such purchases are to be facilitated through a special purpose vehicle/entity to meet the juristic person criteria, and furthermore, to qualify under a large credit agreement in order to utilise the exception contained in s 4(1)(b) of the NCA or if the purchaser is a juristic person with an annual turnover or asset value in excess of the threshold. The days of natural persons purchasing shareholding under a sale and purchase agreement where payments are deferred and interest applicable, are behind us, unless there is compliance with the NCA and the seller registers as a credit provider.

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Estate planning and divorce: Making a spousal donation

By
Edrick
Roux

‘Usually, there should be substance to any “void” movement so that you won’t be defeated. It will amount to useless adventure if there is no solid backing’ (Tao Hanzhang (author) Yuan Shibing (translator) *Sun Tzu’s Art of War the Modern Chinese Interpretation* (New York: Sterling Publishing Company Inc 2007 at 142). Thus any action which is undertaken, should have a foundation built on reason behind it and no action should be taken simply on a whim or without any thought.

Although Sun Tzu was referring to the movement of military forces in a conflict situation, the principle, which lies behind them should resonate with any professional assisting their clients with their estate planning.

Estate planning is a comprehensive exercise and should generally incorporate an investigation into the bequests of the assets of an estate planner in order to ensure that they accomplish their personal goals (usually catering for their family) while also ensuring that the estate will be left solvent.

It is a common misconception that estate planning only relates to the situation which arises once the estate planner has passed away, however, in reality this process must be instituted as early as possible as it will often involve regular amendments to Wills and Trust Deeds, as well as the transfer of assets.

This is particularly the case where there is a fear that an estate will be insolvent in future or where an estate planner is involved in a risk intensive industry and would like to ensure that his family will be protected should his creditors come knocking on the door one day.

From time to time the situation may arise where an estate planner may wish to transfer some of their assets from their personal name to that of their spouse by way of a donation.

As alluded to above, this is usually done as part of an estate planning exercise and is generally used to provide some protection for assets.

Of course in a world where one is constantly confronted by the threat of creditors looming on the horizon, particularly in high risk professions, donations may also be made for the purpose of simply ensuring that assets are kept

safely out of the estate planners name and thus safe from creditors – provided of course that these donations are made well before any such risk actually manifests in order to ensure that it does not run the risk of being seen as a voidable disposition in terms of the Insolvency Act 24 of 1936 (the relevant provisions dealing with dispositions are covered in ss 26 – 31 of the Insolvency Act). This is only beneficial to the estate planner

when it is done in the context of a marriage out of community of property.

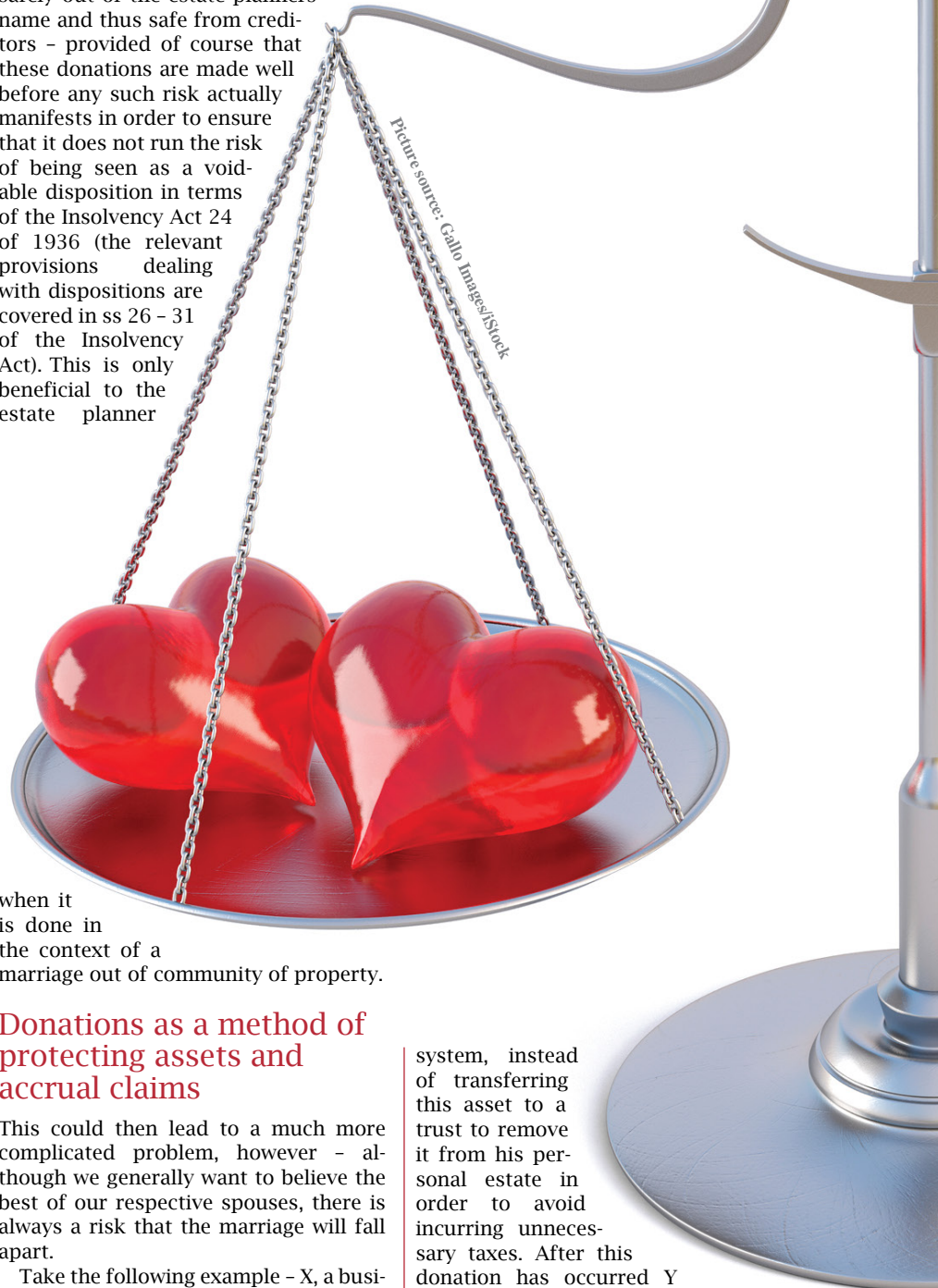
Donations as a method of protecting assets and accrual claims

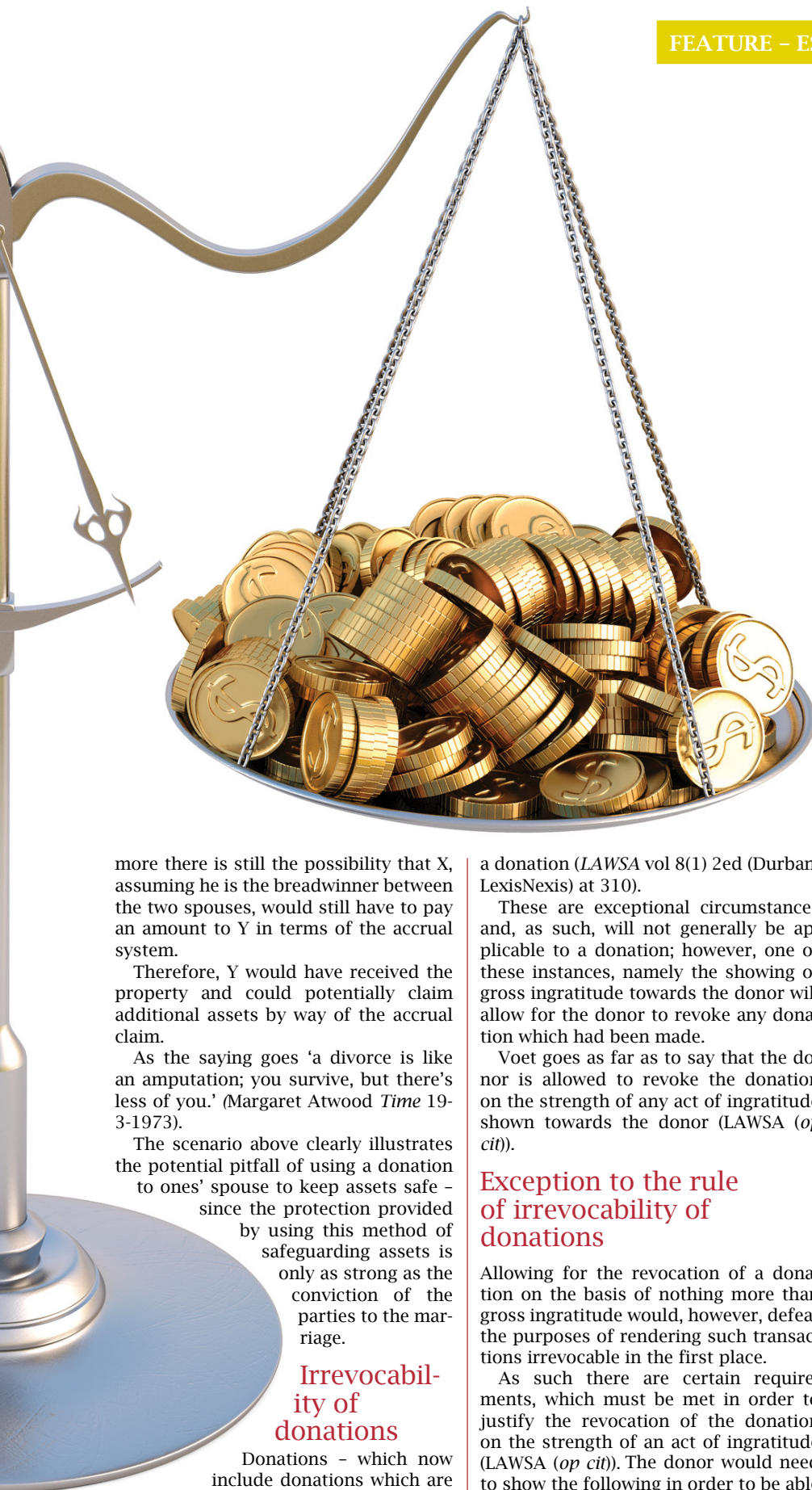
This could then lead to a much more complicated problem, however – although we generally want to believe the best of our respective spouses, there is always a risk that the marriage will fall apart.

Take the following example – X, a business man who is in a high risk profession, has recently inherited an extremely valuable property and decides – on advice to – donate the asset to his wife Y to whom he is married out of community of property, subject to the accrual

system, instead of transferring this asset to a trust to remove it from his personal estate in order to avoid incurring unnecessary taxes. After this donation has occurred Y decides to file for divorce.

The property has now been excluded from the accrual claim as it is a donation made to a spouse in terms of the provisions contained in s 5 of the Matrimonial Property Act 88 of 1984, and further-





more there is still the possibility that X, assuming he is the breadwinner between the two spouses, would still have to pay an amount to Y in terms of the accrual system.

Therefore, Y would have received the property and could potentially claim additional assets by way of the accrual claim.

As the saying goes 'a divorce is like an amputation; you survive, but there's less of you.' (Margaret Atwood *Time* 19-3-1973).

The scenario above clearly illustrates the potential pitfall of using a donation to ones' spouse to keep assets safe – since the protection provided by using this method of safeguarding assets is only as strong as the conviction of the parties to the marriage.

Irrevocability of donations

Donations – which now include donations which are made between spouses which were originally revocable by nature – as a general rule are not revocable. The author Voet, however, expressly provides that there are certain instances which, should they arise, would allow the revocation of

a donation (LAWSA vol 8(1) 2ed (Durban: LexisNexis) at 310).

These are exceptional circumstances and, as such, will not generally be applicable to a donation; however, one of these instances, namely the showing of gross ingratitude towards the donor will allow for the donor to revoke any donation which had been made.

Voet goes as far as to say that the donor is allowed to revoke the donation on the strength of any act of ingratitude shown towards the donor (LAWSA (*op cit*)).

Exception to the rule of irrevocability of donations

Allowing for the revocation of a donation on the basis of nothing more than gross ingratitude would, however, defeat the purposes of rendering such transactions irrevocable in the first place.

As such there are certain requirements, which must be met in order to justify the revocation of the donation on the strength of an act of ingratitude (LAWSA (*op cit*)). The donor would need to show the following in order to be able to successfully claim for the revocation of a donation:

- The alleged act of ingratitude shown must be of a sufficiently serious nature.
- The act must also be accompanied by *dolus*.

In determining whether an act is of a sufficiently serious nature, a factual investigation must be lodged to show what damage, if any, has been caused by such an act in order to determine whether the act is of a serious nature.

Of course, as Goethe once said, 'Everything is both simpler than we can imagine and more entangled than we can conceive' (J Lloyd & J Mitchinson *Quotes for Quite Interesting Times* (London: Bloomsbury House 2010) at 302), thus it is necessary to bear in mind that the term sufficiently serious can be interpreted in a multitude of ways.

Therefore, it does not necessarily refer only to damages being suffered, but rather to any conduct which could reasonably be assumed to have caused undue duress to the donor and this could be used to infer that there has been an act of gross ingratitude, which was shown to the donor.

Take the example where X has given Y a bicycle because of their friendship. In the event where Y is then discovered to have been wooing X's fiancée and has convinced her to leave X in favor of himself, it is unlikely that there will be any conduct which could justify a claim for damages being instituted, yet the conduct of Y would, in my opinion be sufficient to be seen as being of a sufficiently serious nature to justify the revocation of the bicycle.

Thus it is important to note that it is not necessary to prove any damages, such as financial loss, in order to show that an act is sufficiently serious, however, where there are damages, particularly financial loss, coupled to the act the inference that it is sufficiently serious may well be strengthened.

The second requirement, namely that the conduct must be accompanied by *dolus* is self-evident and bears no further explanation.

Should these two requirements be present in a given situation, it would theoretically become possible to revoke a donation. It then becomes necessary to determine exactly what would qualify as an act of ingratitude.

Ingratitude

The term 'ingratitude' is defined in the Oxford Dictionary as follows:

'[A] discreditable lack of gratitude' (A Stevenson and M Waite *Concise Oxford English Dictionary* 12ed (New York: Oxford University Press 2011)).

This definition leads one to conclude that ingratitude is an exceptionally widely defined concept and could include a variable cornucopia of scenarios and actions.

It would not be an easy task, if it were in fact possible at all, to create a comprehensive list of all actions, which could potentially constitute an act of gross ingratitude.

I submit that the question of whether a specific act could in fact qualify as an act of gross ingratitude should be determined by way of a factual investigation into the substantive facts that surround the circumstances, which the donor relies on to try to claim the revocation of a donation.

Revocation of a donation between spouses due to divorce

Where a divorce is based on a mutual decision to bring a marriage to an end, there can be no doubt that the donation will, barring the presence of any unknown circumstances, generally be irrevocable since there could not be any damages caused by any act of ingratitude as both parties mutually consented to dissolving the marriage nor could one justify the statement that there is gross ingratitude for the very same reason.

However, where there is an underlying cause for the divorce linked to a single spouse, which is both intentional and of a sufficiently serious nature, for example the infidelity of such a spouse, the situation may well be very different.

An argument could then be made that this infidelity, being sufficiently serious enough to have caused an irretrievable

breakdown of a marriage – the seriousness of which would be even more evident where it is a marriage which has subsisted for some time prior to the infidelity occurring – between the parties and by the very nature of the act could only be an intentional act, should fall well within the confines of the term gross ingratitude.

Therefore, in my opinion this would, theoretically at the very least, justify the revocation of the donation and could then lead to some recourse for the spouse who was not involved in the infidelity.

Although this situation is not likely to arise any time soon, it is never a bad idea to be prepared for whatever could arise.

Conclusion

Ultimately it becomes the weighing of options after having been provided with an informed opinion by a skilled estate planning professional, what is the bigger risk – being at risk from creditors or being at risk of a potential accrual claim.

Although it is theoretically possible to reclaim a donation, which has been made on the grounds of gross ingratitude shown to the donor, it is definite that the assets donated to a spouse are excluded from an accrual claim.

It is true that the risk of having a donation excluded from an accrual calculation could be mitigated, if not entirely extinguished, by having the appropriate clauses included in an antenuptial contract, it may be prudent to think carefully before donating any assets to a spouse as part of an estate planning process in any event as there may be other alternatives available.

A divorce is never a pleasant experience and the last thing that anybody has strength for during that process is solving more problems, particularly problems which have been caused by your own attempts to forestall other problems from arising in the first place.

It becomes a necessity to ensure that your clients are not only aware of the potential problems which could arise, but also that they are aware of all of the possible pitfalls and how they can be dealt with in future.

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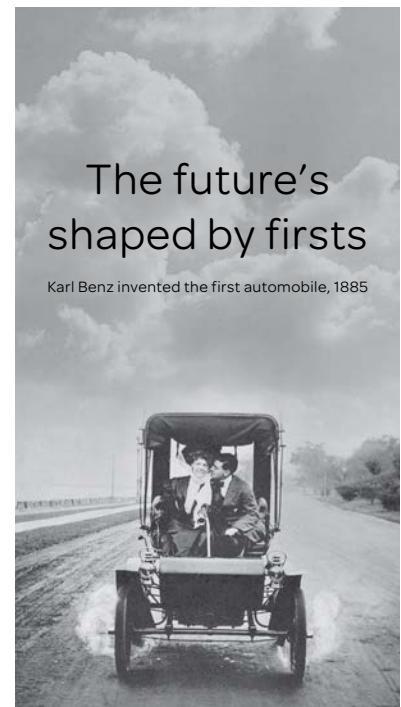
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By
Moffat
Ndou

Detention without consent: *Protection of mentally ill person's financial interest*

Section 9(1)(c)(iii) of the Mental Health Care Act 17 of 2002 (MHCA) provides that a health care provider or a health establishment may provide care, treatment and rehabilitation services to or admit a mental health care user (see s 1 for definition of mental health care user), *inter alia*, only if – due to mental illness, any delay in providing care, treatment and rehabilitation services may result in the user causing serious damage to or loss of property belonging to him or her or others.

Section 32 of the MHCA provides for involuntary services in certain carefully delimited circumstances. Section 32 of the MHCA allows for care, treatment and

rehabilitation of a person without consent if –

‘(a) an application in writing is made to the head of the health establishment concerned to obtain the necessary care, treatment and rehabilitation services and the application is granted;

(b) ... there is reasonable belief that the mental health care user has a mental illness of such a nature that –

(i) the user is likely to inflict serious harm to himself or herself or others; or

(ii) care, treatment and rehabilitation is necessary *for the protection of the financial interests or reputation of the user*; and

(c) at the time the application the mental health care user is incapable of mak-

ing an *informed decision* on the need for care, treatment and rehabilitation services and is unwilling to receive the care, treatment and rehabilitation required’ (my italics).

Once these requirements are met, it is lawful and justifiable to provide mental health care services to a mental health care user. In considering whether the detention of mentally ill persons in instances where the detention is necessary for the protection of financial interest, one is required to look at the concept of mental illness and that of financial interest or reputation.

Concept of mental illness

The MHCA defines ‘mental illness’ as ‘a

cope with the demands of life on a daily basis (M Swanepoel 'Legal aspects with regard to mentally ill offenders in South Africa' *PER* (2015) 18.1).

The diagnosis of whether a person has a 'mental illness' requires a positive diagnosis of a mental health-related illness in terms of accepted diagnostic criteria made by mental health practitioner authorised to make such diagnosis (Landman and Landman (*op cit*) at 12). The diagnosis of mental illness is generally made according to the classification system of the Diagnostic and Statistical Manual of Mental Disorders (DSM) or the International Classification of Diseases (ICD). There are different types of mental illnesses and each of these can occur with a varying degree of severity; they include –

- mood disorders (such as depression, anxiety and bipolar disorder);
- psychotic disorders (such as schizophrenia);
- eating disorders; and
- personality disorders.

Financial interest or reputation

The wording of s 32 of the MHCA clearly states that detention without consent is permitted for protection of a mentally ill person's financial interests or reputation. The MHCA does not define what it means by 'financial interest' and 'reputation'.

'Personal financial interest' defined in relatively broad terms includes: A direct material interest of a financial, monetary or economic nature, or to which a monetary value may be attributed. It may also be defined as a comprehensive term to describe any right, claim, or privilege that an individual has towards real or personal property. (See www.legal-dictionary.thefreedictionary.com, accessed 30-9-2016).

Reputation in the context of delictual claims is the opinion or regard which a person enjoys within the community (see J Neethling, J Potgieter and PJ Visser *Law of personality* (Durban: LexisNexis 2015)). In *Pitout v Rosenstein* 1930 OPD 112 at 117 and *Kriel v Johnson* 1922 CPD 483, it was found that a person's reputation was impaired where defamatory statements exposing a person to hatred, contempt, or ridicule to lower the opinion of a person in the view of men whose standard of opinion the court can properly recognise or induced people to entertain an ill opinion of the person.

Least restrictive means of care, treatment and rehabilitation

The United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (Principles) provides that:

'Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others. The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff. Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners. ... The treatment of every patient shall be directed towards preserving and enhancing personal autonomy' of the mentally ill person. A mentally ill person may be admitted in a mental health facility as an involuntary patient if he or she has a mental illness; and 'because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or

(b) that, in the case of a person whose mental illness is severe and whose judgment is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.'

The provision of the least restrictive type of mental health care is one of the World Health Organisation's Mental Health Care Law: Ten Basic Principles (1996). It is required that everyone with mental illness should be provided with health care, which is the least restrictive. Member states should provide a community based treatment. The following items are considered in deciding the least restrictive measure to be applied:

- (a) the disorder involved;
- (b) the available treatments;
- (c) the person's level of autonomy;
- (d) the person's acceptance and cooperation; and
- (e) the potential that harm be caused to self or others.'

Section 26 of the MHCA provides that the head of the mental health establishment may only approve assisted mental health care if satisfied that the restrictions and intrusions on the rights of the mental health care user to movement, privacy and dignity are proportionate to the care, treatment and rehabilitation services required. During the periodic review and annual reports on involuntary mental health care users, the review must indicate, *inter alia*, state whether there are other care, treatment and rehabilitation services that are less restrictive or intrusive on the right of the mental health care user to movement, privacy and dignity (s 37(2)(c) of the MHCA).

I submit that 'least restrictive meas-

positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis' (see AA Landman and WJ Landman *A Practitioner's Guide to the Mental Health Care Act* (Cape Town: Juta 2014) at 11). 'Mental defect' refers to a condition where the person has significantly below average intellectual functioning, which is accompanied by significant limitations in several areas of adaptive functioning such as communication, social/interpersonal skills and self-direction ('mental defect' is usually equated to 'mental retardation') (see C Tredoux, D Foster, A Allan, A Cohen and D Wassenaar *Psychology and Law* (Cape Town: Juta 2005)). 'Mental illness' or 'mental defect' means pathological disturbance of a person's mental capacity (*S v Stellmacher* 1983 (2) SA 181 (SWA) at 187). Swanepoel defines mental illness as a disorder (or disease) of the mind that is judged by experts to interfere substantially with a person's ability to

ures' means that every patient has the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others; taking into account whether there is other care, treatment and rehabilitation services that are less restrictive or intrusive on the right of the mental health care user to movement, privacy and dignity. The test first requires the determination of whether care, treatment and rehabilitation services are proportionate to the patient's health needs and the need to protect the physical safety of others. Secondly, consider the impact of the care, treatment and rehabilitation services on the right of the mental health care user to movement, privacy and dignity.

Whether involuntary detention may ever be justified for protection of financial interests

Chapter VIII of the MHCA provides a mechanism in terms of which the property of persons suffering from mental illness may be taken care of and administered. This is done by appointing a curator or administrator to take care and administer; and to carry on any business

or undertaking of the mentally ill person. Taking into account the principle of least restrictive measure, it is important to ask whether, taking into account that the MHCA provides a mechanism for the protection of the mentally ill person's property; it is ever justifiable to detain, without consent, mentally ill persons to protect them from any harm to their financial interest.

A possible answer could be sourced from foreign jurisdiction. In the Australian decision in *Re J* (no.2) [2011] NSWSC 1224, the New South Wales Supreme Court had to consider a similar question in respect of a detained mentally ill person. The patient, who suffered from mental illness, had recently received a substantial pay-out on his life insurance and in a manner that seemed out of character for him, had given away substantial amount of money to charity and his friends. He had also given his banking details and PIN to several people. On appeal, and considering whether a person may be detained to protect him from financial harm, the court considered that involuntary detention was to be a measure of last resort to protect against financial harm. The court noted that a financial management order could be applied for if it could be proved that the patient was not capable of handling

his own affairs. Consequently the court found that since an alternative and least restrictive measure was available, it would be unlawful to involuntarily detain the patient.

I submit that a similar approach should likely be followed in respect of the MHCA. I further submit that it would be a reasonable and justifiable approach. The MHCA provides a least restrictive measure of protecting mentally ill persons from financial harm by appointing a curator and administrator. Involuntary detention for such purpose may only be justified in specific circumstances, should it be considered. Involuntary detention to protect mentally ill patients must never be considered as a default position; a further inquiry is required to determine whether, taking into account the principle of least restrictive measure and Chapter VIII of the MHCA, it is justified and lawful.

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THE LAW REPORTS

September 2016 (5) *South African Law Reports* (pp 1 – 332);
[2016] 2 *All South African Law Reports* June (pp 633 – 932);
[2016] 3 *All South African Law Reports* August (pp 345 – 667)

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*.

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
NCK: Northern Cape Division, Kimberley
SCA: Supreme Court of Appeal

Administrative law

Legality of policy: The decision in *E.tv (Pty) Ltd and Others v Minister of Communications and Others* [2016] 3 All SA 362 (SCA) turned on the question whether a unilateral amendment of a previously approved policy document by the Minister of Communications (the Minister) was valid.

At the heart of the present matter was the Broadcasting Digital Migration Policy (the policy), which was first published in 2008. The policy aimed to facilitate South Africa's shift from analogue terrestrial television to digital terrestrial television. Local television viewers who did not own digital television

sets would require set top boxes (STBs) to watch television in the digital terrestrial environment. The poorest television viewers would not have been able to afford STBs, which would have cost approximately R 600 each. The government proposed to subsidise the procurement of STBs required by five million households.

The first respondent, the Minister, unilaterally amended the policy. The amendment precluded free-to-air broadcasters (including the appellant, e.tv) from encrypting their television signals as the amended policy provided that the subsidised STBs would not have encryption capability. An STB that is equipped with encryption technology can decrypt signals that are encrypted. This is the technology used by pay television broadcasters.

Early in 2015 the Minister published the encryption amendment, which precludes subsidised STBs from having encryption technology. She did this without consulting interested persons, including the two relevant regulatory bodies, namely, the Independent

Communications Authority of South Africa (ICASA) and the Universal Service and Access Agency of South Africa (USAASA).

E.tv brought an urgent application for an order reviewing and setting aside the encryption amendment on the basis that there had been no consultation and that the amendment was inherently irrational.

On appeal Lewis JA held that the amendment was a fundamental departure from the previous policy. In terms of s 3(5) of the Electronic Communications Act 36 of 2005 the Minister was required to consult ICASA, USAASA and broadcasters before changing the policy, and she had not done so. The amendment was thus made unlawfully.

The amendment was irrational as it sought, first, to preclude government from paying for the encryption of the subsidised STBs; and secondly, to compel free-to-air broadcasters (such as e.tv) to pay for encryption.

The Minister had accordingly exceeded her powers. The amendment was declared

unlawful and the appeal was allowed with costs.

Arbitration

Matrimonial matters (calculation of accrual): The facts in *AB v JB* 2016 (5) SA 211 (SCA) were as follows: Mr AB (the husband) and Mrs JB (the wife) were married out of community of property, but subject to the accrual system. The marriage did not survive and in terms of a settlement agreement the husband was ordered to pay the wife an amount of R 8 million in respect of her portion of the accrual.

However, two months after the settlement agreement, it became public knowledge that the husband's substantial number of shares in the Patula Group of companies, were actually worth much more than was estimated at the time of the settlement agreement. The wife got wind of this information. In a subsequent *ex parte* application it was shown that the husband's estate had shown a substantial accrual in excess of R 167 million, instead of the approximate R 20 million



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that was believed to be the case at the time of the settlement. The wife then instituted a delictual claim against the husband because she alleged that he knew at the time of the settlement that his shares were worth much more than R 20 million. For reasons irrelevant to the present discussion, the dispute between the parties was instead referred to arbitration. In the arbitration proceedings before a retired judge of appeal, the wife's claim was dismissed because misrepresentation by the husband was not proved. The wife lodged an appeal to an appeal tribunal before three retired judges of appeal who found that the elements for a delict had been established and ruled in favour of the wife.

The husband launched an application in the GJ against the appeal award. His two principal arguments were the following:

- First, the dispute referred to arbitration was incidental to the matrimonial cause and was accordingly prohibited

for referral to arbitration in terms of s 2 of the Arbitration Act 42 of 1965 (the Act).

- Secondly, the appeal tribunal misconceived the nature of the enquiry by assessing the accrual as at the date of divorce rather than at *litis contestatio*, which had the effect that the calculation of the value of the accrual was incorrect.

This resulted in an irregularity that rendered the entire inquiry procedurally unfair. The court *a quo* dismissed both arguments.

On appeal to the SCA, Tsoka AJA decided the two disputes as follows: First, at the stage when the wife instituted the delictual action against the husband, the parties' marriage had been dissolved in terms of the court order, which incorporated their settlement agreement. The effect of the settlement agreement being made an order of court was to bring finality to the *lis* between the parties; the *lis* became *res judicata*. It changed the terms of a settlement agreement to

an enforceable court order. After the order was granted, there was no longer any matrimonial cause to speak of. The inevitable result was that the marriage and all its natural consequences came to an end, and anything relating thereto, such as proprietary consequences, became *res judicata*. The delictual claim that was referred to arbitration was thus not incidental to any matrimonial cause.

Secondly, it held that the time when a right came into existence was determinative in calculating its value, and s 3 of the Matrimonial Property Act 88 of 1984 (the MPA) was clear and unambiguous that a spouse acquired a right to claim an accrual at the 'dissolution of a marriage'. Earlier case law (*Le Roux v Le Roux* (NCK) (unreported case no 1245/2008, 30-10-2009) (Olivier J); and *KS v MS* 2016 (1) SA 64 (KZD)) held that the date for determination of the accrual was at *litis contestatio* rather than at the dissolution of the marriage, was wrongly decided.

The tribunal accordingly made no error in calculating the accrual as at the date of the divorce order. In the result, the SCA found that the date at which the accrual of the value of a spouse married in terms of the MPA is to be determined, is the date of dissolution of the marriage either by death or divorce.

The husband's appeal was accordingly dismissed with costs.

Delict

Sexual assault: In *PE v Ikwezi Municipality and Another* 2016 (5) SA 114 (ECG); [2016] 2 All SA 869 (ECG) the plaintiff was an employee of the first defendant municipality. She was sexually assaulted at the workplace, during working hours. Her immediate supervisor, the second defendant, attempted to insert his tongue into her mouth. The plaintiff informed her superiors of what had happened. Disciplinary proceedings were instituted and the second defendant received a



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two-week suspension. In the meantime the plaintiff had, despite the efforts of municipal officials to keep them apart, run into the second defendant on several occasions, causing her additional distress. She was traumatised by these events, and resigned a year later. The plaintiff sued the municipality for R 4 million on the basis of its vicarious liability. Liability and quantum were separated and the trial proceeded on the merits. The second defendant did not defend the matter, leaving the plaintiff's version undisputed. The municipality, however, denied that the second defendant had acted in the course and scope of his employment as was required for vicarious liability. It argued that it was hard to conceive conduct more removed from the second defendant's duties and the business of the municipality than his sexual assault on the plaintiff.

Pickering J held that the second defendant's conduct towards plaintiff constituted an intolerable and violent abuse of his position of authority, and the two-week suspension belied the gravity of the offence. While the municipality correctly conceded liability for its failure to sufficiently isolate the plaintiff from the second respondent after the incident, its liability for the assault itself depended on whether the common law would be developed to hold an employer vicariously liable where an employee was subjected to sexual harassment by a direct supervisor. The municipality had, by placing the second defendant in a position of trust and authority over the plaintiff, forged the required causal link between second defendant's position and the wrongful act. The second respondent had grossly violated the plaintiff's fundamental rights to dignity, privacy and integrity, and constitutional norms dictated that the common law should be developed to hold the municipality vicariously liable.

Further, by holding an employer vicariously liable for the wrongs of its employee may encourage the employer

to take such steps to prevent such wrongs, also in the case of sexual harassment.

The claim was accordingly allowed.

• See employment law update 2016 (Sep) DR 45.

Evidence (experts)

Experts evidence: In *SS and Another v Road Accident Fund* [2016] 3 All SA 637 (GP) the crisp facts were that the plaintiff was involved in a motor-vehicle accident while she was pregnant. The plaintiff's child was born with cerebral palsy some seven weeks after the accident. Damages were claimed against the defendant, Road Accident Fund (RAF), in respect of both the plaintiff and her child.

The court was faced with conflicting expert opinions by two experts for the plaintiff on the one hand, and one for the RAF, on the other hand. The court had to decide on the approach in evaluating conflicting medical expert evidence.

Fabricius J confirmed that the most important duty of an expert witness is to provide independent assistance to a court by way of an objective, unbiased opinion in relation to matters within his expertise. Essentially, an expert comes to court to give the court the benefit of his or her expertise. An expert witness is also expected to state the facts or assumptions on which his or her opinion is based. He or she should not omit to consider material facts, which could detract from his or her concluded opinion.

In its assessment of the conflicting evidence, the court accepted that it was clear that the part of the child's brain, which sustained injury, was fully formed at the time of the accident. The plaintiff's experts, who were both highly experienced in their fields, agreed that the relevant part of the child's brain had been injured, and that such damage could not have occurred prior to 20 weeks gestation and not after her birth. An intra-uterine traumatic event was the likely cause. The RAF's expert was an experienced neurosurgeon, but did

not remotely have the qualifications and experience of the other specialists in ante-natal radiology, imaging and diagnosis. Applying the judicial measure of proof referred to above, taking into account the particular experience and expertise of the experts, and considering where the balance of probability lay on a review of the whole of the evidence, the court found that the most natural and plausible conclusion was that the accident was the cause of the child's present condition, as well as the injuries sustained by the first plaintiff (the mother).

The claim of both the mother and child were allowed with costs.

Housing

Right to housing: In *Melani and Others v Johannesburg City and Others* 2016 (5) 67 (GJ) the applicants were residents of an informal settlement south of Johannesburg. They sought an order setting aside the respondent city's (the City) failure or refusal to seek government funding to upgrade the settlement. Alternatively, they sought an order compelling the City and its co-respondents (the mayor, the Gauteng MEC for Human Settlements, and the Minister for Human Settlements) to implement government policy and commence the up-

grading process. The policy in question was the Upgrading of Informal Settlements Programme (UISP), contained in the National Housing Code of 2009. It prioritised participative *in situ* upgrading, with government funding being available on application to the provincial government. The City opposed the application on the basis that its 2015 decision to evict and relocate the applicants to a distant, still-to-be-built development – rather than upgrade was an executive policy decision that was not open to challenge via judicial-review procedure.

Strauss AJ held that the City had a constitutional obligation to realise the residents' right of access to adequate housing. The court was tasked with deciding whether the City's decision to relocate the residents was a policy decision that was not open to review. While the formulation of policy was not in principle an administrative action, its implementation in a manner that affected persons' rights and legitimate expectations was. Even non-administrative policy decisions could be reviewed if they breached fundamental constitutional rights such as the right to housing.

The court further held that the National Housing Code (of which the UISP was part) was binding on local govern-

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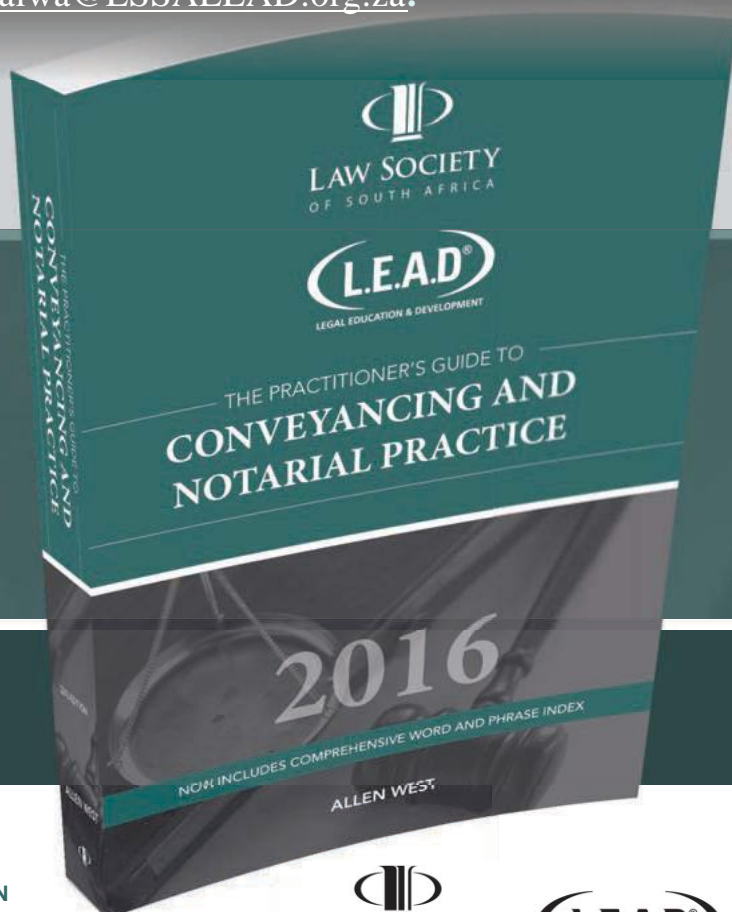
Allen is a lecturer at the University of Pretoria and a moderator and consultant of Conveyancing subjects at UNISA. He has presented courses for the LSSA (LEAD) since 1984 and has served on the following boards: Sectional Title Regulation Board, Deeds Registries Regulation Board, and Conference of Registrars, as well as numerous other related committees. Until September 2014, Allen was the editor of the South African Deeds Journal (SADJ) since its inception.

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ment and it was not open to the City to choose not to comply with it. The UISP made it clear that relocation was the exception and not the rule. The implementation of an existing policy such as the UISP was a typical administrative function that was subject to review.

The City's failure to apply the UISP was unlawful – it had been taken outside the legislative and policy framework intended to apply to informal settlements. Further, its unilateral decision to evict and relocate the residents of the informal settlement was unreasonable and non-inclusive, and reviewable on that ground.

The application was accordingly granted and the City directed to proceed with the application for funding.

Intellectual property

Trade marks: The crisp facts in *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another* [2016] 3 All SA 345 (SCA) were as follows: The appellant, Cochrane, had used the trade mark CLEARVU extensively in relation to security fencing. Although the subject of a pending trade mark application at the time, the mark was not registered. The respondent, M-Systems, sold a competing product.

Cochrane's product was displayed among the natural or organic links displayed when CLEARVU is searched on the Google search engine. Cochrane was also displayed among the sponsored links by such a search. Sponsored links come about through payment made to Google for the use of AdWords (that is, the word CLEARVU in the present case). M-Systems paid Google for CLEARVU as an AdWord. As a result a Google search for CLEARVU displayed a linked advertisement for M-systems and its competing product.

Cochrane claimed that M-Systems' selection and payment for CLEARVU as an AdWord constituted passing off under the common law as it amounted to making a representation that M-Systems

and its competing product were connected in the course of trade with it. Further, this form of dilution of the trade mark constituted leaning on, which was argued to be a separate delict under the common law from passing off. An interdict restraining the utilisation of CLEARVU as an AdWord by M-systems was sought.

It was not possible for Cochrane to claim trade mark infringement by dilution in terms of s 34(1)(c) of the Trade Marks Act 194 of 1993 by virtue of the fact that the trade mark CLEARVU had not been registered. The trade mark application to register this mark was being opposed by M-Systems. Cochrane sought an interim interdict pending the outcome to the trade mark application.

The court *a quo* ruled that the use of Google's AdWords to market a competitive product did not constitute passing off under common law.

Ponnan JA pointed out that passing-off is a species of wrongful competition in trade or business and involves a representation by one person that his business (or goods) is that of another, or is associated with that of another. In order to determine whether a representation amounts to a passing-off, the question is whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another. Whether there is a reasonable likelihood of such confusion arising is a question of fact, which will have to be determined in the light of the circumstances of each case. The critical question was whether the advertisement gives rise to the likelihood of confusion; and not whether or not the bidding by one competitor on the trade mark of another is itself unlawful. Cochrane was unable to adduce any evidence of actual confusion and, in the absence of satisfactory evidence as to actual confusion, its likelihood was not established.

Cochrane's primary contention was based on the general principles of unlawful competition. It argued that

M-Systems' use of the appellant's trade name as a Google keyword offended against the *boni mores* because it amounted to unlawful competition. Generally, every person is entitled freely to carry on his or her trade or business in competition with his or her rivals, but the competition must remain within lawful bounds. If it is carried on wrongfully, in the sense that it involves a wrongful interference with another's rights as a trader that constitutes an *injuria* for which the *Aquilian* action lies if it has directly resulted in loss.

Cochrane's complaint was essentially that M-Systems had appropriated its trade name for a particular purpose (keyword bidding) and for their own benefit. The court held that the use by one trader of the unregistered trade mark or trade name of another is not unlawful under the common law except to the extent that that use gives rise to passing off.

The court concluded that the attempt by Cochrane to ground a cause of action based on unlawful competition in the circumstances was ill-conceived.

The appeal was accordingly dismissed with costs.

Prescription

Extinctive prescription: The dispute between the parties in *Standard Bank of SA Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another* [2016] 3 All SA 487 (SCA) arose from a credit facility extended to Mr Papachrysostomou (Mr P) by Standard Bank (the bank) in 2005 for which the respondent, Miracle Mile, and another company stood surety. The companies also registered mortgage bonds in favour of the bank over certain immovable properties to cover their obligations. In the GJ it was held that the principal debt had prescribed and the sureties were accordingly also no longer liable.

In terms of the provisions of the credit facility the principal debt was payable over a period of 240 months. It also contained an acceleration clause in terms of which the bank could convert the instal-

ment obligations into an obligation to pay on demand if Mr P failed to pay any instalment and failed to rectify such default within seven days of a written notice by the bank. The bank was also entitled to cancel the agreement and claim immediate payment of the full outstanding amount in such eventuality.

Mr P defaulted on the facility and the bank sent a notice in terms of s 129 of the National Credit Act 34 of 2005 advising him of his default. The notice did not contain any indication that the bank would be exercising its right to accelerate the claim if the default was not cured within the stipulated period. Mr P made no further payments after 21 October 2008 and his estate was sequestered on 27 August 2013.

During June 2013 Miracle Mile applied for an order directing the bank to consent to the cancellation of the mortgage bonds, arguing that as Mr P made no further payments after 21 October 2008, the debt had prescribed on 21 October 2011. The bank argued that its notice of 12 August 2008 did not constitute an election to accelerate the payment of the debt, but merely called on Mr P to cure the default.

The court of first instance held that the debt had prescribed as prescription started to run from the date that the bank was entitled to accelerate the debt and claim the full amount.

On appeal to the SCA Mbha JA pointed out that the court *a quo* recognised that, whether or not the debt incurred by Mr P – in terms of the facility had prescribed – depended on when the debt had become 'due', within the meaning of that word in s 12(1) of the Prescription Act 68 of 1969 (the 1969 Prescription Act).

The authority on which the court of first instance relied dealt with the provisions of the previous Prescription Act 18 of 1943 and which was differently worded. In terms of the current Act, prescription only starts running when the debt is 'due' and not when it first 'accrued'. The approach equating the two positions

was endorsed by several High Court decisions.

Where an acceleration clause affords the creditor the right of election to enforce the clause on default by the debtor, the debt in terms of the acceleration clause only becomes due when the creditor has elected to enforce the clause. Before an election by the creditor, prescription does not begin to run.

If a creditor elects not to enforce the acceleration clause, he or she is entitled to wait until all the individual instalments have fallen due before instituting action, albeit at the risk that prescription may then have taken effect in respect of earlier instalments. Depending on the terms of the contract an acceleration clause may automatically come into effect on default by the debtor, without any election by the creditor. This would be the case where the creditor has in advance made an election in terms of the contract to enforce the acceleration clause. This approach has the support of all the leading authorities on this topic.

In terms of the 1969 Prescription Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor.

In the present case, the acceleration clause in the agreement had its own procedural requirements to be satisfied before the bank could claim the full balance owing. The debt was, therefore, not due and prescription did not begin to run on the entire debt. Compliance with the jurisdictional requirements for acceleration of the outstanding balance is not simply a procedural matter but is essential in establishing a cause of action.

The appeal was upheld with costs.

• See law reports 'prescription' 2016 (May) *DR* 38 and case note 'Prescription: Commencement, election and written notice' 2016 (Aug) *DR* 43.

Trusts (removal of trustees)

In *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA); [2016] 3 All SA 382 (SCA) the court was asked to pronounce on the scope of the common-law and statutory powers to remove a trustee from a trust. The facts in the *Gowar* case emanated from a long-standing family feud about the control of various family trusts. The David Gowar Trust owned seven farms. The Rietfontein Trust owned two farms, while the RD Gowar Testamentary Trust owned one farm, farming equipment and livestock. The Gowar Farm Trust owned farming equipment and livestock. These trusts were established at various times by Reginald Denver Gowar, the father of one of the applicants and one of the respondents.

Their conflict largely stemmed from the irreconcilable differences between the Gowar brothers about how the affairs of the various trusts could be best served in the interests of the beneficiaries. Despite concerted endeavours by third parties to mediate, the dispute remained unresolved.

The key issue was the circumstances in which a court may remove a trustee from office in terms of either the common law or s 20(1) of the Trust Property Control Act 57 of 1988 (the Act). One Gowar brother applied for the removal of the other as a trustee of all four trusts. The respondent brother brought a cross-application for the removal of the applicant brother as trustee from three of the trusts.

The court of first instance dismissed both the main application and the counter-application.

On appeal to the SCA Petse JA held that the trustee is the owner of the trust property for purposes of administration of the trust, but *qua* trustee he has no beneficial interests therein.

Where more than one trustee have been specified in the trust deed, they share a common fiduciary obligation towards the fulfilment of the

objects of the trust and must act jointly.

The court pointed out that s 9(1) of the Act requires a trustee to act with the care, diligence and skill, which can reasonably be expected of a person who manages the affairs of another in the performance of his or her duties and the exercise of his or her powers. This standard is higher than the standard expected from an ordinary person when dealing with his or her own property.

Further, the court held that it is trite that the court has inherent power to remove a trustee from office at common law. This power also derives from s 20(1) of the Act which provides that: 'A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.'

The general principle is that a trustee will be removed from office when continuance in office will prevent the trust being properly administered or will be detrimental to the welfare of the beneficiaries. This applies to both the common law power and the power under s 20(1) of the Act.

The court confirmed that common-law powers remain unaffected by the enactment of s 20(1). In this regard it emphasised that, firstly, the power of the court to remove

a trustee must be exercised with circumspection; and secondly, neither *mala fides* nor misconduct is required for the removal of a trustee.

Importantly, so the court reasoned, mere friction or enmity between the trustee and the beneficiaries will not in itself be adequate reason for the removal of the trustee from office. Nor would mere conflict among the trustees themselves be a sufficient reason for the removal of a trustee at the suit of another. The removal must be in the interests of the trust and its beneficiaries.

The court concluded that on the undisputed facts as established neither the applicant brother in the main application nor the respondent brother in the counter-application made out a sufficient case for their removal as trustees from the respective trusts.

Both the appeal and counter-appeal were accordingly 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: Appeals, civil procedure, company law, constitutional law, criminal procedure, elections, labour law, land reform, maritime law, medical schemes, mining and minerals, motor-vehicle accidents and pleadings.



On the lighter side: *Paterfamilias*

S v Burger 1975 (4) SA 877 (A)

Holmes, J: 'Culpa and foreseeability are tested by reference to the standard of a diligens paterfamilias ('that notional epitome of reasonable prudence' - *Peri-Urban Areas Health Board v Munarini* 1965 (3) SA 367 (AD) at 373F) in the position of the person whose conduct is in question. One does not

expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a diligens paterfamilias treads life's pathway with moderation and prudent common sense.'



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By
Theo
Steyn

Beware of a second bite at the cherry

Nexus Forensic Services (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others (GP)
(unreported case no 14708/2015, 21-6-2016) (Van Niekerk AJ)

The recent judgment of *Nexus Forensic Services (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* (GP) (unreported case no 14708/2015, 21-6-2016) (Van Niekerk AJ) is another cautionary tale to administrators to ensure that they comply with procurement legislation and our Constitution when considering and awarding tenders.

The salient facts

During July 2013 the South African Social Security Agency (SASSA) invited bids from interested parties for the appointment of a forensic investigation services provider. After evaluating the bids, SASSA's Bid Evaluation Committee (BEC) recommended that the second highest scoring bidder (third respondent) should be awarded the tender. In a further evaluation phase, the Bid Adjudication Committee (BAC) deemed the reasons and motivation provided by the BEC as unjustifiable to warrant the appointment of the third respondent (as second highest scoring bidder) as the award would be discretionary and fails to take into account the evaluation criteria of the bid. The BAC recommended to SASSA's Chief Executive Offices (CEO) (first respondent) that the applicant, as the highest points scoring bidder be awarded the tender and that a contrary appointment would not be defensible in a court of law.

Despite this recommendation, the CEO awarded the tender to the second highest scoring bidder. In this regard the CEO remarked that she was entitled to reject the BAC's recommendation and had done so based on functional criteria mainly involving the experience of the successful bidder.

With that factual background in mind and before having regard to two important issues that arose from this judgment, it is necessary to shortly identify the legal framework within which procurement by state organs operates.

The legal framework

The procurement process by state or-

gans is achieved through a process of tender and acceptance, creating a contract. This process is strictly regulated by the Constitution, legislation envisaged by the Constitution and regulations and National Treasury guides.

A synopsis of the framework is as follows –

- s 217 of the Constitution deals with 'procurement' and provides for the award of tenders in accordance with a system that is fair, equitable, transparent, competitive and cost effective;
- the Constitution prescribes that national legislation must provide a framework within which to implement the policies. The legislation envisaged by the Constitution is the Preferential Procurement Policy Framework Act 5 of 2000 (the Act);
- the Act mandates that an organ of state must determine its preferential procurement policy and implement it within a prescribed framework, containing goals which are measurable, quantifiable and monitored for compliance;
- the 2011 Procurement Regulations prescribe what should be contained in the invitation to submit a tender and provides for the fact that evaluation criteria in respect of functionality must be clearly specified in the invitation to submit a tender (reg 4);
- reg 7 provides that a contract may only be awarded to a tenderer that did not score the highest total number of points, 'only in accordance with section 2(1)(f) of the Act';
- the National Treasury Implementation Guide: Preferential Procurement Regulation, 2011 Pertaining to the Preferential Procurement Policy Framework Act, Act no 5 of 2000, provides that –

'16.1 A contract must be awarded to the bidder who scored the highest total number of points in terms of the preference point systems.

16.2 In exceptional circumstances a contract may, on reasonable and justifiable grounds, be awarded to a bidder that did not score the highest number of points. The reasons for such a decision must be approved and recorded for audit purposes and must be defensible in a court of law.'

It is clear that the framework was designed to ensure a process in terms of which competing bidders are evaluated by using objective criteria in a fair, reasonable and transparent manner where the highest scoring bidder in terms of a preferential points system should be awarded a tender. Only in exceptional circumstances can a lower scoring bidder be appointed, and then only in accordance with the provisions of s 2(1)(f) of the Act, which requires the objective criteria to justify the award to a lower scoring tenderer.

The use of functionality criteria

With the framework in mind, we once again return to the facts of our case under discussion. It was common cause that, in awarding the tender, the CEO relied on functionality criteria (functionality) for a second time during the award phase of the tender process, after functionality was already used initially during the qualification phase. The pertinent question was, therefore, whether functionality may be taken into consideration for a second time during the award phase?

The CEO relied on the provisions of s 2(1)(f) of the Act for the submission that she was entitled to consider functionality twice. The relevant section provides that –

'(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

...

(d) the specific goals may include –

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points,

unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
...’

In considering this section, the court made it clear that a decision maker is ‘enjoined not to reconsider those criteria which had already been considered, but additional objective factors, other than those already included in the terms of reference’.

On the facts of the case it was held that, unless the CEO could justify the award to another tenderer on objective criteria in addition to those contemplated in para (d) and (e) of s 2(1) of the Act, there were no grounds on which to justify the award. The CEO failed to prove objectivity relating to the decision insofar as she relied on the advice of an employee of SASSA for the appointment of the second highest bidder and this was not considered to be objective information and did not constitute measurable or quantifiable criteria.

Ultimately the court found that to empower a decision maker to utilise the functionality criteria for a second time during the award stage would be con-

trary to the provisions of the regulations promulgated in terms of s 5 of the Act, read in conjunction with s 2(1)(f) of the Act. The court remarked that a contrary finding would vitiate the provisions of s 217 of the Constitution and create an unfair, inequitable system that lacks transparency and undermines competition and cost effectiveness.

Functionality was, therefore, excluded as ‘objective criteria to justify the award to another tenderer’ as envisaged in s 2(1)(f) of the Act.

The CEO’s reliance on the wording in the terms of reference contained in the bid invitation

The clause on which the CEO relied as justification for the decision to award a tender to the second highest scoring bidder from a contractual point of view was contained in the invitation to bid and provided as follows:

‘The agency reserve the right not to accept the lowest price quotation, as other criteria, including the functionality and preferences will be taken into consideration, when bids are evaluated.’

The court held that a general ‘catch all’ clause such as the one in issue could not vitiate the legislative framework within which the procurement process operates. It was held that an organ of state is not entitled to enter into a contract of procurement contrary to the prescribed legislative framework.

Conclusion

The court ordered that the CEO’s award of the tender to the third respondent was inconsistent with the provisions of s 217(1) of the Constitution and consequently invalid in terms of s 172(1) of the Constitution.

This decision affirms the principle that a bidder cannot be scored on functionality during the qualification stage, and again during the award stage of the bidding process. It underscores an objective system, which aims to avoid arbitrary decision-making by functionaries without the bidder knowing what value will be placed on a reconsideration of criteria.

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By
Saber
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Moving beyond *Edcon*: Inferring breakdown in trust relationship where no evidence led to support that claim

Easi Access Rental (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others
(unreported case no JR 385/14, 10-12-2015) (Molahlehi J).

Even though no evidence has been led to support the claim that the trust relationship between employer and employee has broken down, thus making that relationship unworkable, there’s case law that suggests that the nature and seriousness of misconduct can be enough to infer the breakdown of the trust relationship without evidence being led to prove the breakdown. See *Easi Access Rental (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others* (unreported case no JR 385/14, 10-12-2015) (Molahlehi J).

In the *Easi Access* case, the employee was dismissed by the applicant after be-

ing found guilty on five charges of misconduct, including, *inter alia*, dishonesty and gross negligence. The employee, a payroll officer, had allegedly disclosed all of the employer’s payroll information to a fellow employee.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the commissioner relying on *Edcon Ltd v Pillemer NO and Others* [2010] 1 BLLR 1 (SCA) found that the dismissal was unfair on two grounds –

- firstly that he did not find the employee guilty of all the charges against him; and
- secondly that there was no evidence produced by the employer to show that

the trust relationship had broken down between the parties.

The Supreme Court of Appeal, in the *Edcon* matter found the dismissal of an employee was inappropriate where an employer alleged that the employee was dismissed because the trust relationship had broken down and then failed to lead evidence to confirm or support this allegation. In the *Easi Access* matter, the judge found that in cases where direct evidence of the breakdown has not been led, the inquiry into the fairness of the dismissal by the commissioner should include a determination of whether or not the breakdown can or cannot be inferred from the nature of the offence.

In support of this position, the judge referred to *Department of Home Affairs and Another v Ndlovu and Others* [2014] 9 BLLR 851 (LAC), where it was held that the employer has an obligation to lead evidence to justify a dismissal, unless of course the conclusion of a broken relationship is apparent from the nature of the offense and/or circumstances of the dismissal.

Accordingly, so the reasoning goes, in determining the fairness of the sanction, the nature of the offence, the seriousness of the misconduct and the circumstances of the case had to be considered.

This decision supports the point that even though evidence relating to the breakdown in the trust relationship between the parties in a dismissal case is of critical importance in the assessment of the fairness or otherwise of the dismissal, where no such evidence has been led, the commissioner still has to determine whether the breakdown in the trust relationship cannot be inferred from the nature and extent of the misconduct and the surrounding circumstances as a whole.

To summarise, *Edcon* is not the authority for the often misconceived proposi-

tion that in order to sustain its decision to dismiss an employee, the employer must always and without failure adduce direct evidence to show a breakdown in the trust relationship. We need to move beyond *Edcon*.

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By
Siyabonga
Sibisi

Vicarious liability of employer for employee's frolic: More clarity on detour cases

Minister of Safety and Security v Morudu and Others
2016 (1) SACR 68 (SCA)

It is trite in law that an employer is vicariously liable for the wrongful conduct of an employee if such wrong was committed by the employee in the course and scope of his or her employment or while engaged in any activity incidental thereto. The rationale for this is because the employee is an extension of the employer – the instrument with which the latter acts. I submit that by deciding to employ, the employer creates a 'risk of harm', which in turn imposes an obligation on him or her to safeguard others against materialisation of the harm. The difficulty arises when an employee does something outside the course and scope of his or her employment. In this case, can the employer be held liable?

In *Minister of Safety and Security v Morudu and Others* 2016 (1) SACR 68 (SCA) the Supreme Court of Appeal (SCA) seized the opportunity to reiterate the legal position.

Facts

On 25 December 2001, Inspector Frans Duba (Duba), employed by the appellant as a fingerprint investigator, drove to the home of the respondents. On arrival he called out Mr Morudu (the deceased husband of the first respondent). Duba demanded to know the whereabouts of his wife (Mrs Duba). He was convinced

that Mr Morudu was having an affair with his wife. He then pursued, shot and killed Mr Morudu. It was common cause that Duba had driven in an unmarked police vehicle, dressed in civilian clothing and, therefore, it was unknown to the respondents that he was a police officer. He used his private firearm to commit the unlawful deed. His duty was to report to the crime scene – only when called on to do so – to lift fingerprints.

The court *a quo* held that the minister was liable for the wrongful conduct of Duba. It is against this that the matter went to the SCA.

Issue

On appeal the minister maintained that Duba had not been acting in the course and scope of his employment as a fingerprint investigator and consequently the minister was not liable. The respondents maintained that Duba was an employee of the respondent, even if he had not been acting in the course and scope of his employment, there was a sufficiently close link between the business of the appellant and the conduct of Duba.

An overview of the law of vicarious liability

The doctrine of vicarious liability is rooted in public policy. It is based on the belief that because the employer

works through the employee, there is a potential risk of harm created by the employer should the employee be 'negligent, ineffective or untrustworthy' (A Smith 'When can you blame the boss for the worker's misconduct?' (2001) 9 *JBL* 81 at 82; see generally *Feldman (Pty) Ltd v Mall* 1945 AD 733). This is the creation of risk theory. The maxim *qui facit per alium facit per se* (he who acts through another (is considered) to act himself) is the gateway for vicarious liability (BE Loots 'Sexual harassment and vicarious liability: A warning to political parties' (2008) 19 *SLR* 143 at 145). This necessitates a distinction between wrongful acts or omission of an employee committed within the course and scope of employment, the traditional vicarious liability cases, and wrongful acts or omissions committed by an employee outside the course and scope of employment, the deviation or detour cases (*Morudu (op cit)* at para 18).

The question of liability of the employer in the former case (traditional vicarious liability cases) does not pose difficulty; the problem arises with the latter cases (deviation vicarious liability cases); the latter necessitates an extension of the concept 'course and scope of ... employment' (*K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at 425F). In each set of cases the courts apply a suitable test.

The meaning of course and scope of employment

The concept 'course and scope of employment' carries a wide interpretation. It has been understood to refer to acts authorised by the employer. It has also been held that it includes the so-called 'abandonment-mismanagement rule' cases where the employee partially completes the work of the employer while devoting his attention to his frolic. In this case the employer will be held liable (S Wagener 'The abandonment-mismanagement rule: Vicarious liability for an employee's simultaneous commission and omission' (2015) 132 *SALJ* 270 at 272).

Tests used for vicarious liability

There are three common law requirements in standards cases names (Loots (*op cit*) at 149):

- A master-servant/employer-employee relationship must be established.
- A wrongful act must be done by an employee.
- The employee must have committed the wrongful act while acting within the course and scope of his employment.

These common law requirements were redundant when it came to deviation cases. An employer could easily get away simply because the employee had abandoned the employer's business and engaged on a frolic of his or her own. A rigid application of these requirements excluded many cases with legitimate claims. A proper test to apply to deviation cases was formulated in *Minister of Police v Rabie* 1986 (1) SA 117 (A). In terms of this test an employer may still be held liable even if the employer had abandoned the employer's business and engaged on a frolic of his or her own provided that there is a 'sufficiently close connection' between the actions of the employee and the business of the employer.

The test has subjective and objective elements. The subjective elements implore into the intentions of the employee – whose interests was he or she furthering? In *K (op cit)* O'Regan J stated that this requires a consideration of the employee's state of mind and is a purely factual inquiry (at 436C). Once it is established that the employee was on a frolic of his or her own, the employer may nonetheless still be held liable if there is a sufficiently close link between the conduct of the employee and the business of the employer. This is the position no matter how 'badly or dishonestly or negligently' the employee conducted himself (*K (op cit)* at 425H). This is an objective element which involves a mixture of law and facts (*K (op cit)* at 436E).

This test for deviation cases was employed by the Constitutional Court (CC)

in the *K* case. The court criticised the various differing applications of the test resulting in legal uncertainty. Further, it developed the test by making it compatible with constitutional values. The court held that the objective element of the test is flexible and incorporates constitutional norms, as well as other norms, insofar as deciding what is sufficiently close for the purposes of vicarious liability (*K (op cit)* at 441H). However, this approach by the CC has been criticised. Wagener is of the view that there is an increasingly blurring distinction between personal and vicarious liability (S Wagener '*K v Minister of Safety and Security* and the increasingly blurred line between personal and vicarious liability' (2008) 125 *SALJ* 673). Wagener (*op cit*) at 674 is of the view that the court in *K* misdirected itself on three aspects, namely –

- overemphasis of legal duties as a basis for liability;
- erroneous reliance on s 39 (2) of the Constitution and the Bill of Rights as a basis for developing the concept 'course and scope of employment'; and
- the court followed a blurred English decision.

Wagener also made some notable observations about the *K* case such as that the court's reasoning was influenced by the 'nature of the interest infringed'. He shared the view that had a lesser interest been infringed, for example, damage to a motor vehicle, the court would not have come to a similar conclusion (Wagener (*op cit*) at 676 – 677). He concluded, with authority, that the court's approach is questionable and unsustainable and as such the courts ought to apply an 'extraordinary' form of personal liability (Wagener (*op cit*) at 678). Of interest is that the extent of this 'extraordinary' form of personal liability is unknown. Be it as it may, I acknowledge the views raised by Wagener, they are not yet a cause for concerns in light of *Morudu*.

The decision of the court

The court in arriving at a decision in *Morudu* case distinguished the present case from other cases. In *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC) a police officer on stand-by had raped and assaulted the appellant while using an unmarked police vehicle. The appellant had seen a police radio and later a docket in the vehicle, which led her to trust that she was safe and jumped in the vehicle. In *K (op cit)* three on duty police officers had carried the appellant in a police vehicle in contravention of standing orders not to transport unauthorised passengers. They further raped and threw her out of the vehicle. In the *Morudu* case, the employee was employed in a fingerprint unit. In the court's reasoning, '[T]he unit was not a

division of the police to which the public will intuitively turn for protection' (*Morudu* at para 35); different from the *F* and *K* matters. Further, in the *Morudu* case, the respondents had not known that Duba was a police officer. He had used an unmarked vehicle and dressed in civilian clothing. Hence no trust was posed to him by the respondents (*Morudu* at para 34).

The court applied the test. It was agreed that the employee had furthered his own interests, however, there was no sufficiently close link between the conduct of Duba (who was employed in the fingerprint unit) and the business of the employer. Mr Duba had been on a frolic of his own as he believed that the deceased had been having an affair with his wife. This was 'a radical deviation from the tasks incidental to his employment'.

It is because of these distinctions that – while acknowledging the concerns raised by Wagener (*op cit*) – I am of the view that the concerns are of academic consideration. The SCA has provided some form of clarity over concerns. It is, therefore, still possible to draw a distinction between personal and vicarious liability.

Conclusion

The decision of the SCA in *Morudu* set the bar straight, especially after the decisions of the CC in the *F* and *K* matters. The SCA did not allow itself to lightly invoke constitutional norms even where it is unnecessary to do so – an approach frowned on. It bordered on a fine line, carefully distinguishing the case from the standard set by O'Regan J in the *K* matter. It did not cloud itself in the fact that Duba was employed by the South African Police Service (SAPS), a body which is tasked to protect citizens. It considered the specific business of the SAPS as far as Duba's employment was concerned. By so doing the SCA guarded the state from liability where it was too remote for imputation.

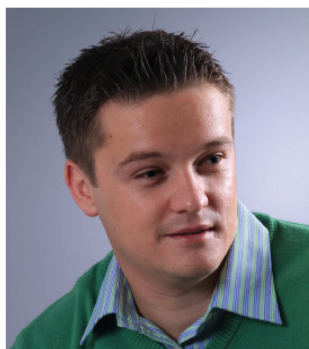
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New legislation

Legislation published from
2 – 30 September 2016

Selected list of delegated legislation

Children's Act 38 of 2005

Amendment of regulations relating to children. GN978 GG40243/2-9-2016.

Financial Markets Act 19 of 2012

Amendments to the JSE Debt Listing Requirements. BN160 GG40293/23-9-2016.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Amendment of regulations governing tolerances for fungus-produced toxins in foodstuffs. GN987 GG40250/5-9-2016.

Health Professions Act 56 of 1974

Amendment of the regulations relating to the specialities and subspecialities in medicine and dentistry. GN971 GG40243/2-9-2016.

Income Tax Act 58 of 1962

Convention between South Africa and Chile for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital. GN1001 GG40262/9-9-2016.

Liquor Act 59 of 2003

Final National Liquor Policy. GN1208 GG40321/30-9-2016.

Medical Schemes Act 131 of 1998

Amendment of regulations. GN969 GG40243/2-9-2016.

National Health Act 61 of 2003

Regulations relating to artificial fertilisation of persons. GN1165 GG40312/30-9-2016.

National Railway Safety Regulator Act 16 of 2002

Railway Safety Regulator Standards. GenN631 GG40312/30-9-2016.

National Water Act 36 of 1998

Revised general authorisation for the taking and storing of water. GenN538 GG40243/2-9-2016.

Property Valuers Profession Act 47 of 2000

Amendment of the rules for the property valuers profession. BN162 GG40312/30-9-2016.

Road Accident Fund Act 56 of 1996

Adjustment of medical tariff in terms of s 14(4B)(b) from 1 August 2016. BN158 GG40293/23-9-2016.

Social Housing Act 16 of 2008

Rules on long-term accreditation of social housing institutions. GenN624 GG40312/30-9-2016.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Ezakheni. GN1184 GG40312/30-9-2016.

Establishment of a small claims court for the area of Coligny. GN1183 GG40312/30-9-2016.

Establishment of a small claims court for the area of Estcourt and Weenen. GN1182 GG40312/30-9-2016.

Draft delegated legislation

Proposed amendments to the JSE Derivatives Rules in terms of the Financial Markets Act 19 of 2012. BN152 GG40243/2-9-2016.

Proposed Industry Code and Ombudsman Scheme for the Funeral Industry in terms of the Consumer Protection Act 68 of 2008. GN534 GG40243/2-9-2016.

Regulations relating to maximum levels of metals in foodstuffs in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 for comment. GN990 GG40252/6-9-2016.

Amendment of regulations relating to the reduction of sodium in certain foodstuffs in terms of the Foodstuffs, Cosmetics and Disinfectants Act for comment. GN989 GG40252/6-9-2016.

Proposed amendments to the Code of

Professional Conduct for Registered Auditors in terms of the Auditing Profession Act 26 of 2005. BN153 GG40262/9-9-2016.

Proposed levy on piped-gas and petroleum pipeline industries for 2017/18 in terms of the Petroleum Pipelines Levies Act 28 of 2004. GN994 GG40257/8-9-2016.

Proposed amendments to the Financial Provisioning Regulations, 2015 in terms of the National Environmental Management Act 107 of 1998. GN R1006 GG40265/9-9-2016.

Draft First Amendment of the Immigration Regulations, 2014 in terms of the Immigration Act 13 of 2002. GenN602 GG40287/16-9-2016.

Draft amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R1156 GG40299/23-9-2016.

Proposed amendments to the JSE Equities Rules in terms of the Financial Markets Act 19 of 2012. BN161 GG40293/23-9-2016.

Proposed declaration of certain substances, products or materials to be Category B hazardous substances in terms of the Hazardous Substances Act 15 of 1973. GN1075 GG40293/23-9-2016.

Draft Local Government: Municipal Staff Regulations in terms of the Local Government: Municipal Systems Act 32 of 2000. GN1074 GG40293/23-9-2016.

Draft National Gambling Amendment Bill. GN1207 GG40320/30-9-2016.

Draft Code of Good Practice on the Preparation and Implementation of Employment Equity Plan in terms of the Employment Equity Act 55 of 1998. GN1202 GG40316/30-9-2016.



Employment law update



Monique Jefferson BA (Wits) LLB (Rhodes) is an attorney at Bowman Gilfillan in Johannesburg.

Can a co-respondent file an answering affidavit in which it seeks the same relief as the applicant and raises facts and allegations that support the applicant's claim?

In *Kruger and Others v Aciel Geomatics (Pty) Ltd* (LAC) (unreported case no JA87/2014, 14-6-2016) (Waglay JP, Davis JA), the Labour Appeal Court (LAC) upheld the Labour Court's (LC) decision that the cancellation of a non-exclusive distribution agreement does not trigger the application of s 197 of the Labour Relations Act 66 of 1995 (LRA). In addition, the LAC was required to consider whether a co-respondent becomes an applicant in the proceedings should it file an affidavit that supports the relief sought by the applicant.

In this case, Geosystems Africa (Pty) Ltd (GSA) was cited as a respondent in the proceedings despite the fact that no relief was sought against GSA. This was because GSA was the old employer of the applicant employees seeking relief and it had an interest in the proceedings in that, should the applicant employees fail in their application, GSA may be required to pay severance pay to the applicant employees. GSA filed an affidavit as a co-respondent but this affidavit raised facts and allegations that supported the applicants' claim. Furthermore, GSA sought the same relief as the applicants.

The respondent objected to the LC taking into account the affidavits filed by GSA. It argued that these affidavits should be struck out as it amounted to an irregularity. The LC did not agree and was of the view that it was entitled to depart from the accepted rules relating to motion proceedings provided that this departure was in the interest of justice

and fairness. It based its decision on the fact that the objection was raised by the respondent late in the proceedings and the fact that excluding the affidavits of GSA could cause the applicants to suffer prejudice.

The LAC per Waglay JP held the view that the LC should have struck out GSA's affidavits and should not have allowed GSA to present evidence as if it were an applicant in the proceedings. Waglay JP accordingly agreed with the submissions made by Counsel for the respondent in the LC proceedings. In this regard, counsel for the respondent argued that GSA had three options as a respondent in this matter – it could either –

- oppose the relief sought and file an answering affidavit refuting the applicants' case;
- elect not to oppose the relief but to abide by the relief sought; or
- apply to be joined to the proceedings as a second applicant.

Thus, Waglay JP held that GSA was not entitled to file an answering affidavit to assist the applicants in building a case against the respondent. Furthermore, not only was GSA assisting the applicants in building a case, but it also sought the same relief as the applicants. This had the effect that GSA was not simply placing evidence before the court but was instead making itself an applicant in the proceedings. Waglay JP was of the view that by allowing the GSA affidavits there was a further founding affidavit that the respondent was required to respond to. Waglay JP concluded that it is not permissible to allow a co-respondent to file answering papers in which it seeks the same relief as the applicant without seeking to be an applicant in the proceedings. Furthermore, a court is not entitled to exercise its discretion to determine whether or not to allow this as this would severely prejudice the respondent in that the respondent would need to defend itself against both the applicant and the co-respondent.

Waglay JP set out the following principles that apply to motion proceedings –

- An applicant must make out its case in its founding affidavit.

- The respondent is only obliged and entitled to respond to the case set out in the applicant's founding affidavit.

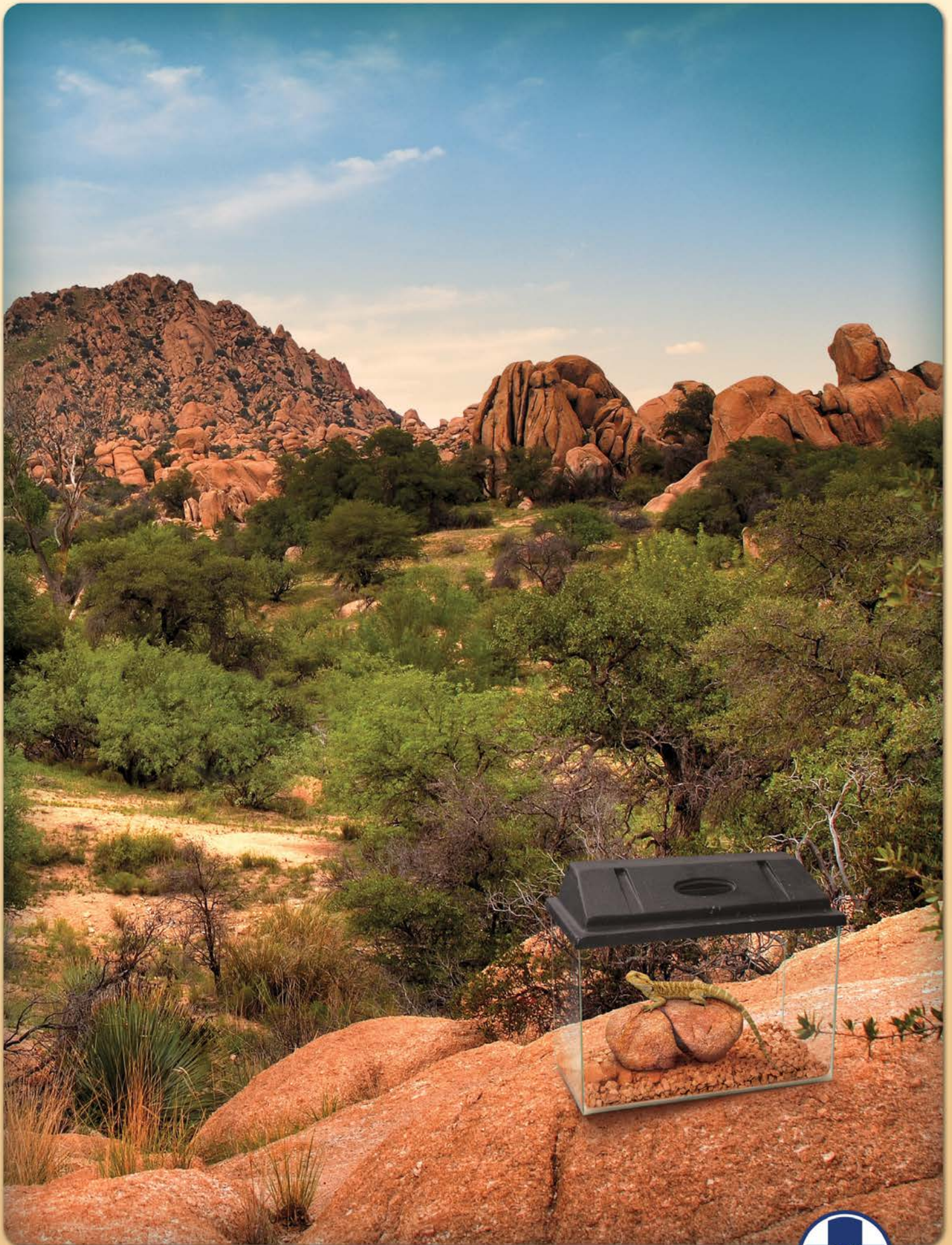
- An applicant can only succeed on the basis of facts in the founding affidavit, which are not disputed in the answering affidavit, read with additional facts deposited to in the respondent's answering affidavit. Therefore, the respondent is only obliged to deal with the case made out in the founding affidavit and the ap-

plicant cannot seek to make out a cause of action based on facts in the answering affidavit which did not form part of the founding affidavit.

- A respondent is not obliged to deal with allegations made in a co-respondent's affidavit, which may assist the applicant's case. This is because there is no *lis* between a respondent and co-respondent. The respondent is only required to deal with the case in the applicant's founding affidavit and does not need to oppose what is stated by the co-respondent as the co-respondent is not entitled to any relief unless it becomes an applicant in the proceedings.

As regards the application of s 197 of the LRA, the applicants argued that s 197 was triggered upon the cancellation of a non-exclusive distribution agreement between GSA and Leica Geosystems AG (Leica) and that their employment should transfer to the respondent in this matter, which had become the sole distributor of Leica products since the cancellation of the agreement between GSA and Leica. The applicants argued that s 197 was triggered as a number of GSA employees had become employed by the respondent. In this regard, approximately six to eight employees had become employed by the respondent while about 22 employees remained employees of GSA. Furthermore, a number of customers of GSA had placed their custom with the respondent after the termination of the distribution agreement. The LAC, per Davis JA, found that this in itself was not enough to trigger s 197 as the applicants needed to show that there had been a transfer of a business as a going concern.

The applicants argued that there had been a conspiracy between Leica and the respondent in which there had been a gradual transfer of the business over time which had ultimately led to the cancellation of the distribution agreement. It was held that the evidence did not show that there was an ongoing discrete economic activity – which was conducted by the business structure of GSA – and which was now in the hands of the respondent. Instead, the facts showed that Leica had entered into a non-exclusive distribution agreement with GSA. Leica then experienced performance problems with GSA and decided to appoint a second distributor, the respondent, in competition with GSA in the hope that GSA would improve its performance. When GSA's performance did not improve Leica decided to cancel the distribution agreement that it had with GSA. The respondent then simply continued



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to perform its functions in terms of the distribution agreement that it had entered into with Leica. As set out above, it was held that this did not constitute a transfer of a business as a going concern and thus s 197 is not triggered upon the cancellation of a non-exclusive distribution agreement.

The appeal was dismissed with costs, including the cost of two counsel.



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

Record of an internal disciplinary hearing – the probative weight at arbitration in appropriate factual circumstances

Minister of Police v M and Others (LC) (unreported case no JR56/14, 19-8-2016) (Whitcher J).

'RM', a member of the South African Police Service (SAPS), was criminally charged for raping his daughter over a period of four years. Pursuant to this the SAPS convened an internal disciplinary inquiry and charged RM for certain acts of misconduct, including contravening the SAPS code of conduct.

At his inquiry, RM's daughter (K) testified how and when her father had raped her. Her testimony was corroborated by RM's son (S) and current wife (D) who both testified on behalf of the SAPS.

Each of the SAPS's witnesses were asked probing and relevant questions by RM's representative, as well as the chairperson of the inquiry, thus their respective testimonies were 'clear, thoroughly ventilated and tested'.

RM was found guilty of the charges and subsequently dismissed, whereafter he challenged the substantive fairness of the dismissal at the bargaining council.

At arbitration the challenge for the SAPS was that it could not locate RM's daughter, son or wife to testify on its behalf and as a result thereof, the only evidence the SAPS tendered in support of its case was the transcribed record of the disciplinary inquiry.

Although the arbitrator found the record was admissible she, however, held that in the absence of any corroborating or additional evidence in support of its case, the hearsay evidence was insufficient, at a *de novo* hearing, to find RM guilty of the charges he was dismissed for. In addition the arbitrator found that RM was prejudiced as he could not exercise his right to cross examine the SAPS's evidence.

On review the SAPS argued that the arbitrator committed a reviewable irregularity by failing to apply her mind to the evidence before her.

As a starting point the court, per Whitcher J, noted that in the same manner a commissioner may commit a reviewable act by attaching too much weight to hearsay evidence, the same can hold true under circumstances where the commissioner places insufficient weight to hearsay evidence.

Having examined the transcribed record the court held.

'In my view, the commissioner did not seem to realise that the transcripts before her were no ordinary hearsay. The transcripts were hearsay of a special type. Considered in full, they comprised a bi-lateral and comprehensive record of earlier proceedings in which K's evidence against RM was indeed corroborated by S and D; in which this substantiation survived competent testing by way of cross-examination; and in which RM's own defense was ventilated and exposed as being implausible.'

While the court found that the verdict reached by the internal chairperson was irrelevant at proceedings before the arbitrator, the records, however, 'constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties' and for this reason should have been afforded greater intrinsic weight than one would to normal hearsay evidence such as a witness's statement.

The inherent prejudice in leading a written statement at arbitration is the fact that the person against whom such evidence is led, is not in a position to cross-examine the author of the statement, yet in this case, through his representative at his internal hearing, RM cross examined all three witnesses extensively. Thus the prejudice RM faced at arbitration was reduced to not having a second opportunity to cross examine the very same witnesses.

Having made this point the court went onto say:

'I do not mean to suggest that transcripts take the place of live witnesses or that arbitrations should not function as hearings *de novo*. The issue is that in appropriate factual circumstances, a single piece of hearsay, such as a transcript of a properly run internal hearing, may carry

sufficient weight to trigger the duty in the accused employee to rebut the allegations contained in the hearsay...'

A reading of the transcribed record demonstrated that K's corroborated version was more probable than RM's version and for this reason he had a *prima facie* case to answer to.

In light of its findings the court took the opportunity to set out some guidelines on when a single piece of hearsay evidence, led at arbitrations under the Labour Relations Act 66 of 1995, could shift the evidentiary burden to an employee to rebut. The hearsay should:

(1) be contained in a record which is reliably accurate and complete;

(2) be tendered on the same factual dispute;

(3) be bi-lateral in nature. In other words, the hearsay should constitute a record of all evidence directly tendered by all contending parties;

(4) in respect of the allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created. ...;

(5) show that the various allegations were adequately tested in cross-examination. For example, the transcripts record not only K's allegations but also RM's attempts to discredit them;

(6) have been generated in procedurally proper and fair circumstances. For example, the internal hearing that generated the hearsay records was run in a scrupulously fair manner by Snr Supt Matabane, with RM free to conduct his defence as he wished.'

Returning to the merits of the review application the court found that the arbitrator erred in unreasonably assigning minimal weight to the transcribed record which in turn unduly distorted the outcome of the matter. The transcribed record, under these factual circumstances, was sufficient to put up a *prima facie* case against RM for which he had to answer to.

The award was reviewed and set aside and remitted to the bargaining council for a hearing *de novo*. No order as to costs was made.



Do you have a labour law-related question that you would like answered?

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Abbreviation	Title	Publisher	Volume/issue
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa	Institute of Foreign and Comparative Law, Unisa	(2016) 49.1
<i>EL</i>	Employment law	LexisNexis	(2015) 16.3
<i>LitNet</i>	Litnet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2016) September
<i>PER</i>	Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2016) September
<i>SAJHR</i>	South African Journal on Human Rights	Taylor and Francis	(2016)
<i>PLD</i>	Property Law Digest	LexisNexis	(2016) 27.3
<i>THRHR</i>	Tydskrif vir Hedengdaagse Romeins-Hollandse Reg	LexisNexis	(2016) 79.3

Administrative law

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Banking law

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By
Matthew
Schoonraad

Candidate attorneys finding the first rung on the corporate ladder

The prerequisites to becoming a proficient director at an upmarket corporate law firm usually includes years of experience as an associate, time spent in court or at mastering one's discipline and a multitude of lonely hours spent solving legal problems. It is so often believed that the zenith of one's career is the direct product of how we developed during the tough, middle years of our lives. Not enough recognition and consideration is given to the early years that in essence formed and fuelled our desire to learn, to work and to prosper. Only with an impenetrable foundation will any individual be able to achieve that which otherwise would be impossible. Notwithstanding this, many legal professionals neglect the importance of their formative years. Those years referred to does not include our time as an associate, or as a professional assistant. Instead, the years that need the most attention but get the least credit are those spent as a candidate attorney (CA).

As a CA, your time is generally a blur of thoroughly researched legal opinions, time-consuming civil and criminal drafting, magistrate court appearances and office administration, all of which is expected to be done at the standard of your principal. The days are long but the months go quick and by the time one gets admitted, there is no time to reflect on one of the most overwhelming experiences in practice.

As a member of the Cape Town Candidate Attorneys Association (CTCAA), I am of the opinion that too many young professionals sprint through their articles looking toward the summit of the corporate ladder before taking the first step with comprehensive certainty. Candidate attorney's play a vitally important role in law firms and in their productivity. On the other hand, the knowledge gained during one's time as a CA is fundamental to your personal growth and commercial worth. Learning to have an eye for detail and a prudent approach to risk will make you a better practitioner, but picking up on legal know-how and practical tact often comes from being observant during your time as a CA.

Due to the legal profession being one largely based on the old corporate model of a commercial hierarchy, CA's struggle to find their place in the corporate setting and approach directors or senior professionals who carry both their legal careers and their egos. Thus, CA's are of-

ten left with a tainted first impression of being within the legal field. CA's are left feeling alone and inept instead of motivated and challenged. The CTCAA believes that the experience that one gets from being a CA is quintessential to the way you practice and inevitably the type of legal practitioner you will become. Being at the bottom of the corporate hierarchy should be a motivation to CA's. Those who find themselves in positions above and around CA's have a responsibility to nurture the skills of CA's and allow them to prosper in an open, approachable environment. Presently there are still too many law firms which look to use and abuse the CA programme to allow for large cutbacks on employee salaries and do not meet their responsibility as a principal. The article clerks can be left to their own devices, sometimes to their own detriment.

The road to the corporate summit is littered with professionals who, somewhere along the way, forgot their foundation and allowed themselves to become consumed by a profession begging for individuals to break the mould. As prevalent as legal reform and amendments, CA's should seek to reform legal commercial stereotypes and eradicate the 'hamster-on-a-wheel' business regime. Instead CA's should realise that their growth and personal climb towards affluence and opulence starts with being humble, determined and strong-willed. Through nurturing these basic but fundamental traits, coupled with an understanding of the South African legal framework, individuals will be better equipped to handle the rigors of practice. Even though confidence and being self-assured are good traits to have, possessing an irrationally large ego can often lead to over-confident practitioners who end up zealously representing their own interests and not the interests of their clients.

With a growing rate of unemployed legal graduates, the importance of CA's being commercially equipped will not only allow for personal growth but will allow legal entrepreneurship to flourish. CA's who come from a background of being well trained, exposed to numerous legal situations and allowed to take on responsibility within the ambit of their experience will have the ability to break away from the normal corporate business mould. The legal fraternity will have to look to the next wave of attorneys, many of them CA's at the date hereof, to usher

in the use of technology and new-world corporate structures. Ideas and models which used to fall outside the scope of a law firm, such as social media, will need to find both a place and a voice. As time and commercial productivity changes in light of technical advances, so too must our beloved profession learn to adapt. It must learn to move away from the rigid hierarchy and synthesise a suitable model for allowing attorneys to market their product: Skilled legal time.

All in all this task seems far beyond the reach of a wide-eyed and bushy-tailed CA but to an extent that is where the mental shift needs to originate. The importance of young professionals should not be overlooked and a conscious recognition of the aforementioned importance must be imprinted onto every individual who is fortunate enough to be afforded an opportunity to be an article clerk. The first step to bringing about this consciousness will need to be refined like a good wine: With a lot of pressure, and even more time.

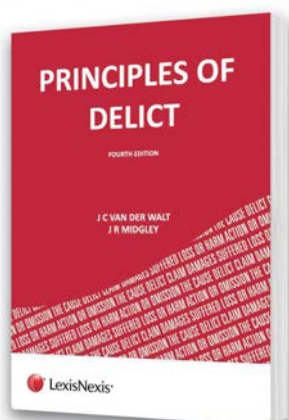
The pathway to greatness used to come to those who kept their heads down, worked really hard and followed the footsteps of directors or other influential learned colleagues. CA's now, however, find themselves at the stage when law firms are being transformed and re-defined into all-purpose practices. These practices need to be better equipped for the type of client the 21st century demands and thus CA's need to be holistic in their fundamental approach to both the law and client services.

It goes without saying that the years spent as a CA can often be overlooked. The years of being underpaid and overworked are soon forgotten only to the impairment of that individual. CA's should be proud of their positions and look to not only survive their years of service but make them unforgettable. This commercial notion of being more than just part of the hamster/wheel regime and instead a vital cog in reforming the identity of legal occupation will not be ignored, even by the odd senior partner or Silk. After all, the best part of being the bottom rung of the ladder is that you are on the ladder, so look no further and take the next step.

Matthew Schoonraad LLB (UWC) is a candidate attorney at C&A Friedlander Attorneys and the Treasurer of the Cape Town Candidate Attorneys Association. □

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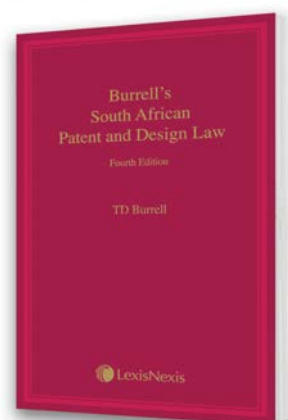
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NOVEMBER 2016 NO 5/2016

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RISK MANAGER'S COLUMN

Dear Readers
Welcome to my first issue as editor of the *Risk Alert Bulletin*.

As you would have noted from the previous edition of the *Risk Alert Bulletin* (August 2016: No 4/2016), the founding editor, Ann Bertelsmann, retired at the end of July 2016. Ann spent almost twenty years with AIIF and played a pioneering role in the introduction of the concept of risk management to practitioners in South Africa. At the outset of my assumption of the Risk Management role and that of editor of the *Bulletin*, I must thank Ann for all the ground breaking work she has done in this regard over the years and her tremendous contribution to the AIIF and the profession in general. We wish Ann a long and restful retirement (and hope to get a few articles from her in the near future). It is thus with great excitement that I take over a role built of a very solid foundation.

The *Bulletin* continues to be one of our most effective risk management interventions. As pointed out in the previous edition, this is just one of a number of risk management interventions employed by the AIIF. Over the years a lot of important risk management tips have been communicated to the profession through this publication. The AIIF policy is also published annually in the July edition of the *Bulletin*.

We appreciate all the feedback on the *Bulletin* received from readers over the years and look forward to your continued contributions—both in terms of your thoughts on the contents of the *Bulletin*



Thomas Harban,
Risk Manager/Editor

as well as your contribution of articles for publication. We have come to learn that the readership of the *Bulletin* is broader than just practising attorneys!

These are exciting times for the legal profession with significant changes about to be brought about with the full implementation of the Legal Practice Act No. 28 of 2014 expected to come into effect in 2018. This piece of legislation will fundamentally change the regulation and practice of law in South Africa. Practitioners need to prepare themselves for the changes to be brought about by the Legal Practice Act (see the article 'The Legal Practice Act: How prepared is your practice for the change?' on page 7 below). The Legal Practice Act will also impact on the Attorneys Fidelity Fund and the AIIF and the two organisations are jointly putting a substantial amount of work into ensuring that we are fully prepared, operationally, for the implementation of the Act.

I look forward to being part of this publication going forward!

Thomas Harban

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RISK MANAGER'S COLUMN continued...

Rampela Mokoena

We have pleasure in introducing Rampela Mokoena. Rampela joined the AIIF in August 2016 and has taken up the role of Company Secretary and Compliance Officer. Rampela graduated from the University of Zululand with a B Proc degree. After being admitted as an attorney of the high court, Rampela spent ten years in private practice. He later joined the Legal Aid Board before going on to serve as a Business Development Officer (BDO) at the Law Society of the Northern Provinces. Rampela has also worked for the Attorneys Fidelity Fund as a Claims Investigator. Immediately prior to joining the AIIF, Rampela served as the Director of the Cape Law Society.

Rampela's background and prior experience have thus given him exposure not only to practice, but also to the various stakeholders of the AIIF. Many practitioners would have dealt with Rampela over the years in his various previous roles.

Lunga Mtiti

We also have pleasure in introducing Lunga Mtiti. Lunga is a final year LLB student at the Uni-

INTRODUCING TWO NEW MEMBERS OF THE AIIF TEAM



Rampela Mokoena



Lunga Mtiti

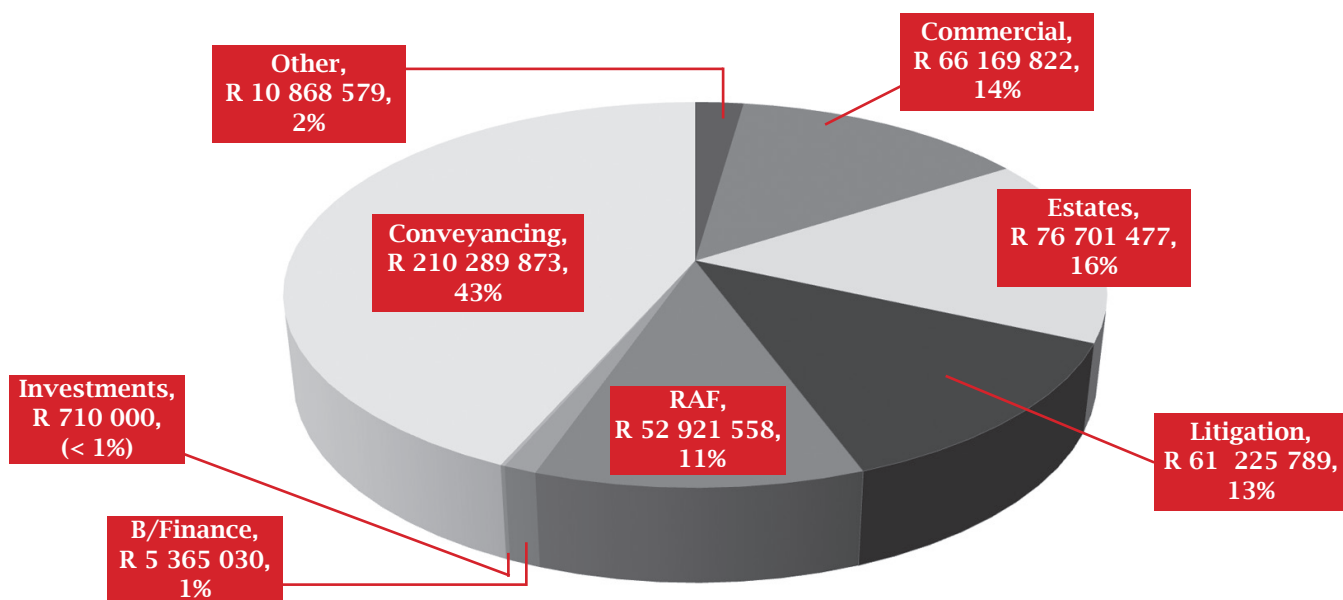
versity of South Africa and a mediator accredited by the African College of Higher Learning. Lunga started his career in the legal field as a legal secretary at a law firm in Stellenbosch, where he assisted with debt collection and garnishee orders. Lunga went on to work as a Legal Advisor and was promoted to

Legal Manager for a private mediation company. Lunga joined the AIIF on 20 June 2016 as Supervisor in the Prescription Alert and is based at the Cape Town office.

We look forward to the input that Rampela and Lunga will bring to the AIIF.

CLAIMS STATISTICS

CLAIMS AGAINST THE ATTORNEYS FIDELITY FUND (GRAPH 1)



RISK MANAGER'S COLUMN continued...

Graph 1 shows the contingent position in respect of claims notified to the Attorneys Fidelity Fund as at 30 June 2016. These are current, unfinalised claims. Jerome Losper, the Claims Executive at the Fidelity Fund, reports that in the first six months of 2016 the Fidelity Fund had received 1138 claims with an aggregate value of R484, 252, 129. Conveyancing claims make up the bulk of the contingent claims (43%), followed by Estates (16%), Commercial (14%) and Litigation (13%) related claims respectively. RAF claims make up 11% of the total value of claims notified to the Fidelity Fund in this reporting period.

There are similarities in the trends of claims notified to the Fidelity Fund and the AIIF. It is significant to note that in respect of claims notified to the AIIF (see further below), the main contributors are RAF claims, followed by conveyancing claims. It must be remembered that the AIIF and the Fidelity Fund cover different risks. The

AIIF provides professional indemnity insurance to practising attorneys. The claims that are notified to the AIIF will thus mainly arise out of negligence or a breach of mandate by the attorney. The Fidelity Fund, on the other hand, reimburses members of the public who have suffered losses as a result of the misappropriation of money or property entrusted to practising attorneys. The estate related claims that the AIIF has had to indemnify are based on the bonds of security issued in favour of executors and have mainly arisen out of the misappropriation of estate property or funds by practitioners or their staff. Though the two entities cover different risks, the main areas of practice from which claims arise are thus similar.

The Fidelity Fund claim statistics include investment and bridging finance related claims. Claims arising from or in connection with investment advice are excluded from the AIIF policy (see

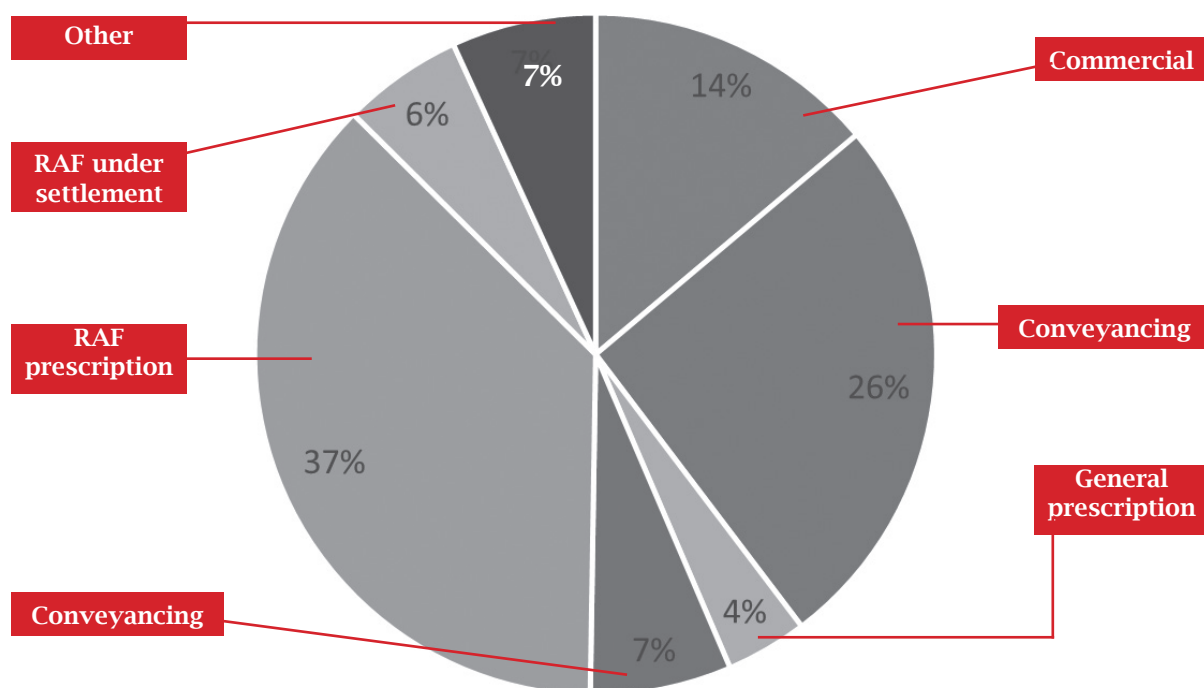
clause 16 (e) of the policy.) The AIIF policy will only apply to bridging finance related claims related to the payment of:

- (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 homeowners association relating to the immovable property which is to be transferred.

(See clause 16 (i) of the policy)

Attorneys practising in the high risk areas should thus pay special attention to the potential dangers and ensure that the appropriate risk management measures are implemented in their firms. Various documents with extensive risk management tips can be accessed on our website www.aiif.co.za.

CLAIMS AGAINST THE AIIF 1 JANUARY 2016 – 30 JUNE 2016 (GRAPH 2)



RISK MANAGER'S COLUMN continued...

It will be noted from table 2 above that RAF related claims (prescription and under settlement) account for 43% of the claims notified to the AIIF in the first six months of 2016. Conveyancing claims make up the second highest category. The number of litigation related claims are also a cause for concern. The AIIF received 224 new claim notifications in this period with an aggregate value of R31,943,683.

Many of the conveyancing claims reported to the AIIF relate to attorneys who have fallen victim to the email scam. We have previously published many articles warning the profession of the conveyancing scam. It is concerning that practitioners are still falling victim to the conveyancing scam. Under no circumstances should practitioners accept emails purporting to be written by clients or third parties ostensibly advising of a change in

banking details. Please see the July, August and November 2015 editions of the *Bulletin* in this regard. We have also warned practitioners of the scam whenever we have addressed members of the profession. Practitioners should also inform all staff that under no circumstances are payments to be made into a new bank account solely on the basis of an email that purports to emanate from a client.

THE NEW AIIF POLICY: THREE MONTHS ON

At the time of writing, three months have passed since the redrafted AIIF policy was implemented on 1 July 2016. Prior to the publication of the policy, we communicated with the profession through a number of channels alerting attorneys to the changes. The communication channels we used included the *Bulletin*, our Twitter handle (@AIIFZA), the reports we prepared for the annual general meetings of the four statutory law societies and we also addressed the profession in various forums, including some of the annual general meetings of the law societies and of the councils. We also engaged with the top-up insurance (brokers and insurers) market and obtained their input prior to the finalisation of the policy. Though many practitioners took heed of the impending changes, unfortunately some practitioners allege that they were not aware of the policy changes. It is important that practitioners take note of all communication emanating from the AIIF. A prudent practitioner will ensure that she/he is aware of what cover exists under the AIIF policy. Those practitioners who purchase top up cover need to have an understanding of what the primary layer of cover afforded by the AIIF provides in order to have a better appreciation of what cover they need to purchase in excess of the primary layer.

One of the most significant changes introduced in the new policy has been



the cyber liability exclusion (clause 16 (o)). Since 1 July 2016 we have been notified of 18 claims arising out of cyber liability in respect of which an amount in excess of R7 million has been claimed. The AIIF policy will not respond to these claims and the firms concerned will thus have to bear the losses themselves in the event that they do not have the appropriate top up cover.

A prudent broker (with an equally prudent law firm as a client) will ensure that the top up cover placed adequate-

ly protects the law firm by providing cover 'from the ground up' in those instances where the AIIF policy will not respond. Practitioners are urged to familiarise themselves with the provisions of the current AIIF policy. It cannot be assumed that the AIIF policy (or any other insurance policy) will remain unchanged in perpetuity. The duty to familiarise oneself with the policy provisions lies with the practitioners in insured firms.

AIIF RISK MANAGEMENT INTERVENTIONS

CREATING A RISK MANAGEMENT CULTURE IN LAW FIRMS

Very often, in talking to attorneys who have notified claims to the AIIF, we hear sentiments along the lines of: 'I have been in practice for many years and I have never done anything wrong. I don't know how it has come about that this claim has been made against me'. Some practitioners go to the extent of stating that they will never have professional indemnity claims against them!

The reality is that every practitioner faces the risk of possible claims-no-body is immune.

Every practitioner and every member of staff in the firm are human- every human being can make mistakes!

Law firms, as with any other business, face a number of risks. In considering the information provided to us by firms in the notification of claims, it is alarming that a high number of claims still arise from a failure by many practitioners to adopt even basic risk management measures. It is important that a risk management culture is developed and implemented in law firms. Every person in the firm (professional and support staff) has a role to play in risk management.

Firms should take an integrated and holistic approach in looking at risk management. Risk management should be a part of the strategy of your firm. The benefits of risk management include:

- mitigation of the risks that could potentially give rise to claims
- financial benefits in that the firm avoids having to pay the deductibles associated with claim payments
- maintaining a positive risk profile, in that there is no claims his-



tory (this will give the practitioner leverage to negotiate lower top up insurance premiums)

- increased client confidence. Litigation in respect of a professional indemnity claim takes place in a public forum (the courts) and may damage the professional reputation that you have put many years of hard work into establishing
- the implementation of a good risk management system in your firm could be used in your marketing material in order to attract potential clients. Any prudent client will be only too happy to entrust an important instruction to a firm that prides itself on how it does things correctly
- a good risk management system could differentiate you from the rest of the of the market and be the differentiator from competitors in the area in which you practice.

We have previously published extensively on some of the risk management measures that you could consider implementing in your firm. A comprehensive risk management document can also be downloaded from our website. We have looked at the risk mitigation measures proposed by a number of professional indemnity insurers across the globe and have noted that similar suggestions are made to those contained in our documents.

It is important that every member of your firm is educated on the need for (and benefits of) risk management.

The AIIF team are available to address firms on issues regarding risk management. Please contact us should you wish that we visit your firm in order to discuss appropriate risk mitigation measures with you, your colleagues and your staff.

AIIF RISK MANAGEMENT INTERVENTIONS continued...

The Prescription Alert service is a back-up diary system made available by the AIIF to the profession in respect of time-barred matters. Practitioners should also have their own internal diary system. This service is a risk management tool provided to the profession at no cost!

The Prescription Alert system is designed to assist practitioners in keeping track of their time barred matters. The system is particularly useful for the tracking the prescription dates in time barred matters, including Road Accident Fund and any other civil litigation matters. The claims statistics above show the dangers associated with the prescription of matters in the hands of practitioners.

The Prescription Alert system sends practitioners notices and alerts regarding lodgement dates and the dates by which summons is to be served in matters registered on the system. It is important that practitioners heed the alerts sent out by the unit. In registering matters on the Prescription Alert system, practitioners must ensure that they capture the correct date when the cause of action arose- **the responsibility for the provision of accurate information lies with the practitioner.** In an RAF matter for example, capturing the accident date as 1 January 2015 when in fact, the accident date was 1 January 2013, would

result in the prescription period being calculated from an incorrect date and will expose the practitioner to the risk of a claim.

An analysis of the AIIF claims bordereaux shows that only a very small number of the matters registered on the Prescription Alert system result in professional indemnity claims. The system has thus proven to be very effective! It must also be noted that prescribed RAF claims reported to the AIIF will attract a higher deductible and an additional 20% loading in the event that the matter giving rise to the claim was not registered on the Prescription Alert system or the Prescription Alert reminders were not complied with.

How to register with the Prescription Alert

Firms can register with Prescription Alert via the AIIF website which is www.aiif.co.za or by contacting the Unit on Tel: 021 422 2830 in order to request a registration form. Once the firm is registered on the Prescription Alert system, it will be able to register matters either by online submission or by sending the completed claim forms to the unit. The claim will be captured on the Prescription Alert system and the firm will re-

ceive reminders of the approaching prescription date.

It is the responsibility of the practitioner to submit accurate and updated information of the firm, the claim, prescription dates etc. It is essential that the Prescription Alert team is apprised of the progress of the claims: for instance, when summons is served or matter is settled, to ensure that the system is updated and it calculates the prescription periods correctly. Practitioners should also inform the Prescription Alert unit of any changes in contact details or personnel.

The profession is encouraged to utilise the services of the Prescription Alert.

For more information on the Prescription Alert system please contact Lunga or Zodwa:

Lunga Mtiti

Prescription Alert Supervisor
Email: lunga.mtiti@aiif.co.za
Telephone: 021 422 2830

Zodwa Mbatha

Guarantees Manager
Email: zodwa.mbatha@aiif.co.za
Telephone: 012 622 3925

You can also send an e-mail to alert@aiif.

GENERAL PRACTICE

The claims statistics above (notified to both the Fidelity Fund and the AIIF) give an indication of the potential risks associated with RAF claims. In dealing with these claims, the AIIF effectively steps into the shoes of the RAF. The claims must thus be considered by the AIIF on the same basis that the RAF would have dealt with them. We also need to consider whether or not the AIIF policy will respond to the matter and, if so, whether or not there is any liability on the part of the practitioner. A concern has been raised regarding certain fraudulent activities which have become prevalent with regard to RAF claims. The alleged fraudulent conduct

RAF MATTERS: BEWARE CERTAIN PITFALLS

implicates certain attorneys as well as certain RAF staff, medical professionals, law enforcement officers and touts. The RAF has indicated that a large number of matters are being investigated and various role players are alleged to be implicated in the respective matters. A forum has been established between the RAF and the various other stakeholders to look specifically at the issue of fraud. The AIIF and the Fidelity Fund are also part of this forum.

We must remind practitioners that fraudulent conduct may lead to criminal

prosecution and/or disciplinary action by the law society. The result could be that those found guilty of having engaged in fraudulent conduct face imprisonment and even being struck off the roll. **Claims arising out of fraud or dishonesty are excluded from the AIIF policy.**

Be aware of your ethical duties and uphold them at all times!

The RAF has analysed the fraudulent claims and ascertained that the two main heads of damages affected by fraudulent

GENERAL PRACTICE continued...

claims are loss of support and loss of earnings.

Concerns have also been raised regarding under settlement of claims. Practitioners must ensure that the claims of their respective clients are properly quantified. The system of 'block settlements' opens practitioners up to potential under settlements. Matters settled on the day of the trial have also been identified as being susceptible to under-settlement.

Be aware of the dangers associated with touts!

Investigate all aspects of claims you have been instructed to attend to, including the identity of your client, the merits and the quantum. Do not accept documents (or even a version of events) on face value. In the event that the claim later turns out to have an element of fraud, you may be implicated. Instruct an investigator to look into all aspects of the matter where necessary. Approach matters with the appropriate level of professional scepticism.

Adequately supervise all junior staff working on RAF files and perform regular file audits!

The RAF has indicated that 33,000 matters have prescribed in the hands of attorneys. Register all your RAF matters with the Prescription Alert Unit and implement a reliable diary and file audit system internally in order to mitigate against the risk of prescription. Be wary of accepting instructions on new matters where the prescription date is looming and you have insufficient information to lodge the claim.

This area of practice will be receiving a lot of attention by us in order to bring down the high number (and value) of RAF claim notifications.

THE LEGAL PRACTICE ACT: HOW PREPARED IS YOUR PRACTICE FOR THE CHANGES?

With the Legal Practice Act (LPA) expected to come into full operation in February 2018, it is important that practitioners familiarise themselves with the provisions of the Act. Practitioners must ready themselves and their practices for the implementation of the LPA. Several provisions of the LPA will affect how practices are run. Over the next editions of the *Bulletin*, we will focus on various provisions of the LPA that have a bearing on risk management. There are a host of articles and opinions published on the LPA in general and we do not intend repeating what has already been written. Our focus will be on the issue of risk management.

In past publications we have urged practitioners to document the terms of their engagement with clients in letters of engagement. Section 35 of the LPA sets out important provisions regarding fees in respect of legal services. When a practitioner first (or as soon as practically possible thereafter) receives instructions from a client for the rendering of litigious or non-litigious services, that practitioner must provide the client with a cost estimate notice in writing, specifying all particulars of the legal services. The various matters that must be dealt with in section 35 (7) of the LPA. These are:

- (a) the likely financial implications including fees, charges, disbursements and other costs;
- (b) the attorney's or advocates's (i.e advocates who will practice with fidelity fund certificates) hourly fee rate and an explanation to the client of his or her right to negotiate the fees payable to the attorney or advocate;
- (c) an outline of the work to be done in respect of the litigation process, where applicable;
- (d) the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise; and
- (e) if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well as the costs recovery regime.

The practitioner must, in addition to providing the client with a written costs estimate, also verbally explain to the client every aspect contained in the notice, as well as any other aspect relating to the costs of the legal services to be rendered. (See section 35(8)). The client must, in turn, in terms of section 35 (9) agree in writing to the estimated costs set out on the notice

contemplated in section 35(7)).

The matters prescribed by section 35(7) can be addressed in a letter of engagement. Non-compliance with the provisions of section 35 will constitute misconduct (section 35(10)). Letters of engagement should be countersigned by clients in acknowledgment of their agreement with the terms. Where necessary, an interpreter should be used to explain the terms of the engagement letter to the client.

A letter of engagement properly recording the terms of the agreement between the practitioner and the client will play a crucial role in assisting with the practitioner's defence in the event of a dispute regarding the mandate. Practitioners are urged to familiarise themselves with the provisions of section 35 of the LPA and to have regard to the section on letters of engagement in the document available on our website setting out risk management tips. Many professional indemnity insurers around the world have the documentation of the engagement as one of the risk management tips included in their checklists. The risks associated with the failure to properly document the mandate thus appears affect practitioners in many jurisdictions.

GENERAL PRACTICE continued...

Recent SCA judgements

Two reportable judgements delivered by the Supreme Court of Appeal (SCA) in September 2016 dealing with issues of the applicable time limits within which actions are to be instituted will be of interest to practitioners.

The first is the judgement in the matter of *G4S Cash Solutions v Zandspruit Cash & Carry (Pty) Ltd* [2016] ZASCA 113 (12 September 2016). The court held that delictual claims were not subject to the time-limitation clause in a contract.

In the matter of *Mbele v Road Accident Fund* (799/15) [2016] ZASCA 134 (29 September 2016) the court held that a claim for future medical expenses based on an undertaking in terms of section 17(4)(a)(i) of the Road Accident Fund Act 56 of 1996 (the Act) is not subject to prescription under the Prescription Act 68 of 1969. Instead, section 23(3) of the RAF Act as it read prior to its amendment in 2008 is applicable.

Practitioners are urged to read these two judgements carefully and to consider the implications of the decisions.

LETTERS TO THE EDITOR

An insured enquires what the AIIF does and who it covers

Many practitioners are unaware of the existence of the AIIF and/or the services it provides. We recently received communication from a practitioner with the following query:

Good Day

ATTORNEYS INSURANCE INDEMNITY FUND NPC

Regarding the above I would like to inquire as to what the Attorneys Insurance Indemnity Fund NPC is and what does it exactly do?

If it is insurance that is recommended to attorneys firms, how do we go about acquiring such insurance?

I look forward to hearing from you.

Signed: Practitioner (Name withheld)

We responded to the query as follows:

Dear Practitioner

The Attorneys Insurance Indemnity Fund NPC (the AIIF) is a short term insurance

company set up by the Attorneys Fidelity Fund acting in terms of sections 40A and 40B of the Attorneys Act 53 of 1979. The AIIF provides the primary layer of professional indemnity insurance to all practising attorneys in South Africa. All practitioners who are either in possession of a valid fidelity fund certificate or who are obliged to apply for such a certificate are automatically covered. The cover extends to staff in the firm as well. We indemnify attorneys against professional indemnity claims arising out of the conduct of the profession. As the cover is automatic, you do not have to do anything 'to acquire the insurance'. If your firm falls within the definition of an insured in terms of the AIIF policy, your firm will be covered (subject to the exclusions stipulated in the policy).

In order to read more about the AIIF and the services it provides, please have a look at our website www.aiif.co.za

We also provide bonds of security to practising attorneys who have been appointed as executors of deceased estates. A copy of the professional indemnity policy and the terms and conditions under which we issue bonds of security can also be accessed via our website. You

will note that the limits of indemnity are determined by the number of partners/directors in the firm on the date that the cause of action arose.

The AIIF also provides risk management services for the benefit of the profession. These include:

- (i) The Prescription Alert system- this is a back-up diary system offered to practitioners in respect of time barred matters;
- (ii) Educating the profession (through lectures, seminars etc.) on risk management measures to avoid claims;
- (iii) Publication of risk management tips (many of which can also be accessed via our website);
- (iv) The publication the Risk Alert Bulletin and practice management articles in *De Rebus*.

I hope that the above assists in giving you a background to the AIIF and its services. Should you require any additional information, please contact me.

Kind Regards
The AIIF team