

## VICARIOUS LIABILITY: EASY TO UNDERSTAND DIFFICULT TO ADJUDICATE

*In Duplum* rule: **Another view**  
of *Paulsen v Slip Knot*

Legal practitioners  
fighting for **constitutional**  
**democracy**

**Witchcraft as**  
**misconduct**

Do all the services you  
provide fall within the  
**ambit of the conduct**  
of the profession?

The value of **mentorship**  
in the legal profession

Unpacking the affirmative action  
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perspective

***Impossible no more:***  
*The demise of the common  
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### 32 Unpacking the affirmative action equation from a constitutional perspective

**S**outh Africa (SA) has a rich history of racial divisions that affected people of colour (African, Coloured, and Indian people) at all levels of the society, be it socially or in employment. However, the advent of the Constitution marked the beginning of a democratic dispensation, which ushered a new lease of life to the dejected masses of SA. **Gideon Tapanya** writes that s 9(1) of the Constitution provides a formal equality clause to the effect that all people are equal and that they should be guaranteed the equal protection and the benefit from the law. However, s 9(2) of the Constitution goes a step further to provide for a substantive equality clause comprising of affirmative action measures, which are meant to eradicate the aforementioned socio-economic disparities caused by Apartheid. This article distinguishes the concept of broad representivity from the concept of demographic representivity.

### 36 Impossible no more: The demise of the common law defence of impossibility for spoliation

**M**andament van spolie (spoliation) has been the possessory remedy and inherently emanates from common law. In essence the law of spoliation has not yet been codified in our legal jurisprudence. In this article, **Nicholas Mgedeza** makes the legal analysis of what spoliation is and succinctly lays out the common law defences that are countenanced by common law. Inherently, this article utterly focuses on the defence of impossibility and he makes an analysis on whether this common law defence in particular is still a tenable defence in our jurisprudence.

### 39 In Duplum rule: Another view of *Paulsen v Slip Knot*

**T**ertius Maree writes that the in duplum rule is a simple-seeming rule inherited from our Roman-Dutch legal history, but it gives rise to many thorny questions. These questions arise from the judgment of the Constitutional Court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC). In fact, this is a tale so complex and has been discussed in *De Rebus* previously, but without dealing fully or convincingly with the double-edged nature of the in duplum problem, seen from a public interest, and from a legal viewpoint.

### 42 Legal practitioners fighting for constitutional democracy

**A**t the most recent KwaZulu-Natal Law Society annual general meeting the guest speaker was former President Kgalema Motlanthe and he is reported to have issued a challenge during his address. He said: 'Lawyers of the future should be equipped with legal skills that will enable them to work towards the realisation of justice for all.' **Paul Hoffman SC** examines the statement and finds that in such an order the various rights and freedoms in the Bill of Rights must be 'respected, protected, promoted and fulfilled' by the state and promoting equality, respecting human dignity and encouraging a non-racial non-sexist approach to governance is a vital part of the work of the attorneys of the land.

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**CONTENTS:** Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

*De Rebus* editorial staff use online products from:

- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta.** Go to: www.jutalaw.co.za.

**PRINTER:** Ince (Pty) Ltd, PO Box 38200, Booyens 2016.

**AUDIO VERSION:** The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

#### ADVERTISEMENTS:

**Main magazine:** Ince Custom Publishing

Contact: Dean Cumberlege • Tel (011) 305 7334  
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**Classifieds supplement:** Contact: Isabel Joubert

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**CIRCULATION:** *De Rebus*, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. It circulates free of charge to all practising attorneys and candidate attorneys and is also available on general subscription.

**ATTORNEYS' MAILING LIST INQUIRIES:** Gail Mason

Tel (012) 441 4629 E-mail: gail@lssalead.org.za

All inquiries and notifications by practising attorneys and candidate attorneys should be addressed to the relevant law society which, in turn, will notify the Law Society of SA.

#### SUBSCRIPTIONS:

General, and non-practising attorneys: R 968 p/a

Retired attorneys and full-time law students: R 743 p/a

Cover price: R 102 each

Subscribers from African Postal Union countries (surface mail):

R 1 538 (VAT excl)

Overseas subscribers (surface mail): R 1 878 (VAT excl)

**NEW SUBSCRIPTIONS AND ORDERS:** David Madonsela

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# Legal education in crisis?

**T**he Council for Higher Education (CHE) released its outcomes of the National Review of the LLB qualification in April. The document sites four universities who were issued with a notice of withdrawal of accreditation if the quality of their programmes do not improve.

In 2012, the CHE and the South African Law Deans Association (SALDA), after extensive talks, reached an agreement to conduct a national review of the LLB programme. During the LLB Summit held in 2013, the General Council of the Bar (GCB) and the Law Society of South Africa (LSSA) also decided that a national review of the LLB programme should be conducted. The aim of the review was to strengthen the quality of legal education provision across South African universities.

Because of the type of issues raised, the LLB Summit also proposed that the standard development process should precede the start of the proposed national review of the LLB Programme. The threshold standard was envisaged to serve as a national benchmark against which all programmes leading to the LLB qualification would be measured.

The LLB Qualification Standard was developed by a working group of expert law academics, established by the CHE after consultation with SALDA. The draft Qualification Standard was published for public comment; this was accompanied by a series of consultation meetings, attended by stakeholders in the legal field. The finally approved version took into account comments and recommendations received from stakeholders in the legal field.

Since the standard was developed,

long after the LLB programmes had been in existence, the CHE agreed that it would not be used as the primary benchmark for the national review. Universities were requested to identify any areas in their programmes, which currently do not meet the standard and to indicate plans for improvement together with proposed timelines for implementation.

The national review included all LLB programmes (whether first-degree integrated programmes or second-degree programmes following a BA (Law), BCom (Law), etcetera). It did not include the other such initial programmes, except insofar as credit for law-related modules/courses was transferred to the LLB programme and integrated with the LLB credit requirements.

The four universities who were issued with the notice of withdrawal of accreditation are North West University, Walter Sisulu University, University of South Africa and University of the Free State. While the universities are still accredited, if their accreditation is withdrawn it would mean that future lawyers would not be able to study law at the four universities if the institutions do not make the necessary changes.

A more extensive article on the matter will be published in forthcoming issues.

See also:

- [www.che.ac.za](http://www.che.ac.za)
- 'Law deans and legal profession to discuss refinement of LLB' 2013 (March) *DR* 12.
- 'LLB summit: Legal education in crisis?' 2013 (July) *DR* 8.
- 'LLB Task Team: Five years the way to go' 2013 (Oct) *DR* 20.
- 'National LLB Task Team on access and quality legal education' 2014 (July) *DR* 8.



Mapula Sedutla - Editor

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# 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.

### Response to 'No more free copy of *De Rebus*'?

I have just read your editorial 'No more free copy of *De Rebus*' (2017 (March) DR 3) in connection with the imminent demise of *De Rebus*.

As a South African-qualified attorney, now living in Geneva, I have come to rely on *De Rebus* to keep me informed on the evolution of the South African legal system. *De Rebus* has always been an invaluable source and well-executed publication.

I, for one, would be happy to pay an annual subscription to continue to receive such an important and informative publication.

Thank you for your continued work.

**Tanya Robinson**, senior company secretarial assistant, Geneva

I would like to take this opportunity to firstly thank you for all your hard work that goes into your publication.

I am an admitted attorney who diligently reads *De Rebus* each and every month to stay abreast of all the legal developments. I for one, would terribly miss this journal as I look forward to reading my copy. The attorneys' profession cannot do away with the journal.

If funds are allocated to its publication somehow, we could look at only having a free electronic copy instead of the printed version?

**Nicole Africa**, compliance officer, Bellville

### Twitter pic of the month

I must thank you and your team for the amazing work you do. Always keeping us abreast with the latest legal developments. I cannot describe how important the work you do is, especially for young legal minds, like myself, that need to be kept up to date with developments in the legal field. Stay winning.

**Jeandré Goliath**, student, Kimberley.





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# NADEL discuss decolonisation of the law at AGM

**T**he National Association for Democratic Lawyers (NADEL) held its annual general meeting (AGM) and conference in Pietermaritzburg from 24 to 26 March. The AGM was also in celebration of NADEL's 30th anniversary. The theme of the conference was 'Decolonisation of the law'.

On the evening of 24 March, President of NADEL and former Co-chairperson of the Law Society of South Africa (LSSA), Mvuzo Ntshulana, delivered the President's Report. In his address, Mr Ntshulana said that the goal of NADEL is the realisation of the aims of its constitution, which would lead to a truly democratic society. He added that NADEL adopted the Freedom Charter, as the Freedom Charter is what the South African Constitution was informed by. He noted that it is the duty of lawyers to maintain the rule of law and ensure the survival of democracy in South Africa (SA). 'We should remember that as lawyers we need to remain concerned that there are too many people suffering in the country,' he said.

Speaking about the recent development in the country, Mr Ntshulana said: 'It has been demonstrated that SA has a strong judiciary. Seventeen million people would not be able to get their social grants if it was not for the involvement of the judiciary. We know for a fact that SA judiciary is under capable hands.'

## Transformation of the legal profession as a constitutional imperative

On 25 March, Mr Ntshulana welcomed dele-

gates to the conference. The keynote address was delivered by Deputy Minister of Justice and Constitutional Development, John Jeffery. Mr Jeffery's address centered on transformation of the legal profession as a constitutional imperative.

Mr Jeffery said that one cannot see transformation of the legal profession in isolation, as the legal profession should reflect society. 'A transformed legal profession will lead to a transformed judiciary. What it means, in short, is that society as a whole must be transformed – the Constitution demands it. Transformation can be many things: Economic transformation, institutional transformation, social transformation. All forms of transformation, just like human rights perhaps, are indivisible and interconnected,' he added.

Mr Jeffery asked: What is the role of the legal profession and the judiciary to bring about the achievement of a better life for all? Reflecting on what was reported in the media recently; Mr Jeffery said that much had been written over the past few weeks about the role of the courts in holding the other branches of government to account.

Mr Jeffery noted: 'Some argue that the court is performing its duty as the custodian of the Constitution. Others will say that it's judicial overreach, with the judiciary entering the domain of the executive. Whichever way one argues it – and whether or not one agrees with the judgments or not – two important points emerge: Firstly, our courts have proved themselves to be independent. And secondly, as President [Jacob] Zuma said at the United Nations: "Perhaps nothing re-

flects adherence to the rule of law like the judicial settlements of disputes." But, claim the pontificators, watch this space, because all this is about to change. Phephenaphi Dube, the Director of the Centre for Constitutional Rights, writes about a "vulnerable judiciary". Justice Malala says "judges (are) being intimidated". And, some claim, it is government who is making the judiciary vulnerable. Nothing could be further from the truth. ... In fact, I could stand here all day citing cases, but the bottom-line is this: Government complies – so how can it possibly be capturing or undermining the judiciary?'

Mr Jeffery said that to ensure that the judiciary is transformed, the legal profession has to be transformed. 'For a long time in the history of our legal profession, black people and women were almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar. Unfortunately, although there is better representation in these upper echelons, they are no way close to reflecting the race and gender demographics of the country. They were also largely absent from the controlling bodies of the Bar councils and law societies until recently, when steps were taken to make these bodies more representative,' he added.

Speaking about the Legal Practice Act 28 of 2014 (the Act) Mr Jeffery said: 'Some of the main challenges clearly evident are the need to make the legal profession representative of the diversity of South African society and the need to make the legal profession more accessible to the public. Therefore, the Legal Practice Act was passed to transform the legal



*From left: Deputy Minister of Justice and Constitutional Development, John Jeffery; General Secretary of NADEL, Patrick Jaji; Vice President of NADEL, Xolile Ntshulana; and President of NADEL and former Co-chairperson of the LSSA, Mvuzo Ntshulana at the NADEL conference held in March.*





profession. ... The Act paved a way for the establishment of a National Forum [of the Legal Profession]. The Forum will develop [an] election procedure for constituting the South African Legal Practice Council, which will serve as a regulatory authority of the legal profession in South Africa. The Forum will make recommendations for, amongst others, the establishment of the Provincial Councils and their areas of jurisdiction, composition, functions and manner of their election. It will also set all the practical vocational training requirements that candidate attorneys must comply with before they can be admitted by the court as legal practitioners; prepare and publish a code of conduct for legal practitioners, candidate legal practitioners and juristic entities.

With regard to where we are in the process, the code of conduct for legal practitioners, candidate legal practitioners and juristic entities was gazetted on 10 February 2017 [GenN81 GG40610/10-2-2017]. The code is not in force yet, but will apply to all legal practitioners (attorneys and advocates), as well as candidate legal practitioners and juristic entities when the Legal Practice Act comes into operation.

I can also advise that the Minister has granted an extension of time to the National Forum to finalise outstanding issues and negotiations with the statutory, provincial law societies. The timeframes for the implementation of the Act have accordingly been amended in view of the extension granted by the Minister. A Legal Practice Act Amendment Bill is currently before Cabinet to give effect to this. The Bill also effects some amendments to the transitional process that the National Forum identified.' (See LSSA News 'Code of Conduct for the future of the profession published' 2017 (March) DR 9.)

Mr Jeffrey noted that by the second half of 2017, the National Forum is to make recommendations to the Minister in terms of s 97(1)(a) of the Act. He added: 'By early 2018 we envisage the implementation of chapter 2. The minister's proclamation for the establishment of the Legal Practice Council and provincial

councils should be finalised. The Forum is to make all rules in terms of s 95(1)). By the second half of 2018 we want to ensure the implementation of the rest of the LPA in terms of s 120(4). All Rules and Regulations will need to be in place, law societies to be abolished and regulatory functions of advocates' structures to be transferred to the Legal Practice Council and the Provincial Councils. The Council and Provincial Councils will then commence as the bodies responsible for regulating the legal profession.'

### Panel discussion: Decolonisation of the law

Starting off the panel discussion, Professor Adam Habib said that the term 'decolonisation' is not a new term. 'We have been grappling with this term for over 23 years. The terminology emerged from the "fees must fall movement"', he added. Prof Habib noted that the easiest way to deal with decolonisation of the law is by removing all colonial symbols in the court systems. 'Even during graduation ceremonies, there are many symbols that are linked to colonial manifestations,' he said.

Prof Habib noted that some work has been done, in the past 20 years, in terms of decolonisation of the LLB curriculum. He added: 'We recognise customary law, we have looked at the legal framework on traditional leadership and government. We also apply the law to the context and realities of South Africa. However, there is still much more to be done. We need to protect the rights of citizens and if that is done the law will be deployed to assist the fundamental problems in society.'

Speaking about the Constitution, Prof Habib said the Constitution is not static and it is meant to be read in a more progressive way. 'The Constitution also requires universities to teach in an imaginative way... There are threats to this debate, we should not enter the debate by having an inwards focus, we should focus on what is happening in the world at large. We need to be focused on our challenges but we must not be blind

to what is happening in the rest of the world as this is fundamental to learning,' he said.

Second to the podium on the discussion on decolonisation of the law was Chief Executive Officer of the LSSA, Nic Swart. Mr Swart's presentation centered on what decolonisation means in the context of education and how the discussion will be taken further. Mr Swart said that prior to writing his presentation, he consulted with 2016 graduates who now attend the School for Legal Practice and attorneys and others who have an interest in, and a passion for the topic.

Below are remarks, gathered by Mr Swart, made by graduates on the matter:

- We are concerned about the inequality at primary, secondary and tertiary levels. Most of our schools and some of our campuses are under-resourced in comparison to those of the advantaged. So are the families of many students.
- We are concerned about the position of the profession that our degrees are not up to standard as this will influence our access to the profession and our ability to be competitive.
- The emphasis is on Eurocentric jurisprudence. Why is an effort not made to teach us African jurisprudence? Why are there so few African legal experts teaching and why are more resources by African authors not prescribed? African culture and practices must be integrated to influence our thinking and application.
- Language is a problem. Even if English is chosen as the language of tuition, some of us have not been effectively exposed to the language at school level. Why is there little emphasis on indigenous languages?
- Self-confidence is at a low level, we feel that some lecturers and employers see us as inferior.

Mr Swart added that the most touching remark for him was: We do not see ourselves in our education.

Mr Swart noted that following the LLB summit in 2013, the Council of Higher Education (CHE) published new standards for the LLB. In 2016 the LLB's of all faculties were reviewed and the way for-



*Cake to celebrate the 30th anniversary of NADEL.*

ward with regard to accreditation, was advised by the CHE. He added that the standards document gives opportunity to move away from a historical curriculum as it states:

'The graduate has a comprehensive and sound knowledge and understanding of the South African Constitution and basic areas or fields of law. This relates to the body of South Africa law and the South African legal system, its values and historical backdrop.'

The standards document goes on further to state that the basic areas must include:

'(c) the dynamic nature of law and its relationship with the relevant contexts such as political, economic, commercial, social and cultural contexts.'

Mr Swart said that in the preamble to the standards, the following is stated:

'[L]egal education cannot be divorced from transformative constitutionalism.' Mr Swart quoted Judge Pius Langa, who said: 'At the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws.'

Mr Swart noted that the process to in-

tegrate or replace the curriculum will be intensive and time consuming. 'It is necessary to ensure that a conflict between rules are avoided, to prevent a resort to western principles. Commencement with the development of a digest of African laws and principles is critical. In addition to codifying African law that require attention, legal processes, instruments and the administration of justice at all levels will be transformed. This includes training of aspirant judges in understanding their critical role in the process of development and application. NADEL/LEAD developers of the judicial courses will have to look at this.'

Other speakers during the panel discussion were Professor Suren Pillay and Professor Thandabantu Nhlapho.

### A word from the AFF

Chief Executive Officer of the Attorneys Fidelity Fund (AFF), Motlatsi Molefe, spoke about s 46(b) of the Attorneys Act 53 of 1979. Mr Molefe said that s 46(b)



*Justice of the Constitutional Court, Nonkosi Mhlanta, delivered the 11th Dullah Omar memorial lecture.*

requires the AFF to carry out certain functions with the objects of enhancing the practice of practitioners. He noted that the AFF through s 46(b) has concentrated on education in order to enhance practice standards. He added that the AFF continues to subvert education services rendered by NADEL, LEAD and the Black Lawyers Association.

Speaking about Proxi Smart, Mr Molefe said that the AFF has a possible competitor for the income the fund accrues via interest. He said that Proxi Smart wants to conduct the admin functions in the conveyancing value chain. Proxi Smart



*Judge of the Western Cape, Siraj Desai, delivered an address in tribute to late Judge Essa Moosa.*

seeks to render certain conveyancing-related services, which are currently exclusively performed by conveyancers - who are regulated by the statutory, provincial law societies. (See editorial 'Conveyancing work encroached upon' 2016 (Dec DR 3).)

### Current state of the nation

Chairperson of the Justice and Correctional Services Portfolio Committee, Dr Mathole Motshekga, reminded delegates that the current situation that the country is facing arises from the legacy of racism and colonialism. Dr Motshekga added that the aim of revolution in SA was to eradicate colonialism and Apartheid. He noted that at the root of Apartheid was racism and justified seizure of land from the indigenous population.

Dr Motshekga said that the South African struggle was to liberate citizens of SA under the concept of human rights for all. 'South Africa was to be reclaimed so that Africans can participate in the economy of the country. ... The people of South Africa developed their own Freedom Charter, which was a document for all Africans, not just the ANC [African National Congress]. The Freedom Charter came up with the concept of the rule of law in the African context. ... Therefore, it is not a surprise that after 1994 we developed a new jurisprudence that embraces the notion of *ubuntu*, which one can argue permeates the Constitution,' he said.

*Mapula Thebe,  
mapula@derebus.org.za*

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

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

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# NADEL welcomes government's withdrawal of the Repeal Bill on Rome Statute of ICC

**T**he National Association of Democratic Lawyers (NADEL) welcomed the South African government's withdrawal of the Repeal Bill on the Rome Statute of International Criminal Court (ICC). In a press release NADEL said acting Minister of Justice and Correctional Services, Minister Faith Muthambi, stated that the withdrawal of the Bill is not an indication of the abandonment of the process. NADEL complimented the minister and other key role players for respect and speedy execution of the court order.

The withdrawal came after the Gauteng Division of the High Court in Pretoria ruled that:

- The notice of withdrawal from the Rome Statute of the ICC, signed by the Minister of International Relations and Cooperation on 19 Octo-

ber 2016, without prior parliamentary approval, was unconstitutional and invalid.

- The cabinet decision to deliver the notice of withdrawal to the United Nations Secretary-General without prior parliamentary approval, was unconstitutional and invalid.

- The Minister of International Relations and Cooperation, the Minister of Justice and Correctional Services and the president of the Republic of South Africa, are ordered to forthwith revoke the (said) notice of withdrawal.

NADEL said it remains aware of the challenges and imperfections of the ICC and that they are not convinced that a withdrawal from the ICC is the best solution. The organisation added that there must be discussions and the paramount of these discussions should be the promotion and protection of human rights, specifically those of the poor and vulnerable.

NADEL said dictators and other cruel

leaders who engage in acts of crime against humanity, genocide and gross violations of human rights, which result in the highest risk to women and children who are often casualties in war and terror, must never be protected. NADEL congratulated and extended gratitude to role players in the withdrawal of the Rome Statute Repeal Bill.

NADEL also appealed to those in power to exercise their power as stated in the Constitution, to adhere to both procedural and substantive dictates of the Constitution and hear the voices of the civil society and the many stakeholders fighting for justice for all.

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## MENTORSHIP LINK

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As an additional vote of thanks, the LSSA will recognise each successful mentorship through publicity in *De Rebus* and on the website.

Message from  
Nic Swart: CEO LSSA  
and Director LEAD



LAW SOCIETY  
OF SOUTH AFRICA





# Sexual Offences Court launched in Mpumalanga

**T**he Deputy Minister of Justice and Constitutional Development, John Jeffery, launched a Sexual Offence Court in Boschfontein, Mpumalanga in March. In his speech, Mr Jeffery said the objective of the Sexual Offence Courts are to reduce and ultimately eliminate the secondary traumatising from the court system, and to improve the conviction rate in these cases.

Mr Jeffery added that other measures have included the establishment of an Inter-Ministerial Committee on violence against women, to investigate the root causes of violence against women and develop national plans to prevent and respond to violence against women in a coordinated manner. He said government, in conjunction with the National Prosecuting Authority (NPA), has been running the Ndabezitha Project, which seeks to train traditional leaders, prosecutors and court clerks on domestic violence matters in rural areas.

Mr Jeffery pointed out that in the quest to eradicate violence against women and children, government rolled out National Dialogues on Violence against Women and Children around the country. 'Our country can be proud in the great strides we have made in achieving freedom, equality and dignity for all, but despite these achievements and initia-

tives many of our women and children still face sexual violence' Mr Jeffery said.

Mr Jeffery noted that every woman that is raped is somebody's mother, daughter, grandmother or sister. He said the courts do not hesitate to impose harsh sentences for these crimes. He added that the NPA conducted a sentence breakdown (per offence, per accused) for the year-to-date (as at Q3 of 2016/17) includes 219 sentences of life imprisonment, 127 sentences of 20 to 25 years' imprisonment and 568 sentences of 10 to 19 years' imprisonment.

Mr Jeffery noted that the courts can only impose harsh sentences if people report crimes. He added that the prosecutors who prosecute these types of cases need good witnesses and circumstances must be so that victims are not afraid to testify in such cases. He said it must be made easier for victims to report sexual offence cases and easier for witness to give evidence.

Mr Jeffery said that figures from the Department of Justice shows that rape is the most predominant sexual offence charge reported at over 80%. For the period of April to December 2016, over 10 300 children were victims of sexual offences. He pointed out that often rape and sexual offences are not reported.

Mr Jeffery said the victims may choose not to report cases, for a number of rea-

sons, and that is the reason communities need Sexual Offence Courts and the Thuthuzela Care Centres. He noted that in 2016/2017 five Sexual Offence Courts were established in Mpumalanga. He added that the Boschfontein/Tonga Sexual Offence Court serves as a key service point to the Nkomazi Municipality.

Mr Jeffery noted that the court is situated in a rural community. He said it represents the Department of Justice's commitment to give priority to rural communities so as to address the disparities of the past. He pointed out that the outstanding roll for the Boschfontein/Tonga Hybrid/Sexual Offence Regional Court is currently at 139 cases of which 51 cases are sexual offence related.

Mr Jeffery announced that in this financial year, the Department of Justice finalised the production of the information DVD for the court in preparation of adult victims of sexual offences. He said the DVD will be shown at the adult waiting room to ensure that victims are empowered where there is a shortage of supply of court preparation officers. He said these are some initiatives to strengthen the criminal justice system and to assist survivors of rape and sexual offences.

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## The Department of Rural Development and Land Reform, releases amended definition of area of deeds registry in Pretoria

**M**inister of Rural Development and Land Reform, Gugile Ernest Nkwinti, has under s 1(1)(a)(iii) of the Deeds Registries Act 47 of 1937, amended with effect from date of the publication of the notice in the *Government Gazette (GG)*. The government notice released, states that the definition of the area of deeds registry in Pretoria, as set out in the schedule to GN R861, GG30288/25-9-2007, by excluding the Limpopo Province as defined in sch 1A to the Constitution, from the area defined in the said schedule to the GG notice, R861.

In the notice, Minister Nkwinti, under s 1(1)(a)(i) and 1(1)(a)(iii) of the Deeds Registries Act, established with effect from date of publication of the notice in

the GG, a deeds registry in Polokwane for the Province of Limpopo and defined with effect from date of publication of the notice in the GG, the area of deeds registry in Polokwane as the Province of Limpopo, as defined in sch 1A to the Constitution.

The released Registrars Circular 3 of 2017, states that -

• **Purpose:** The purpose of the circular was to provide clarity on description of Limpopo Deeds Registry on deeds and documents, which are already prepared to be lodged in Pretoria Deeds and have not been lodged on the opening of the Limpopo Deeds Registry.

• **Description of seat of deeds registry on deeds and documents already prepared -**

- the deeds, powers of attorney and supporting documents which contain 'Pretoria Deeds Registry' as seat on which they must be registered and have not been lodged on opening of Limpopo Deeds Registry. The reference to Pretoria Deeds Registry shall be scratched out or ruled out and replaced by 'Limpopo Deeds Registry, at Polokwane'. Initialling by the conveyancer will suffice; and

- the process outlined above will only be allowed for a period of three months and from the opening of the office. Deeds and documents that are lodged after three months and still refer to the Pretoria Deeds Registry as seat of registration will be rejected.

• **Description of seat of deeds registry on new deeds and documents:**



- All deeds and documents, which are prepared from 3 April must contain the new description of the 'Limpopo Deeds Registry, at Polokwane' as the seat of registration.

- Deeds and documents, which do not refer to the correct description of the seat of deeds registry and were signed on or after 3 April will be rejected.

The circular came into operation on 3 April.

In a released Registrars Circular 3 of 2017, Deeds Registry Pretoria and 2 of 2017, Deeds Registry Limpopo stated -

• **Purpose:** The purpose of this circular is to provide for transitional measures relating to the Pretoria Deeds Registry and the opening of the Limpopo Deeds Registry.

• **Lodgements:** Lodgements for transactions relating to properties falling within the Limpopo Province will only be allowed in the Pretoria Deeds Registry up and until 27 March. All transactions lodged on or before 27 March will be processed in the Pretoria Deeds Registry.

• **Permanently filed titles:** The conveyancer who applied for the title to be filed permanently in the Pretoria Deeds Registry, relating to properties in Limpopo, must withdraw TRs CBs and DTs. If it is still a requirement to file the title permanently, the conveyancer, practising at the seat of the Limpopo Deeds Registry, must re-apply to have the title filed permanently.

• **General power of attorneys:**

- In instance where a General Power of Attorney is filed at the Deeds Office in Pretoria and is required for use at the Limpopo Deeds Registry the provisions of reg 65(6) and (7) of the Deeds Registries Act must be complied with.

- Alternative to the above, the conveyancer may apply for the registration of new General Power of Attorney in the Limpopo Deeds Registry.

• **Cancellation of bond over a property in Pretoria and Limpopo**

In a case where there is one bond registered over two properties, one in Limpopo and one in Pretoria, such bond

needs to be cancelled. It is the responsibility of the lodging conveyancer to ensure that such bond is cancelled in both the Pretoria and Limpopo deeds registries and it must comply with the following requirements -

- lodge original consents to cancellations in both deeds registries. Copies of consents will not be accepted;

- lodge original bond in one deeds registry and copy of the same bond in another deeds registry; and

- the registration of the cancellation in both registries must be on the same day meaning it must be a *simuls* between two registries. The normal procedure in respect of *simuls* between two deeds registries must be followed by both the conveyancer and both deeds registries.

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## Brazil legislation offering opportunity to foreign investors to take advantage of their local businesses

Partner of Sampaio Ferraz Advogados (Lawyers), Dr Luís Wielewicki, said Brazil does not intend to address short-term investments in bonds or other securities issued in their country, including the high-interest bonds issued by the Brazilian Federal Government. Mr Wielewicki was speaking about foreign investment in Brazil, a blend of corporate, capital markets and contractual possibilities at the Brazil-South Africa Trade and Investments seminar in March. He said that Brazil's focus was on direct foreign investments in local business.

Dr Wielewicki said Brazilian legislation offers a multitude of options for foreign long-term investors to take advantage of local business opportunities. He added that discussions about the form of investment takes effort and the most efficient structure for each investment requires disclosure and understanding of, at least, the most important tactical and strategic objectives of an investment.

Dr Wielewicki said another important factor is shareholders' structures, and that picking a local partner requires a clear negotiation of economic and political rights of the parties in the intended



*Partner at Sampaio Ferraz Advogados, Luís Wielewicki, spoke about legal aspects and foreign investment at the Brazil-South Africa Trade and Investments seminar in March.*

business structure. He added that if an investor is used to a typical common-law corporate and capital market structure, investors will find comfort in dealing with the Brazilian legal structures.

### Foreign investment rules in Brazil

José Carlos Junqueira Sampaio Meirelles of Pinheiro Neto Advogados, spoke about foreign investment rules in Brazil. He said Brazil is a dynamic country that stands out for its multifarious values, characteristics and opportunities. 'The public sector and the private initiative intertwine in a unique business environment, which makes the country a challenge for organisations from other cultures,' Mr Sampaio Meirelles said.

Mr Sampaio Meirelles pointed out that Brazil is generally considered a friendly environment for foreign investments, in addition to the aforementioned blending of public and private initiatives, there are other elements that may further complicate matters for foreign investors sailing into Brazil's complex business environment, such as a very intricate and sometimes confusing or even contradictory tax and regulatory requirements, instability arising from constant enactment of new laws and corruption scandals soaring in the country.

Mr Sampaio Meirelles added that when planning to direct resources to Brazil, foreign investors should be aware of



*Attorney at Pinheiro Neto Advogados, José Carlos Junqueira Sampaio Meirelles, spoke about foreign investment rules in Brazil.*

how business is run and regulated in the country. He said for instance, the fact that in Brazil, the incorporation and operation of companies are governed by federal laws, which are applicable throughout the country. 'Consequently, from a strictly legal point of view, there is, in principle, no advantage to be gained from choosing a particular region or state,' Mr Sampaio Meirelles added.

Mr Sampaio Meirelles also noted that another matter an investor must have is the knowledge about which type of entity they should invest in. He added that corporations/joint stock companies and limited liability companies (which are the most common forms of business organisations in Brazil) have different regulations, implying certain advantages depending on the intended structure of investment.

Mr Sampaio Meirelles spoke about restrictions for foreigners in Brazil. He

said there was no restriction -

- on participation by foreigners in either limited companies;
- limits to the proportion of capital, which may be held by foreigners; or
- the need to obtain authorisation from any government department before a Brazilian company may be formed by foreign individuals or companies.

Mr Sampaio Meirelles said the only restrictions, which related to the investment companies, were namely, the percentage of equity interest allowed for a foreigner to hold and need for previous government authorisation, relating to companies that act in certain specific industries, such as health services, the fishing industry and the civil aviation sector.

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## Brazil uses technology to improve access to justice

**D**e Rebus had an opportunity to interview Brazilian Federal Labour Court Judge, Francisco Barbossa, in March. Judge Barbossa spoke about how Brazil has used technology to effectively improve access to justice.

Judge Barbossa said that in 2008, Brazil implemented a full e-litigation system as opposed to mere e-filing in its labour courts. He added that the labour court of the state of Paraíba was one of the first Brazilian judiciaries to adopt and implement electronic lawsuit systems and tools, which has been very successful and, therefore, it has been rolled out across the whole judicial system.

Judge Barbossa noted how South Africa (SA) is much like Brazil in some aspects in terms of the spread of communities in rural areas and the fact that the two countries have similar social divides. He added that other similarities include the fact that the two countries are part of BRICS and that both countries need to continually improve access to justice. He noted that Brazil, much like SA, still has some bandwidth and communication access challenges.

Judge Barbossa said that at the beginning of the implementation of the electronic system, the system was made to be downloaded, which then changed to be a website based system that can be accessed from anywhere in the world. He added that the system has helped re-



*Brazilian Federal Labour Court Judge, Francisco Barbossa, spoke about how Brazil has used technology to effectively improve access to justice.*

duce the time it takes to conclude a case from seven to eight months to four to five months.

Judge Barbossa said lawyers register on the web based system and receive an electronic device that looks like a USB flash drive for signing in. 'Lawyers are able to write court documents on the system or submit PDFs. The document is then distributed electronically. The system also sends notifications when the other party sends documents or when

the judge on the case sends a directive. Lawyers can see what is happening throughout the process,' he said.

Speaking about the positive changes the electronic system has brought, Judge Barbossa said the employees of the courts are now able to work out of office. He noted that this also means that lawyers do not have to go to court and can maximise their time better. 'Court buildings that were originally designed to be ten floors are now only five floors because not many people are using the offices and also there is less file space required,' he added.

Judge Barbossa said the implementation stage of the electronic system was difficult as there was resistance and an unwillingness to change. 'This was resolved by having a room where lawyers could come in and their papers were converted to pdf, this started to break the resistance. On occasion we would experience low internet speed and break down but, there are more problems with paper based systems,' he added.

Judge Barbossa noted that the system ensures that there is no loss of documents, mitigates against fraud and is not expensive to maintain.

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# The BLA celebrates its 40th anniversary in October: We have come this far because we stand on the shoulders of giants

**T**he Black Lawyers Association (BLA) will celebrate its 40th anniversary in October. The BLA was established in October 1977 when a few black lawyers came together to unite against the mayhems and harsh treatment which they were subjected to by the then Apartheid government. Equally, they did not receive the necessary assistance and support from their provincial law societies. Individually, they tried to stand for their rights and defy any form of discrimination and ill treatment they came across, even from the courts. They, however, realised that on their own they would not succeed, as the odds with which they were faced, required a collective resistance, hence the birth of the BLA.

Government prevented black lawyers practicing in major cities in terms of the Group Areas Act in its numerous forms, namely, Act 41 of 1950, Act 77 of 1957 and 36 of 1966. The Law Society of the Transvaal did not intervene to protect the rights of the black lawyers who wanted to practice in city centers, such as Johannesburg. The case of *R v Pitje* 1960 (4) SA 709 (A) gives an indication of the form and amount of discrimination black practitioners were confronted with in courts. Black practitioners were supposed to be protected by the courts in defense of the rule of law and equality before the law, instead the opposite was the case as can be observed in the trial and conviction of Godfrey Mokgonane Pitje, who refused to take a seat on the side demarcated for black practitioners in court. Mr Pitje fought his case to the highest court of the land, the Appellate Division (now the Supreme Court of Appeal) and lost his appeal. This was another serious indicator that the fight against discrimination within the legal profession would not be won individually. It, therefore, did not come as a surprise that Mr Pitje became the founding president of the BLA.

This is why when we celebrate the existence of the BLA, over the past 40 years, we must also reflect on black lawyers in South Africa (SA) and draw some lessons from their lives and selfless leadership. The practicing of law by black lawyers in SA started with the dawn of the 20th century. South Africa – despite its early coming into contact with the Roman-Dutch law by the arrival of Jan van Riebeeck in the Cape in 1652 – did not have a South African lawyer of African

descent until the arrival of Alfred Mangena in 1910. On the other hand, other African countries such as the Gold Coast (British Colony) (now Ghana) had its first African lawyer, John Mensah Sarbah, as early as 1887.

The first black person recorded to practice law in SA was Mahatma Gandhi (an Indian citizen) who came to SA in 1893. He was followed by Henry Sylvester-Williams (a Trinidadian) who qualified as a barrister in England and came to SA in 1903, he became the first black man to be called to the Bar in the Cape Colony. After him came Mr Mangena, who also qualified in England and was called to the Bar in 1909. In 1910 he returned to SA as the first black South African to qualify as an attorney in SA. In 1911, Pixley ka Isaka Seme, came home from Europe, qualified as SA's second black lawyer. In 1916 Mangena and Seme went into partnership under the name of Mangena and Seme Solicitors. These two represented the first generation of the black lawyers in SA.

The second age of black lawyers is represented by the era of Anton Lembede who obtained his law degree at the University of South Africa in 1942 and later qualified as an attorney after hav-

ing served articles under Mr Seme. In the early 50s, we saw the emergence of Nelson Mandela who opened his law offices as an attorney in August 1952 and in December of the same year he was joined by Oliver Tambo in what came to be affectionately known as Mandela and Tambo. Apart from the fact that there were other black lawyers in SA, Mandela and Tambo was the only black law firm with multiple partners in the then Transvaal, and apparently in the whole of SA at the time. In 1955 Duma Nokwe joined this group as an advocate and was the first black advocate of the Supreme Court of Transvaal. The last of this group was Mr Pitje who was admitted as an attorney in 1959. Mr Pitje served his articles of clerkship in the firm of Mandela and Tambo. Mr Pitje became the game changer as he conversed with other black lawyers and formed the BLA, which was founded in 1977 with Mr Pitje appointed its inaugural president.

The third generation of black South African lawyers was mainly represented by the founding members of the BLA. Among them were: JN Madikizela; VLA Bekwa; GSS Maluleke; KS Kunene; SKS Makhambeni; WV Ngxekisa; TT Mokone; HT Netshifhefhe; WL Seriti; MA Ndlovu;





D Nkadameng; DM Finca; BP Matswiki; SJ Monyatsi; and DJSS Moshidi.

South Africa did not have a black female lawyers until 1962 when Zainunnisa 'Cissie' Gool, from District Six in Cape Town, became the first black female advocate in SA. It was only in 1967 when the first black female attorneys were admitted to practice law. These were Desiree Finca and Navi Pillay, from Natal and the Transkei of African and Indian descent, respectively. Ms Finca served her articles under Mr Pitje. Later other women found their way into the profession such as Ms Matswiki (one of the founding members of the BLA).

From the first black lawyers we see important characteristics. Firstly, they did not see each other as competitors but they complemented one another. It is remarkable that Mr Mangena and Mr Seme – when they were still the only two black lawyers in the country – formed a partnership. In the Transvaal Mr Mandela and Mr Tambo practiced in partnership. The other quality that we see in these outstanding personalities is that they made it their mission to multiply the numbers of black lawyers by giving new entrants opportunity to serve articles and join the profession. Mr Seme gave an opportunity to Mr Lembede, Mr Mandela and Mr Tambo allowed Mr Pitje to serve articles under them. Mr Pitje in turn saw it fit to contract Ms Finca, the first black female, to serve articles of clerkship and be admitted as an attorney. They were indeed an extraordinary blend of society.

The founders of the BLA came from different political backgrounds and ideologies. They were brought together by one bond, that black lawyers suffered discrimination and hardship in the hands of the Apartheid government. It made no difference to them whether one was a member of the African National

Congress (ANC), Azanian People's Organisation, Pan Africanist Congress or South African Communist Party. They were never partisan, they stood for the interest of black lawyers and the black community. They wanted freedom for all and the respect of the rule of law. This has been the foundation of the BLA and it continues as such.

The black lawyers from Mr Mangena to Mr Mandela and Mr Pitje were selfless distinguished human beings. They used their education to protect, enlighten and empower their people. It was not about their own personal interest, it was education for the benefit of many. They could have chosen to use their new found status for self-enrichment but they chose not to. They found it appropriate, in times of need, to close their practices in order to pursue what they deemed noble and worth chasing. These are the men and women to whom we owe our being and the privilege that we now enjoy. We are lawyers today because they made it possible for us. That is why it is of importance that when we commemorate the BLA's 40th anniversary we must not be oblivious of the sacrifice these men and women made in order for us to be called lawyers.

We owe it to Mr Mangena for his vision and courage to believe in himself that he could become a black lawyer when, at the time, everyone else from his race was destined to become a teacher, if not a priest. When he had no example to emulate he offered himself as a 'guinea pig' to experience it for all of us. In him we see that nothing is impossible as long as you have the will and opportunity is not denied. Another pioneer to be specially recognised as we celebrate this milestone is Mr Pitje. Through his own personal experience, when he was subjected to abuse by a magistrate and the high-

est court of the land failed to protect him, he came to realise that no matter how strong one's character might be we are only strong when we come together. This vision is the same as that of Mr Sarbah when he came together with other African intellectuals in Ghana to establish the Aborigines' Rights Protection Society in their country. Mangena and Seme did the same when they formed the ANC.

The voice and strength of the BLA saw many of our people gain access to the legal profession and some grew to the highest echelons that the legal profession may offer. For instance, if it had not been for the BLA, which fought for the admission of the recently retired Deputy Chief Justice Dikgang Moseneke as an attorney in 1978, SA and the global legal fraternity would have been robbed of one of the finest jurist and legal brains this era has produced.

The current crop of the BLA must build on this rich history to continue with the strong legacy of those who came before us. In these past 40 years, the BLA has achieved much and there is no room for us to be despondent. We owe it to the coming generations to address the challenges facing us today in a manner that they will look back and appreciate the role we would have played. We still have a lot to achieve and we need not doubt our future because if we have come this far, '... it is by standing on the shoulders of giants', as Isaac Newton once remarked.

It is on account of these giants that we today walk tall as we celebrate the contributions by the BLA in the transformation of the legal profession.

*Lutendo Benedict Sigogo,  
President of the Black Lawyers Association*



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## The Department of Justice takes constitutional awareness programme to learners

**I**n March the Department of Justice visited the OR Tambo Secondary School, in Katlehong Gauteng, to promote constitutional education. The visit was part of the Human Rights month activities, which was coordinated under the theme 'Celebrating our Constitutional Democracy.'

The Deputy Minister of Justice and Constitutional Development, John Jeffery, delivered the keynote address. He said the school was privileged to carry the name of one of the country's greatest leaders, Oliver Tambo. He added that this year was important as the country commemorates the centenary of the birth of Oliver Tambo and that is why 2017 is themed 'The year of Oliver Reginald Tambo: Unity in action together moving South Africa forward.'

Mr Jeffery said the Constitutional Learners' Programme aims to educate learners about human rights and about the spirit and values of human rights as enshrined in the Constitution. He added that it aims to uphold the culture of human rights in the learning environment and encourage learners 'engagement on Human Rights topics at schools'. He noted that the department was launching the programme in the memory of the late struggle icon, Ahmed Kathrada.

Mr Jeffery told learners that South Africa was a free society because of the sacrifices people, such as Mr Kathrada made. He said that Mr Kathrada dedicated his life to the struggle for freedom, human rights and non-racialism. He added that Mr Kathrada inspired other South Africans to do the same and to uphold the human rights of others.

Mr Jeffery encouraged learners to study the Constitution and share it with their families and friends.

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*Chief Director: Social Justice and Participatory Democracy of the Department of Justice and Constitutional Development, Danaline Franzman, handed over a preamble of the Constitution to the OR Tambo Secondary School Principal, Lingani Godwana.*



*Learners of OR Tambo Secondary School reading the Constitution.*

## Never too old for school

**G**raham Rhodenburg, a 52-year-old grandfather of six, is currently studying towards his LLB degree and believes that one is never too old to follow their dream.

Mr Rhodenburg, who is from the Western Cape, told *De Rebus* that he is aiming to finish his LLB degree in 2019. His

greatest concern is whether there will be a law firm willing to take him on to serve his articles when he has completed his degree, because of his age.

Mr Rhodenburg served in the South African Police Service for 24 years and has a diploma in Police Administration, which he obtained in 1996. In 2008 he enrolled at the University of South Africa (Unisa) for his LLB degree and in 2009

decided to change direction to do the B-Tech in Security Risk Management also at Unisa, which he suspended in 2013 and still needs four subjects to finish it.

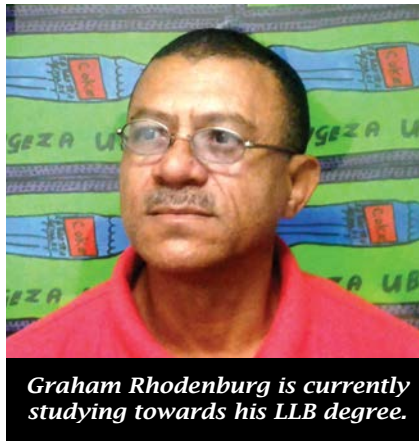
He picked up where he left off with the LLB degree in 2014 and will have finished 20 subjects at the end of 2017 which are spread over first, second and third years.

'I decided to study law because I al-

ways liked to and wanted to help others, especially the vulnerable ones. The fact that one must apply to the High Court to be admitted as an attorney, and also the famous phrase "a fit and proper person", always appealed to me. The latter also emphasised that attorneys are indeed people of good standing in the community,' he said, adding that it was a title that he would 'love to hold'.

Some of the challenges that Mr Rhodenburg is faced with, studying so late in life, is the infamous question of 'when are you going to finish?' All the reading and research is also very tiring for him and sometimes his family gets upset with him for not joining them and socialising. He adds: 'My biggest challenge is not the content for it comes natural to me, and I manage to grasp it quickly. Modern technology is also another challenge that I face.'

Mr Rhodenburg is studying through Unisa. He is currently working as a security officer at a beverages company in Parow. 'I have realised that education is one way to better yourself and that it is



**Graham Rhodenburg is currently studying towards his LLB degree.**

very important to earn more to provide for ones' family. I am looking at achieving this through studying law,' he said.

'My advice to people who feel it is too late to pursue their dreams is simply that it is never too late. One can never be too old to practise law as long as you have a living and real interest in it,' he said, adding that he has watched all the

'lawyer movies' he could lay his hands on.

'I also follow all high profile cases with a keen interest and more than often predict the correct verdict.' Mr Rhodenburg has told *De Rebus* that he also listens to and participates in Afrikaans radio programmes on law.

Mr Rhodenburg believes that whether you are young or old you must have an interest and a passion for what you want to do and that you must not be forced into something, because then you will never succeed. 'I also strive to score good marks in my subjects so that I can be noticed and can gain advantage over the younger students. I also managed to score a few distinctions and it just shows it can be done,' he said.

After serving his articles, Mr Rhodenburg would like to specialise in criminal law. He hopes to one day have his own practice.

*Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za*

## New FSLs President

**T**he Council of the Law Society of the Free State announced a new President on 24 February. Cuma Siyo from the National Association of Democratic Lawyers (NADEL) has replaced Sizane Stanley Jonase from NADEL. Mr Jonase is currently completing his pupillage at the Bar.



**New President of the Law Society of the Free State, Cuma Siyo.**

*Christina Marais, Chief Executive Officer, The Law Society of the Free State.*

## SADC LA Executive Officers meet

**T**he first meeting of Southern African Development Community Lawyers' Association (SADC LA) Executive Officers was held on 15 March in Johannesburg.



**Back row left to right: Law Association of Zambia Executive Secretary, Edward Sakala; Law Society of Zimbabwe Executive Secretary, Edward Mapara; Law Society of South Africa (LSSA) Chief Executive Officer, Nic Swart; SADC LA Administrator, Prudence Mabena; National Forum on the Legal Profession (NF) Senior Researcher, Enerst Nemusimbori; President of the Law Society of Swaziland, Ben Simelane; Malawi Law Society Executive Secretary, Tiwonge Kayira; Law Society of Lesotho President, Tumisang Mosotho; and Law Society of Namibia Executive Secretary, Retha Steinmann.**

**Front row from left: LSSA Finance Director, Tony Pillay; SADC LA Executive Secretary, Stanley Nyamanhindi; NF Executive Officer, Charity Mhlungu; SADC LA Vice President, Max Boqwana; and LSSA Co-chairperson, Mvuzo Ntyesi.**

*Prudence Mabena, Southern African Development Community Lawyers' Association, prudence@sadcla.org*



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# Action Group on Briefing Patterns in the Legal Profession reports on progress one year on

**T**he last day of March marked a year since the establishment of the Action Group on Briefing Patterns in the Legal Profession (the Action Group). The Action Group deemed it necessary to provide an update on the progress made since the formation of the Action Group on 31 March 2016.

The continued outcry from various members of the legal profession and other stakeholders regarding the uneven distribution of legal work among advocates and attorneys, prompted the Law Society of South Africa (LSSA) to host a Summit on Briefing Patterns in the Legal Profession on 31 March 2016 (see 'LSSA hosts summit on briefing patterns' 2016 (May) DR 6).

Members of the legal profession and other stakeholders came together to discuss the lack of progress in addressing the persistent exclusion and marginalisation of certain legal practitioners in the attorneys' and advocates' professions. The summit's main objective was to 'find solutions' to the perceived discriminatory practices. The focus on identifying solutions was significant as members of the legal profession; especially those who suffer from various forms of exclusion, have become weary of what is viewed generally as endless 'talk shops' on transformation of the legal profession. The LSSA was thus very cautious when hosting the summit not to duplicate another form of a dialogue without any tangible outcomes.

The summit resulted in a hands-on Action Group, which comprises of representatives of the attorneys' and advocates' professions, the big law firms and the Department of Justice and Constitutional Development who meet on a monthly basis.

According to the Action Group, it has made progress by collating information on how national government departments and state-owned entities distribute their legal work to legal practitioners. The information it received indicates that:

- lucrative work goes mainly to a select pool of black male advocates and thus, excludes many other advocates;
- other lucrative work goes to an identi-

able pool of a few white male advocates thus, also excluding other advocates;

- to a limited extent, other lucrative work goes to a classifiable group of black female advocates; and
- the majority of advocates, regardless of gender and race, receive little and/or no work.

In its statement, the Action Group noted that in other instances, there are government departments and state-owned entities that only make use of the services from big law firms, a few black advocates and a limited group of white advocates. It added that: 'The Action Group has ascertained that a firm's BBBEE status is important to government departments when deciding whether to give them work or not.'

The Action Group also found that there is a small, select pool of black law firms that receive work. The bulk of the lucrative work goes to well-established law firms. According to the Action Group, the majority of law firms do not get work because they are not on the list of service providers/database of various government departments and state-owned entities. The Action Group stated that some law firms are on the database/panel but never receive work.

## Support from the judiciary

According to the Action Group, it has sought and obtained the assistance of Judges President of various divisions of the High Courts to document statistics on legal practitioners who appear in their courts in both civil and criminal matters.

'At the National Efficiency Enhancement Committee meeting chaired by Chief Justice Mogoeng Mogoeng on 30 March 2017, the Chief Justice expressed his support for the initiative. He sees the fact that black and women practitioners do not get the opportunity to develop their skills, as a huge problem. At the Constitutional Court, high level work did not appear to be going to black and women practitioners. The Chief Justice said that government and state-owned enterprises seem to prefer to appoint white practitioners, especially at senior level. Bias must be overcome and clients must be encouraged to change briefing patterns. He added that, even small achievements must be celebrated. That

is why all efforts to change are necessary,' the Action Group stated.

## Procurement Protocol

The Action Group has drafted a Procurement Protocol that has been approved by the attorneys' and advocates' professions. There will be a formal signing ceremony of the Procurement Protocol in June 2017. Keep an eye out on the LSSA website ([www.LSSA.org.za](http://www.LSSA.org.za)) to find out how your firm can align yourself with the protocol.

## Empowerment

According to the Action Group, it has facilitated applications for funding from the Safety and Security, Sector Education and Training Authority for, *inter alia*, the provision of stipends to pupil advocates, candidate attorneys and the funding of development courses.

## Challenges

The Action Group stated that challenges it faces concern a lack of cooperation from certain government departments, state-owned entities and the business sector. It added that it is exploring alternatives including the use of the Promotion of Access to Information Act 2 of 2000 to have access to the information required.

The Action Group members concluded by stating their commitment to discharge the mandate that has been given to them. However, it also emphasised that the solutions to address the challenges facing the legal profession require a concerted contribution from all stakeholders, including clients.

Members of the Action Group on Briefing Patterns in the Legal Profession are:

- Busani Mabunda (Chairperson).
- Dion Masher.
- Advocate Thandi Norman SC.
- Mvuzo Notyesi (Co-chairperson, Law Society of South Africa).
- Dr Tsili Phooko (facilitator).
- Onicca Phahlane, Department of Justice and Constitutional Development.
- Advocate Anthea Platt SC.
- Richard Scott.

*Nomfundo Manyathi-Jele, Communications  
Officer, Law Society of South Africa,  
[nomfundom@lssa.org.za](mailto:nomfundom@lssa.org.za)*



## LSSA at Commonwealth Law Conference in Melbourne

**A**dvocate Thuli Madonsela received the 3rd Rule of Law Award at the 20th Commonwealth Law Conference last month in Melbourne. She was nominated for the award by the Law Society of South Africa (LSSA) (see 'LSSA congratulates former Public Protector on Commonwealth Law Conference Rule of Law Award' 2017 (March) DR 9).

Mr Bekker is the LSSA's representative on the CLA Council.

LSSA representatives at the Commonwealth Law Conference in Melbourne, Australia – David Bekker and Jan van Rensburg – held an informal meeting with the immediate Past President of the Law Society of Hong Kong, Stephen Hung, where issues of mutual interest and concern to the profession were discussed.

Both Mr Bekker and Mr Van Rensburg participated as speakers at the conference: Mr Bekker, who is chairperson of

the LSSA's Financial Intelligence Centre Act Committee – spoke in the session on money laundering; and Mr Van Rensburg was a panellist in the session on 'the ethics of litigating civil cases in the media'.

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



*From left: Incoming Commonwealth Lawyers' Association (CLA) President, Ramamurthy Santhanakrishnan, from India; former Co-chairperson of the LSSA, David Bekker; immediate CLA President, Alexander Ward; advocate Thuli Madonsela; and former Co-chairperson of the LSSA, Jan van Rensburg.*



*From left: Former Co-chairpersons of the LSSA, David Bekker and Jan van Rensburg, with the immediate Past President of the Law Society of Hong Kong, Stephen Hung.*

## LSSA concerned at unsubstantiated allegations against attorneys regarding medical negligence claims

**T**he Law Society of South Africa (LSSA) voiced its serious concern last month at the allegations made against the attorneys' profession at a joint sitting of Parliament's Standing Committee on Appropriations and the Portfolio Committee on Health in March. At the time of going to print, the LSSA was seeking a meeting with the joint committees in order to discuss what it views to be unsubstantiated and sensationalist allegations against attorneys with regard to medical negligence claims.

'The country is still traumatised and shocked by the death of the 94 mentally and physically disabled patients as a result of the failing healthcare system, which included the neglect of the patients. We urge the Health Ministry to focus on addressing the dire skills shortages and poor conditions, as well as the duty of care owed by healthcare professionals and medical facilities to patients,

rather than on curtailing their right to fair and legitimate compensation. Attorneys cannot be blamed for simply carrying out their duties on behalf of victims who have been wronged,' said LSSA Co-chairperson, Mvuzo Ntyeseni, in a press release.

Mr Ntyeseni reiterated that: 'The LSSA has consistently maintained that legal practitioners cannot "manufacture" malpractice injuries and claims – these are substantiated by experts and then by the courts.'

He added: 'Where government or state facilities neglect to administer proper healthcare and treatment to patients, these patients rarely receive meaningful answers or feedback; and are even less so informed that a procedure went wrong due to negligence. They are also not told that they have rights at their disposal to seek relief. Where an individual's family member suffers loss as a result of medical negligence, that victim

has the right to be informed and to be legally assisted, thereby ensuring that fair justice is ultimately served.'

In the press release, Mr Ntyeseni said: 'The LSSA has stated that it is the duty of legal practitioners to assist victims of medical malpractice – who are often the poor and vulnerable – to be compensated fairly for their losses if they have suffered life-changing and critical damage at the hands of the healthcare system and healthcare practitioners. Victims have the right to legal representation and they must have parity of arms if they are going to challenge the institutions that caused their loss in the first place.'

According to the press release, the LSSA has also requested to meet the Minister of Health, Dr Aaron Motsoaledi, on several occasions to discuss this issue. The LSSA is of the view that '... both the medical profession and the legal profession exist to serve the public and it is in the best interest of the public that they

cooperate to ensure that members of the public and victims of medical malpractice are treated fairly and professionally.'

Mr Notyesi concluded by saying: 'Attorneys are stringently regulated by the statutory provincial law societies, and touting or pestering of victims is certainly not tolerated. There are also strict rules regarding advertising. Should any member of the public, whether a victim or practitioner, have complaints against

attorneys, they are encouraged to contact the relevant regulatory law society and follow the necessary steps to ensure that attorneys overstepping boundaries are dealt with. If there is alleged collusion between medical professionals and legal practitioners, as well as a downgrading of standards to create an opportunity for collusion, this must be reported to the relevant statutory provincial law society and to the law enforcement

agencies. If attorneys are found to be overreaching or overcharging, the law societies have assessment committees that investigate the allegations and assess the fees charged. This is regarded as serious misconduct by the profession and by the courts.'

*Nomfundo Manyathi-Jele, Communications  
Officer, Law Society of South Africa,  
nomfundom@lssa.org.za*

**T**he Law Society of South Africa (LSSA) has submitted comments on the Traditional Courts Bill B1-2017. In the submissions, the LSSA stated that it is pleased that the Bill is a much improved and amplified version of the previous Bill, but believes that there are still various aspects that need to be addressed. The LSSA goes on to highlight these aspects, which include the following:

### Composition of courts

The LSSA states that clause 5(1)(b) provides that the traditional court must be convened by a traditional leader or any person designated by the traditional leader. The LSSA believes that parameters should be placed on who would qualify to be designated.

### Training

The LSSA states that it is important that the traditional leader and any person designated by him or her as contemplated in clause 5(1)(b) must be sufficiently and competently trained to comply with the Constitution, so as to guard against the High Court being saddled with review proceedings in terms of clause 11. 'If such persons are not properly trained, the potential will be there for matters to be taken on review, due to a lack of understanding of the Constitution and the objectives that the Bill seeks to achieve,' the LSSA stated in its submissions.

It added: 'Careful consideration should be given to the training model, as experience has shown that teaching by way of a manual, delivering a lecture and evaluation by way of question and answer is not always appropriate. Material should be created that, as far as possible, resembles real life situations.'

The LSSA is also concerned about the delegation and separation of powers and believes that the Bill should clarify whether the powers of traditional leaders may be fully delegated or whether some would remain the preserve of the traditional leader.

### Legal representation

Clause 7(4)(b) denies a party before a traditional court the right of legal repre-

sentation. The LSSA feels that preventing a party the right to legal representation will deny many persons, particularly the uneducated, the marginalised and the indigent, the constitutional right to a fair trial.

'Further, legal practitioners assisting parties may play a pivotal role in enhancing the jurisprudence of traditional/indigenous law in line with the Constitution,' the LSSA stated in its submissions. It added: 'The fact that participation in the traditional courts is voluntary and that there are alternative ways through which a case can be ventilated, should not be construed to imply that the general rights and duties relevant to normal civil and criminal courts should not apply in respect of traditional courts. This is relevant, given that there is recourse for review by the High Court in terms of clause 11.'

### Jurisdiction of traditional courts

In its submissions, the LSSA stated that although it notes that there is no distinction between civil and criminal jurisdiction in customary law, it is concerned about the provisions of clause 4(2)(b)(i), namely, that criminal matters referred to in terms of sch 2, can be dealt with by the traditional courts, except those that are already being investigated by the South African Police Service (SAPS). 'We believe that all matters of criminality should be reported to the SAPS and investigated, also so that they can form part of the statistics of the country. Reporting should not be curtailed based on the monetary amount,' the LSSA stated.

Regarding clause 8(3), which permits traditional courts to make an order for compensation for personal injuries, the LSSA submitted that personal injury matters should be excluded from the jurisdiction of traditional courts as these matters are complicated and require

medico-legal reports from experts, determining the extent of the injury and future consequences of such injuries. 'The extent of an injury is often difficult to determine at first glance and it may take years for such injuries to settle,' it stated.

### Orders that can be made by traditional courts

'Clause 8(1)(b) empowers traditional courts to order a party against whom proceedings were instituted and who is financially not in a position to comply with the order to render some specific benefit or service to the aggrieved party instead of compensation. Although we believe that this provision has been made with good intentions, it opens up the possibility for abuse by the aggrieved party, including subjecting people to servitude and forced labour. If not monitored properly, it may lead to undesirable consequences, which may be offending Section 13 of the Constitution,' the LSSA states in its submissions.

### Record of proceedings

In conclusion, the LSSA states that the Bill makes provision for the recording of the proceedings (clause 13). It states, however, that no provision is made for the keeping of mechanical record of the entire proceedings. The LSSA states: 'This will make review and appeal proceedings difficult and we suggest that this issue be addressed.'

The full submissions can be viewed at [www.LSSA.org.za](http://www.LSSA.org.za).

*Nomfundo Manyathi-Jele, Communications  
Officer, Law Society of South Africa,  
nomfundom@lssa.org.za*

## Pro bono helpdesks launched at KZN High Courts

**T**he KwaZulu-Natal Law Society (KZNLS), in partnership with Probono.Org and Legal Aid South Africa, has launched a pilot project to administer helpdesks stationed at the Pietermaritzburg and Durban High Courts. The project was launched on 10 April at the KwaZulu-Natal Division of the High Court in Pietermaritzburg.

The project is the brainchild of Deputy Judge President of the KwaZulu-Natal Provincial Division of the High Court, Justice Isaac Madondo.

According to the KZNLS, legal assis-

tance will be provided to unrepresented litigants specifically in the areas of evictions, family matters and estates, as well as foreclosures, subject to the applicants qualifying for *pro bono* assistance in terms of the KZNLS's 'means test'.

'The helpdesks will operate within the courts from 9:00 am to 12:00 pm daily and will be manned by administration staff together with practitioners who will be available to provide the necessary legal assistance *pro bono* and on a roster basis,' the KZNLS stated in a press release.

The KZNLS has encouraged attorneys

and advocates to volunteer to be on the roster for a daily session (9:00 am to 12:00 pm) and also to volunteer the services of their candidate attorneys or pupils to assist them.

If you would like to volunteer your services, contact the KZNLS *pro bono* assistant, Michelle Naidoo, at (033) 345 1304 or e-mail: michelle@lawsoc.co.za.

*Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za*

## LSSA meets with CCMA

**A** delegation from the Law Society of South Africa (LSSA) met with officials at the Commission for Conciliation, Mediation and Arbitration (CCMA), including its Director, Cameron Morajane, on 2 March. The purpose of the meeting was to deal with mutually relevant practical issues. The institutions undertook to convene meetings on six-monthly basis. Subsequent to the meeting, the LSSA provided comments on the proposed amendments to r 25 of the Rules for the Conduct of Proceedings before the CCMA.

*Ricardo Wyngaard, Senior Legal Officer, Professional Affairs, Law Society of South Africa, ricardo@lssa.org.za*



*From left: Law Society of South Africa (LSSA) Labour Law Committee member, Roy Ramdaw; Deputy Chairperson of the LSSA Labour Law Committee, Melatong Ramushu; Commission for Conciliation, Mediation and Arbitration (CCMA) Manager: Capacity Building and Outreach, Hilton Mudau; Chairperson of the LSSA Labour Law Committee, Jerome Mthembu; CCMA General Manager: Legal Services, Rebecca Moeketsi; CCMA Director, Cameron Morajane; LSSA Labour Law Committee member, Vuyo Morobane; and Chief Executive Officer of the LSSA, Nic Swart.*

## LOOKING FOR A CANDIDATE ATTORNEY?

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- 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: Dianne Angelopulo at (012) 441 4622 or e-mail: dianne@LSSALEAD.org.za**



# People and practices

Compiled by Shireen Mahomed

**Herold Gie Attorneys** in Cape Town has four new appointments.



Anja Haupt has been appointed as an associate in the property law department.



Rekha Jaga has been appointed as a director in the property law department.



Jamie-Lee Jacobs has been appointed as an associate in the employment and public law department.



Zikhona Ndlebe has been appointed as an associate in the employment and public law department.



**Jurgens Bekker Attorneys** in Johannesburg has appointed Sarah Kelly as a junior associate.

**VZLR Attorneys** in Pretoria has four new appointments.



Waldo Snyman has been appointed as a director in the general litigation department.



Michelle van der Merwe has been appointed as a director in the family law department.



Wihann Joubert has been appointed as a director in the medical law department.



Jeanne Rabie has been appointed as a director in the deceased estates and trust law department.



**Tomlinson Mnguni James** has eight new appointments. From left: Natalie Luck has been appointed as an associate in the property department in Durban. David Ngcobo has been appointed as an associate in the litigation department in Pietermaritzburg. Sameera Muslim has been appointed as an associate in the property department in Pietermaritzburg. Neil Riekert has been appointed as a senior executive consultant in the commercial and fiduciary department in Pietermaritzburg.

Michael Browning is the managing director. Thato Mokone has been appointed as an associate in the fiduciary department in Pietermaritzburg. Tamsin Jones has been appointed as an associate in the litigation department in Durban. Phindile Mdluli has been appointed as an associate in the litigation department in Pietermaritzburg. Megan Stone has been appointed as an associate in the litigation department in Durban.

**Stegmanns Inc** in Pretoria has three new appointments.



Isa Vorster has been appointed as a director in the general litigation, family and labour law department.



Nico van der Merwe has been appointed as a director in the Nelspruit Branch.



Zainab Baba has been appointed as a conveyancer at the Nelspruit Branch.

**Matthew Francis Inc** in Pietermaritzburg has two new appointments and one promotion.



Alicia Carmine Naidoo has been appointed as a director.



Thuli Motloli has been appointed as a director.



Janine Isaacs has been promoted to a senior associate.

**Marais Muller Hendricks Attorneys** in the Western Cape has appointed two new directors Robert Wilson Stewart and Mari Garanito.



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

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

**Eversheds Sutherland** in Johannesburg has two new promotions.



Tasso Anestidis has been promoted as a senior associate in the litigation department.



Laura Schlebusch has been promoted as a senior associate in the litigation department.

## *Cyril Muller Attorneys* incorporating **Willie Wandrag Costs Consultants**

Economic reality dictates that few, if any, are in a position to disregard the expense of litigation and attempts to maximise costs recovery on behalf of successful litigants or to limit the exposure of the less successful have served to highlight the degree of speciality required in this field. To assist attorneys in this regard, Cyril Muller Attorneys offer professional and efficient solutions to these aspects of litigation.

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[info@cmattorneys.com](mailto:info@cmattorneys.com)



**Smit Sewgoolam Inc** in Johannesburg has appointed Sinenhlanhla Mtshali as a professional assistant.

By  
Thomas  
Harban

# Dear practitioner: Do all the services you provide fall within the ambit of the conduct of the profession?

**T**he answer to the question posed in the title of this article may, on the face of it, seem simple and straightforward, but it is hoped that a deeper consideration of the issue will focus the minds of practitioners on the potential risks associated with certain activities, which do not traditionally fall within the scope of 'the conduct of the profession'.

The nature and extent of legal practice, as with many other aspects of commerce and general human life, have evolved over time. The services provided by attorneys today have, in numerous ways, evolved from what they were in the past. This evolution and progression has affected both the content and the scope of the services provided by attorneys and is attributable to many factors, including the changing needs of the consumers of legal services, as well as legal practitioners identifying new areas in which they could potentially generate work. However, it must be noted that not all the extended services currently offered to the public and provided by some practitioners are what would traditionally be considered as falling within the scope of 'the conduct of the profession' or 'the scope of professional conduct' of an attorney. Some practitioners have set themselves up as 'one-stop shops' providing a wide range of services to clients over and above the rendering of legal services. These additional or extended suite of services may be allied to the core legal services provided by the attorney or even offered on a stand-alone basis. Other practitioners may seek to provide services or act as multinational legal advisers to clients across national boundaries, including advising on questions of law relating to foreign jurisdictions.

The most common supplemented forms of service provided to clients by some practitioners include –

- investment advice;
- brokerage and intermediary services (for financial services products or general business services);
- to act as paymasters or recipients of funds without an existing underlying instruction to render legal services of any nature whatsoever in connection with the payment;
- services as appraisers, auctioneers or even as estate agents;
- bridging finance, structured finance or other services as creditor grantors or

agents/ intermediaries for credit grantors;

- forensic investigation services; and
- legal advice and services on the law applicable in foreign jurisdictions.

It is important that the risks associated with the extended scope of services are properly assessed. In order to properly answer the question posed in the title of this article, each and every circumstance must be assessed on its own facts. For the purposes of this article, the focus will only be on selected activities listed above.

Practitioners must be aware that claims arising out of services not falling within the conduct of the profession and advice on foreign law (unless the practitioner is admitted in the respective jurisdiction) will not be covered under policy of the Attorneys Insurance Indemnity Fund NPC (the AIIF). Some of the services (eg, investment advice, acting as an intermediary, broker or estate agent) not only carry their own unique risks, but also fall within the regulatory authority of entities outside of the legal profession. Activities such as investment and/or intermediary services fall within the ambit of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) regulated by the Financial Services Board (the FSB) and are subject to specific licencing requirements, which include the placement of a level of professional indemnity (PI) cover specific to such activities. Acting as an estate agent is subject to the appropriate applicable legislation regulating the conduct of that profession.

The scope and extent of services provided to a client *qua* attorney must be discussed and agreed between the practitioner and the client. Best practice dictates that the agreement in this regard should be reduced to writing and signed by both parties. A well drafted letter of engagement may serve this purpose.

In the case of multi-disciplinary partnerships (MDP's), the services carried out other than *qua* attorney will not be indemnified under the AIIF policy. Insofar as the future regulation of MDP's is concerned, it must also be noted that s 34(9) of the Legal Practice Act 28 of 2014 prescribes that the Legal Practice Council must, within two years after the commencement of ch 2, investigate and make recommendations to the Minister of Justice and Constitutional Development on, *inter alia*, the creation of other

forms of legal practice, including MDP's taking into account best international practices, the public interest and the interests of the legal profession.

## The AIIF

From time to time, the AIIF receives notification of claims from practitioners where the circumstances arise from conduct falling outside of the conduct of the profession. Unfortunately, some attorneys labour under the misapprehension that all activities conducted by them will be indemnified under the AIIF policy.

The AIIF Master Policy, on the basis set out therein, indemnifies attorneys for claims arising out of the conduct of the profession. Whether conduct falls within the conduct of the profession is a matter that must be assessed on the facts of each claim notified to the AIIF. Practitioners engaging in conduct or rendering services that are not ordinarily considered to be part of the conduct of the profession must be aware that, in the event of a claim arising out of such conduct, the claim will not be indemnified under the AIIF policy. Should a practitioner accept instructions or engage in business or other activities that fall outside of the conduct of the profession, such practitioners must ensure that appropriate cover for such activities is purchased in the open market and that appropriate measures are implemented to mitigate the attendant or associated risks. Those practitioners who have top up PI cover in place must have regard to the wording of their top up policies in order to ascertain whether or not their activities fall within the ambit of such policies.

'Legal Services' are defined in the AIIF policy as:

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

The definition of a legal practice in the policy includes sole practitioners, partnerships of practitioners and incorporated legal practices. (A practitioner is defined as '[any] attorney, notary or conveyancer as defined in the [Attorneys Act 53 of 1979]').

Practitioners working on matters involving the law of another country should



note that, if they are not admitted to practice in the applicable jurisdiction(s), the AIIF policy will not respond to claims arising out of the work done or advice given on the law of the foreign jurisdiction. Similarly, as pointed out below, the AIIF policy will not respond to claims arising out of a judgment of a foreign court.

Comparing the examples of extended services listed above to the provisions of the AIIF policy, it will be noted that the policy (clause 16) specifically excludes claims arising out of or in connection with:

- Trading debts or those of the legal practice or business managed by the practitioner.
- Misappropriation or unauthorised borrowing of trust funds.
- Any judgment or order of a court other than that of a South African court with competent jurisdiction.
- The provision of investment advice, the administration of any funds or taking of any steps as contemplated in:
  - The Banks Act 94 of 1990;
  - The FAIS Act;
  - The Agricultural Credit Act 28 of 1966;
  - Any law administered by the FSB or the South African Reserve Bank and any regulations issued thereunder;
  - The Medical Schemes Act 131 of 1998 as amended or replaced.
- An instruction to invest money, except if relating to an instruction to invest in an interest-bearing account in terms of s 78(2A) of the Attorneys Act, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made.
- A direct or indirect consequence of the provision of bridging finance in respect

of a conveyancing transaction. This exclusion does not apply to bridging finance provided for the payment of:

- Transfer duty and costs.
- Municipal or other rates and taxes relating to the immovable property, which is to be transferred.
- Levies relating to the body corporate or home owners association relating to the immovable property to be transferred.
- A breach of contract unless such breach is a breach of a professional duty by the insured practitioner.
- Payments, which are unrelated to or connected with a particular transaction or matter which is already in existence or about to come into existence, at the time of receipt or payment and respect of which the insured attorney has received a mandate.
- Claims brought by an entity in which the insured attorney or an interrelated person has a material interest and/or holds a position of influence or control.

## The Attorneys Fidelity Fund

It will be remembered that the AIIF is an insurance vehicle established by the Attorneys Fidelity Fund (the Fund) acting in terms of ss 40A and 40B of the Attorneys Act. The relevant sections of the Act empowering the Fund to establish the AIIF refer to insurance cover provided to practitioners in respect of claims arising out of the professional conduct of such practitioners. 'Professional conduct' is not defined in the Attorneys Act, but 'profession' is defined in s 1 as meaning '...the profession of attorney, notary or conveyancer...' Subject to the provisions of the Attorneys Act, the Fund will only indemnify claimants in respect of claims arising out of the theft of trust money or property entrusted to a prac-

tising attorney, candidate attorney or his or her employee 'in the course of his or her practice' (s 26). The limitations of liability of the Fund (s 47) include investment instructions. Insofar as the investment instruction limitation (s 47(1)(g)) is concerned, it must also be noted that s 47(5) sets out specific requirements which practitioners are encouraged to consider carefully.

## Conclusion

The risks related to investments need to be considered in relation to Ponzi, Pyramid and other similar schemes which, unfortunately, many practitioners have participated in or promoted to their peril. A number of statutes (including ss 42 and 43 of the Consumer Protection Act 68 of 2008) outlaw the participation in such schemes. It is hoped that the exposition above will be taken into account by practitioners in assessing the potential risks to themselves and third parties insofar as accepting instructions, the performance of which will fall outside the conduct of the profession, are concerned. The potential risks are dual in nature in that claims arising out of the provision of those services may fall outside of the ambit of the AIIF policy and third parties may not have recourse against the Fund in the unfortunate event of a misappropriation of funds. It is thus also important that the expectations of clients are appropriately managed in so far as requests to perform services outside of the conduct of the profession are concerned and that clients and other practitioners are warned of the attendant risks.

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



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# HAVE YOU HIT ROCK BOTTOM?

By  
Michelle  
Beatson

# The value of mentorship in the legal profession

**H**istorically articles in the legal profession were for a period of two years in the very practical environment of a legal practice. A junior legal professional had the advantage of understanding the formal procedures and unwritten rules of the professional organisation in which he or she found themselves, and learnt to fit into the organisational culture, values and norms. With the guidance of a senior mentor and feedback, the less experienced attorney had access to knowledge, experience and wisdom and as a result began to master new management and leadership skills and could reach their potential over a period of time in this environment.

As life's tempo quickened, experienced attorneys had less time to spend on teaching, supervising and mentoring. Schools for Legal Practice came into being to fill the gap and, as brilliant as this innovation was, nothing could fully replace the one-on-one practical mentoring on a daily basis in a legal firm.

The advantages of a mentoring programme as developed by the Law Society of South Africa's Legal Education and Development Department are vast. The less experienced junior attorney gains improved confidence when being in a one-on-one mentoring relationship with

a senior mentor, where they feel comfortable to ask 'silly' questions without embarrassment and improved confidence leads to improved performance. The junior professional ultimately feels valued and appreciated and with continuous feedback from an objective teacher will become an asset to the company. Once he or she reaches senior status and a higher potential he or she should have no reluctance in becoming a mentor to a junior professional.

Although senior mentors may feel strapped for time and less inclined to open themselves up to mentoring, this process does not necessarily have to be time consuming, as, with today's technology a simple WhatsApp or telephone call can be utilised by the mentee to obtain an immediate reply or solution to a practical problem, which he or she may experience in the course of his or her practice.

Although legal knowledge can be obtained through study and research, the mastering of management, leadership and communication skills can only be attained through time and proper mentoring and are of paramount importance in the running of a successful legal practice.

The legal profession is constantly changing. Through his or her mentoring, the legal mentor is placed in an advan-

tageous position of having to reflect on their own experience and legal expertise. The best way to learn and expand one's own capabilities and ultimately broaden one's own outlook is to teach.

By being involved as either a mentor or mentee in a structured environment where specific time is allocated to achieving specific goals professional individuals are placed in a position where they are able to systematically track their own development, their own achievements and their own results: The most time efficient manner and least costly way of transferring practical skills.

Only one instance is more effective in becoming a legal practitioner on a practical level than actually hearing, seeing and watching your principal in a legal firm conduct their practice, and that is being mentored in a structured mentorship programme, by a more experienced legal practitioner who is prepared to empower you by acting as a sound board and adviser.

Consider becoming a student of your own life by becoming either a mentor or a mentee.

Michelle Beatson *BLC LLB (UP)* is an attorney at Lanser & Williams in Bela-Bela.

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By  
Nkateko  
Nkhwashu

# A cart before the horse or the other way round?

## *Amendment of the schedules of the Financial Intelligence Centre Act*

**T**he Financial Action Task Force (FATF) is an independent intergovernmental body that promotes policies to protect the global financial system against money laundering and terrorist financing. FATF's 40 Recommendations are recognised as international best practices and standards. Various countries subscribe to these recommendations. As a result their financial institutions and other businesses are attractive to the international markets (thus leading to flourishing international trade).

FATF analyses the level of compliance with its 40 Recommendations through peer review mutual evaluation exercises (MEs). Currently the ME methodology also assesses the level of effectiveness of a particular country's Anti-Money Laundering and Counter Terrorist Financing regime (AML/CFT).

Recently FATF have published various MEs of member countries, which were assessed under the new methodology and revised standards. The United States of America (US) is one such country. The US has a clear understanding of its AML/CFT risks. Their systems are said to be 'well-developed and robust' (www.fatf-gafi.org, accessed 30-3-2017). All these are 'supported by a variety of ongoing and complementary risk assessment processes' (www.fatf-gafi.org, accessed 30-3-2017), which include key steps such as the 2015 National Money Laundering Risk Assessment, National Terrorist Financing Risk Assessment (and other initiatives, ie, National AML/CFT strategy, action plans, key priorities). Irrespective of all these elaborate efforts the US was recently found to be still wanting on some of the 40 Recommendations namely, minimal coverage of certain institutions and businesses.

Take note that no jurisdiction, to date, has ever been found or assessed as fully compliant with FATF's Recommendations. The comparison or argument made here is solely for the purposes of trying to answer or probe the question, if a well-developed and robust system informed by a national risk assessment, as well as some elaborate efforts is still found to be non-compliant with some of

FATF's Recommendations then what of a jurisdiction, in a developing world, with no such national risk assessment and/or elaborate efforts?

The above is a detour to arrive at the current South African scenario (or context) whereby the Financial Intelligence Centre (FIC) 'has begun a process of reviewing the current legislative framework against money laundering and terrorist financing with the view to improve South Africa's [SA] measures to combat money laundering and terrorist financing' (www.saica.co.za, accessed 30-3-2017). Before delving deeper into the discussion it is important to note certain facts. First, FATF advocates for a Risk-Based Approach (RBA) to customer identification and verification by banks and other businesses. Secondly, FATF advocates for a National Risk Assessment (NRA) to ensure effective implementation of the RBA.

The NRA, ideally, precedes any attempt at implementing an RBA. South Africa has not yet done an NRA, yet is it attempting to implement an RBA through the Financial Intelligence Centre Amendment Bill B 33 of 2015? Of course a counter-argument can be made to the effect that this was necessitated by the 2009 ME on SA. A further argument can also be made, based on some of the recommendations made by the World Bank through its Financial Sector Assessment Programme Report, which states that although SA does not yet have an NRA in place it 'seem[s] to have a reasonable understanding of its [AML/CFT] risks' (www.imf.org, accessed 5-4-2017). However, one cannot help but question the logic or sequence behind some of the current developments or processes.

For instances through one of its recent notices the FIC says 'Based on its experience in implementing the provisions of the FIC Act and supporting efforts of law enforcement and other agencies in combating money laundering and terrorist financing, the Centre has identified a number of activities that should be brought within the scope of the FIC Act, with a view of improving the transparency of the financial system. *The proposal to include certain businesses or institutions is based, in part, on the Centre's view that*

*these businesses or institutions may present a higher risk of being used to carry out money laundering or terrorist financing'* (my italics) (www.associatedcompliance.co.za, accessed 30-3-2017).

The above efforts are laudable but should this process not be preceded by both a NRA, as well as industry-based assessments and how did the FIC get to select these specific institutions? Logic would dictate that before one can deem certain sectors as higher risk in need of urgent intervention, one would then deem it prudent to conduct or do a risk assessment. The reasoning behind these concerns or points seeking clarity are:

- SA has yet to do an NRA (this will be done prior to 2019).
- SA does not have a national strategy, action plan or organised processes in place that relates to AML/CFT.
- SA will be undergoing another ME by FATF in 2019 (the deficiencies noted in 2009 might change so are the outcomes and priorities).
- Is SA seeking to comply with FATF for the sake of compliance or should there be impact in practice or achieving defined outcomes or objectives?
- Some of the institutions that are to be incorporated within the proposed schedules are regulated (professionals).

For completeness-sake some of the institutions, which are to be added are: Professional accountants; co-operatives, which provide financial services, as defined in the Co-operatives Bank Act 40 of 2007; persons who provide trust and/or company services; short-term insurance as defined in the Short-Term Insurance Act 53 of 1998; credit providers who are required to register as contemplated in s 40 of the National Credit Act 34 of 2005; and others.

Nkateko Nkhwashu LLB (University of Venda) LLM (UJ) Certificate in Legislative Drafting (UP) Certificate in Compliance Management (UJ) Certificate in Money Laundering Controls (UJ) is an advocate at the Banking Association South Africa. Mr Nkhwashu writes in his personal capacity. □



A man with short dark hair and a goatee, wearing a dark suit, white shirt, and a red tie, is looking down at a black folder he is holding. The background is plain white.

# Vicarious liability: *Easy to understand, difficult to adjudicate*

By  
Leslie  
Kobrin

**I**t is a well-known principle in South African law that an employer is vicariously liable for the negligent act of his or her employee or agent, when the employee or agent acts negligently while in the course and scope of his or her employment. However, the question that remains to be answered is: What is the position when the employee deviates from his or her employment to perform a personal errand during his time of employment and in that time commits a negligent act?

The jurisprudential foundation for the above issue was discussed in *Feldman (Pty) Ltd v Mall* 1945 AD 733.

In that case, while driving his employer's motor vehicle, the employee went to perform a personal errand, consumed alcohol and was involved in a motor collision, which was due to his negligence. The majority comprising the Appeal Court Bench found that the employee never entirely abandoned his employer's work as throughout the entire episode he had custody and control of his employer's motor vehicle. In this instance, the court held the employer vicariously liable.

In the case of *Minister of Police v Rabie* 1986 (1) SA 117 (A) the plaintiff sued for damages for wrongful arrest and assault. The police officer who made the arrest was an engineer in the employ of the police. At a time when off duty and in plain clothes, he made the arrest. He encountered the plaintiff, introduced himself as a police officer, took the plaintiff to the police station, opened and filled out a docket, and wrongfully charged the plaintiff with housebreaking.

The minister was held liable and in passing judgment Jansen JA held that although the policeman acted off duty outside of the scope of his employment, his clear intention was to arrest the plaintiff. This is a subjective test. On the other hand if there is a close link between the employee's act and his personal interests but for the business of his employer, the employer would be liable. This is the objective test. In conflating the two tests to the facts, he found the employer liable.

The Constitutional Court (CC) applied this test in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), but went further in holding that:

- Applying the subjective test and the objective test both

questions must be answered in the affirmative.

- In the objective element the court is obliged to articulate whether there is a sufficient connection between the wrongful act and the employment and the application of this test should not offend the Bill of Rights or be at odds with our constitutional order.

Thus the common law of vicarious liability was developed in two essential respects.

Firstly, the normative considerations at play must be articulated by the court. Secondly, a new test, namely, that the imposition of vicarious liability must embrace the normative conditions.

In the *K* matter three off-duty police officers offered the plaintiff a lift home. Clearly in offering her a lift home they were acting in the fulfilment of their duties as police officers. On route they raped her and abandoned her on the side of the road. In this case the CC held that the police officers and their employer carried a constitutional duty to prevent crime and protect members of the public. Secondly by accepting the lift offered to her, she placed her trust in them to deliver her safely to her home, which was reasonable for her to do in these circumstances. Thirdly, there was a simultaneous commission and omission. The commission was the actual rape and the omission was they failed to protect her from harm in offering her the lift when it was reasonable for them to do so.

The CC dealt with this very issue in the case of *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC) the fact were strikingly and disturbingly similar to the facts in the *K* matter. The police officer offered a 13-year-old girl a lift home from a night club. He was off-duty, in plain clothes and had himself been at the night club. He was, however, on standby, which meant that he could be called to be on duty at any time and for this reason he was given use of an unmarked motor vehicle. In the vehicle the girl noted police dockets and asked the officer what these were and he said he was a detective, which made her realise he was a police officer. He took her to a secluded spot where he raped her. In this case, in holding the minister liable, the court held that the

state's constitutional duty to protect the public, the trust the public is entitled to place in the police, the significance of the officer being off duty but on standby, the simultaneous commission of the rape and his omission to protect the plaintiff, and the existence of an intimate link between the officer's conduct and his employment. Mogoeng J (as

he then was) noted that these elements complemented each other in determining and holding the minister vicariously liable.

In another matter, the Supreme Court of Appeal (SCA) in *Minister of Safety and Security v Booysen* (SCA) (unreported case no 35/2016, 9-12-2016) (Makgoka AJA (Leach JA, Wallis JA and Schoeman AJA concurring. Bosielo JA dissenting)), the police officer was on duty as a reservist in police uniform and armed with a police pistol working night shift. He went to have supper with the plaintiff with whom he was in an intimate relationship, which he did often. He was dropped off there in a police vehicle and was to be fetched by his colleagues when done with supper. After eating supper he and the plaintiff sat outside. Suddenly and without warning he got up, drew his pistol, shot the plaintiff in the face and turned the pistol on himself and shot and killed himself. No one at the house had any inkling of his intentions.

The SCA ruled that it was common

***'What is the position when the employee deviates from his or her employment to perform a personal errand during his time of employment and in that time commits a negligent act?'***

cause that the shooting was not foreseen by the plaintiff and there was no sign that the officer would act as he did. Moreover, there were no problems in the relationship. He held that there was no connection between him visiting the plaintiff and his duties as a police reservist. She did not fall in love with him because he was a policeman. Whereas in the preceding cases there was an element of trust, which the victims placed in the policemen, such element did not arise in this case. The court found, no link between the act he performed and his duties as a police reservist despite the fact that he was there in police uniform and he carried a pistol.

On this basis, Makgoka AJA found there was not a strong and significant connection between the conduct of the police reservist and his employment by the police and as such ruled that vicarious liability cannot be imputed to the police.

Bosielo JA wrote the dissenting and minority judgment. He found that the following common cause facts existed in this case namely, the police officer was on duty on the night in question, he was

dressed in full police uniform, he carried a police pistol, he had been dropped off at the plaintiff's home for supper in a police vehicle, that he had arranged to be fetched from the plaintiff's home in a police vehicle to continue with his duty, but for him having shot and wounded the plaintiff and committing suicide, and that he had been assigned to attend complaints by members of the public. He also found that it could not be disputed that he assumed his official duties the moment his shift started until the time he knocked off duty. Should there have been an attempted burglary at the plaintiff's home, while eating his supper, he would have been expected to act in his official duty. The normative values expressed in the *F* matter must not be seen in isolation, but holistically to determine if they complement one another in order to establish vicarious liability. At para 51 of the judgment, Bosielo JA stated:

'Does the fact that the deceased shot his girlfriend at her home whilst he had gone there to have supper make any difference? Simply put, does the fact that the deceased was on a break to eat his supper, sever his links as a police officer with the Minister to a point where it destroys any basis of a possible vicarious liability on the part of the Minister? I think not.'

He thus found that the normative factors constitute a sufficiently and intimate connection between the shooting of the plaintiff and the police reservist, and his employment by the employer to combat crime. This, he found to be in line with the spirit, purport and objects of the Bill of Rights. For these reasons he found the existence of vicarious liability could be imputed to the minister.

The article by Siyabonga Sibisi 'Vicarious liability of employer for employee's frolic: More clarity on detour issues' (2016 (Nov) *DR* 52) clearly sets out the legal principles, which will be applied in cases where an employee, while performing tasks allocated to him or her by his or her employer deviate from such duty to embark on a frolic of his or her own and on the course thereof acts negligently.

I submit that the principles of vicarious liability are easy to understand but difficult to adjudicate as is clearly seen in the case of *Booyesen*. Two meticulous descriptions of the same facts and application of the same principles led to two different conclusions. A careful analysis of all the facts and applying them to the principles enunciated above are required in each case.

**Leslie Kobrin Dip Iur (Wits) Dip Bus Man (Damelin) is an attorney at Bove Attorneys in Johannesburg.** □



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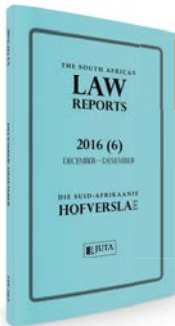
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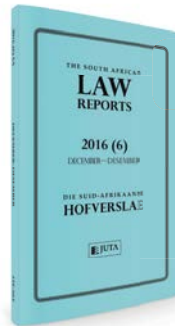
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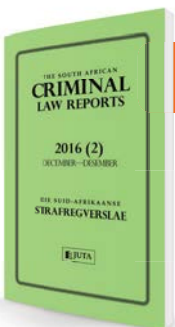
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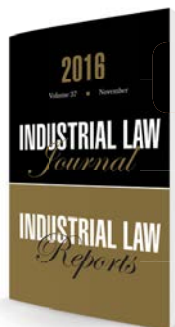
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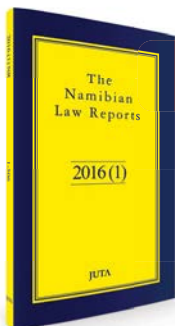
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By  
Gideon  
Tapanya

## Unpacking the affirmative action equation from a constitutional perspective

**S**outh Africa (SA) has a rich history of racial divisions that affected people of colour (African, Coloured, and Indian people) at all levels of the society, be it socially or in employment. However, the advent of the Constitution marked the beginning of a democratic dispensation, which ushered a new lease of life to the dejected masses of SA. Significantly, s 9(1) of the Constitution provides a formal equality clause to the effect that all people are equal and that they should be guaranteed the equal protection and the benefit from the law. However, s 9(2) of the Constitution goes a step further to provide for a substantive equality clause comprising of affirmative action measures, which are meant to eradicate the aforementioned

socio-economic disparities caused by Apartheid.

The Employment Equity Amendment Act 47 of 2013 (EEA), a legislation enacted to guide the implementation of constitutional affirmative action measures deviates from the general equality notion and the affirmative action standard stipulated in ss 9(1) and 9(2) of the Constitution respectively. Section 2 of the EEA, which provides the EEA's aim adopts a new standard of affirmative action measures that reads in equitable representation as a requirement of substantive equality, which in itself is a deviation from the s 9(2) constitutional affirmative action measures. The practical consequence of utilising the equitable representation notion stipulated in s 2 of the EEA is the potential application of

the concept of demographic representivity, a mechanism that operates the same way as racial quotas.

However, ss 174(2), 193(2), 195(1)(i) and 205(2) of the Constitution that provide for the concept of broad representivity may be the missing link, which is meant to direct the procedure to be adopted when implementing the s 9(2) constitutional affirmative action measures. This article distinguishes the concept of broad representivity from the concept of demographic representivity.

### Broad representivity and demographic representivity defined

Some reading into ss 174(2), 193(2), 195(1)(i) and 205(2) of the Constitution

Picture source: Gallo Images/Stock





denote that 'broad representivity' is only the presence in an employer's workforce, of the race and gender classes, which are represented in SA's national demographic profiles. While, Koos Malan ('Observations on representivity, democracy and homogenisation' (2010) 3 *TSAR* 427) defines 'demographic representivity' as the norm in 'which institutions and organised spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population.' Coincidentally, s 9(2) of the Constitution provides for affirmative action measures only sets a standard, which the contemplated measures should conform to, however, omitting to provide the procedure that must be adopted when implementing those measures. However, considering that the enforcement of the equality guarantee is not only limited to the literal interpretation of s 9 of the Constitution, it is imperative to consider other parts of the Constitution. Sections 174(2), 193(2), 195(1)(i) and 205(2) of the Constitution are discussed in turn.

### Section 174(2) of the Constitution

Section 174(2) of the Constitution provides for an affirmative action procedure of appointing judicial officers that is akin to the concept of demographic representivity. Section 174 of the Constitution came under spotlight when it was inappropriately applied by the Magistrates' Commission in *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EqC). However, the section provides for a peculiar procedure comprising broad representivity. Section 174(2) of the Constitution states that whenever judicial officers are appointed, the racial and gender profiles of SA must be broadly reflected. Moreover, the section goes further to state that 'any appropriately qualified woman or a man who is a fit and proper person may be appointed as a judicial officer.'

The significance of s 174(2) of the Constitution in providing for the concept of broad representivity is that it displays that the procedure that is contemplated by s 9(2) constitutional af-

firmative action measures, which was never to impose rigid racial and gender quotas as provided for by the concept of demographic representivity, a mechanism created by the EEA. Section 174(2) of the Constitution is clear in its wording that not even race and gender quotas can preclude any appropriately qualified man or woman from appointment as a judicial officer once he or she has been certified a fit and proper person. Thus, the presence of the race and gender classes represented in SA's demographic profiles suffice without a mathematical requirement for the appointment of judicial officers to mirror the demographic profiles.

### Section 193(2) of the Constitution

Section 193(2) of the Constitution provides that democratic institutions established in terms of Chapter IX of the Constitution must reflect the race and gender profiles of SA. This section's requirements are akin to those of s 174(2) of the Constitution discussed above.



Thus, this section will not be dwelled on much. However, s 193(1)(c) of the Constitution is significant because it is the only section of all the aforementioned sections on broad representivity, which reads in a consideration that can potentially negate s 193(2) of the Constitution. Section 193(1)(c) of the Constitution requires compliance with national legislation when recruiting staff in democratic institutions created in terms of Chapter IX of the Constitution. The application of the concept of demographic representivity, a mechanism of affirmative action, which is empowered by the EEA may find justification in terms of s 193(1)(c) of the Constitution. However, the application of the concept of demographic representivity can be challenged in terms of *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) and the fairness test, which requires proportionality in all affirmative action measures.

### Section 195(1)(i) of the Constitution

In *Munsamy v Minister of Safety and Security and Another* [2013] 7 BLLR 695 (LC) at para 65 s 195(1)(i) of the Constitution is mentioned as an integral section, which ensures broad representivity in public administration appointments. Section 195(1)(i) of the Constitution requires public administration institutions to broadly reflect the composition of the South African people. The extent to which this section provides for in public administration appointments might also be implied to apply by extension into private sector appointments. Section 195(1)(i) recommends 'employment and personnel management practices based on' the following factors in order to achieve broad representivity:

#### • Ability

The literal meaning of 'ability' from the *Colour Oxford English Dictionary* 3rd ed (New York: Oxford University Press 2011) is 'the power or capacity to do something'. Thus, prospective employees or prospective candidates for promotion must possess a certain degree of competence in the job concerned before they can be hired. In *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) placing prospective job seekers and candidates for promotion on competence tests was justified on the basis of the ability factor. However, ability cannot be solely considered to qualify a prospective employee for a particular job. The ability factor has to be complemented by the other factors.

#### • Objectivity

'Objectivity' means 'considering the facts about something without being influenced by personal feelings or opin-

ions' as per the *Colour Oxford English Dictionary* (*op cit*). Thus, in the context of affirmative action, objectivity means the allocation of available employment placements based on the real needs of the department concerned without being influenced by race and gender animosity. However, Mildred Oliphant, the incumbent Minister of Labour expressed in her speech on the Employment Equity Amendment Bill, 2013 to the National Council of Provinces in Cape Town on 21 November 2013 that the African National Congress's Affirmative Action Policy is marred with racial animosity against white people. This animosity is deeply rooted in the implementation of the concept of demographic representivity which is devoid of the objectivity that is envisaged by s 195(1)(i) of the Constitution.

#### • Fairness

In *Du Preez v Minister of Justice and Constitutional Development and Others* (2006) 27 ILJ 1811 (SE) at para 40, 'fairness' is defined as the consideration of all competing interests in the decision-making process. The *Harksen* case at para 52 concurs by reading in some degree of proportionality holding that fairness entails considering the severity of any decision on the rights and legitimate interests of prospective employees or candidates for promotion excluded from any affirmative action benefits. Moreover, in *Public Servants Association of South Africa and Others v Minister of Justice and Others* 1997 (3) SA 925 (T) at para 989A – B, it was held that rationality requires that if mechanisms of affirmative action like the concept of demographic representivity are to be regarded as alternatives of equality, a reasonable link must exist between executing such measures and the achievement of equality.

#### • The need to redress imbalances of the past

The need to redress imbalances of the past requires affirmative action measures to be implemented in compliance with the threefold inquiry formulated in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 37. The three legs of inquiry formulated were whether:

- The measure targets persons or categories of persons who have been disadvantaged by unfair discrimination.
- The measure is designed to protect or advance such persons or categories of persons.
- The measure promotes the achievement of equality.

While it is easy for affirmative action measures to satisfy the first and the second legs of inquiry, the third leg of in-

quiry is often overlooked. Even the then Acting Chief Justice, Dikgang Moseneke, when he adjudicated in the *South African Police Service* case, he seemed to have been swayed by the need to defend his earlier judgment in the *Minister of Finance* case where he overlooked the need for affirmative action measures to have the achievement of equality as their objective.

### Section 205(2) of the Constitution

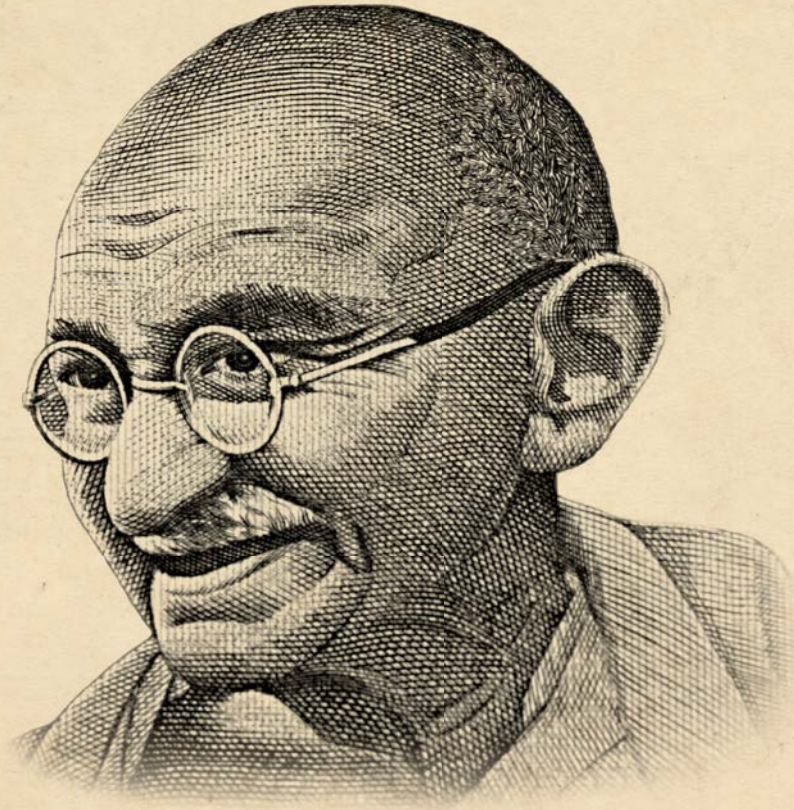
Section 205(2) of the Constitution provides that: 'National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.' While s 205(2) of the Constitution specifically applies to the police service, it might be inferred to apply to other public administration departments. The significance of s 205(2) of the Constitution is that it provides a challenge to s 42 of the EEA, which accords designated employers the choice to either use the national or the regional economically active population profiles of SA. There has been serious debate over this unfettered power, which is accorded to designated employers by s 42 of the EEA. However, s 205(2) of the Constitution seeking to improve efficiency in the police service adopts a realistic approach, because whether a company or an organisation is nationally based, employment always occurs regionally as far as employees are concerned.

### Conclusion

Sections 174(2), 193(2), 195(1)(i) and 205(2) of the Constitution could be read to create an exception to s 9(2) of the Constitution, so as to restrictively accommodate instances of broad representivity, which entail social inclusiveness without a strict mathematical reliance on SA's demographic profiles. Sections 174(2), 193(2), 195(1)(i) and 205(2) of the Constitution provide an ideal affirmative action procedure, which should be followed whenever instances of demographic representivity are encountered in legislation. The sections complement merit with other competing interests. Thus, ss 174(2), 193(2), 195(1)(i) and 205(2) of the Constitution are the only instances in which limited versions of demographic representivity are permitted to exist constitutionally.

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# Impossible no more:

## *The demise of the common law defence of impossibility for spoliation*

By  
Nicholas  
Mgedeza

**M**andament van spolie (spoliation) has been the possessory remedy and inherently emanates from common law. In essence the law of spoliation has not yet been codified in our legal jurisprudence. The rationale behind the remedy of spoliation is to avert chaotic backdrop wherein the members of society take the law into their hands without resorting to the recourse of law. Notably, this will culminate into a lawless and chaotic society. In this article, I make the legal analysis of what spoliation is and succinctly lay out the common law defences that are countenanced by common law. Inherently, this article utterly focuses on the defence of impossibility and I make an analysis on whether this common law defence in particular is still a tenable defence in our jurisprudence.

### Concept of spoliation

In *Mdlulwa and Another v Gwija and Others* 1992 (3) SA 776 (Tk), the court held at 777 B - C that the requirements for the spoliation order are that:





The fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. It is available both in respect of the dispossession of corporeal property and incorporeal property. In the case of incorporeal property it is the possession of the right concerned that is affected – a concept described as “quasi-possession” to distinguish it from physical possession. The manifestation of the dispossession of the right in such a case will always entail the taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned.’

The main objective is to restore the unlawfully deprived possession, irrespective of the nature of possession, for example, the thief can use spoliation remedy to restore unlawfully deprived possession. (See *Zozi v Minister of Police and Others* (ECM) (unreported case no CA&R 12/2014, EC/MTHA/RC 269/13, 19-4-2014) (Laing AG)).

### Common law defences

The respondent or the party against whom a spoliation order has been launched can gainsay or oppose the application by raising justifications that are prescribed by common law. However, there are defences that are intolerable in law, to wit, the spoliator –

- believed in good faith and that he or she acted in good faith;
- that he or she acted lawfully;
- that the possession of the article was not illicit;
- that the spoliator has a *ius possidendi* with respect to the article;
- that the spoliator is the proprietor of the article.

In principle, the following defences can be used by the respondent in order to mitigate against the application for spoliation, lapse of time, factual denial, impossibility of restoration, counter-spoliation and exception *spolie*.

### Common law defence of impossibility

The defence of impossibility applies in two situations –

- where the spoliated article has been destroyed, irreparably damaged or lost; and
- where a third party has acquired possession of the article.

Ideally, if the restitution is objectively impossible, the spoliation should not be granted and the applicant should rely on delictual claim for damages. *Malan v Dippenaar* 1969 (2) SA 59 (O), *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 720 G – H, the court stated: ‘In the context of the *mandament van spolie*, impossibility is a question of fact, and where it is contended that an order should not be

granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.’

Through the doctrine of effectiveness, the courts are not supposed to make orders that are moot and academic (*Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A)). Where the restoration is impossible, the courts cannot coerce the respondent to do something, which is practically impossible. In *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (W) at 535 A – B, Nugent J emphatically held that: ‘In my view, the weight of authority supports the proposition that a spoliation order cannot be granted if the property in issue has ceased to exist. It is a remedy for the restoration of possession, not for the making of reparation.’ Notably, by construing the *Rikhotso* judgment, it literally implies that the spoliation remedy is used solely for restoration, not for substitution of the property or article. Ideally it sets the precedent that if the property or the article is obliterated, the applicant must utilise other legal remedies except spoliation. One cannot overlook that since the inception of the Constitution common law is developing rapidly. Section 8(3)(a) and (b) of the Constitution unequivocally provides that: ‘(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the *common law* to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1)’ (my italics).

Furthermore, s 39(2) of the Constitution provides that: ‘When interpreting any legislation, and when developing the *common law* or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’ (my italics).

Prior to the political transition, there were some decisions wherein the courts ordered that the destroyed or an alienated property can be replaced through the spoliation order. As the matter of illustration, the matter of *Zinman v Miller* 1956 (3) SA 8 (T) Rumpff J held at 11 A – C that: ‘There seems to be no doubt that the *mandament van spolie* not only envisaged the return of possession, but also a restoration.’ Furthermore, in the matter of *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C), the two applicants were both labourers in the building industry and both lived near the Old Paarl Road, Kraaifontein, in the Division of Stellenbosch. The respondent was the Divisional Coun-

‘(a) that the applicant was in possession of the property; and

(b) that the respondent wrongfully deprived him thereof without his consent.’

In the matter of *Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521 (WCC) the court held that: ‘The *mandament van spolie* is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the *status quo ante*, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for a *mandament van spolie* has to show. (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor). The underlying principle is expressed in the maxim “*spoliatus ante omnia restituendus est*”.

cil of Stellenbosch. The applicant alleged in his affidavit that he was married, had two children and lived with his family as a squatter for some two years near the Old Paarl Road. He said that his house was built of sheets of corrugated iron which he bought for R 50 and erected himself. On 14 February both he and his wife left the house together, locked the door and went off to work. On his return from work that evening at 7:00 pm he found that his house had been demolished during the course of the day by the use of heavy machinery. The demolition was carried out by employees of the respondent council who removed the corrugated iron in a truck. Diemont J (as he then was) held at para 117H: 'In my view the granting of this order should create no practical problems. If the original sheets of corrugated iron cannot be found or if they have been so damaged by the bulldozer that they cannot now be used there is no reason why other sheets of iron of similar size and quality should not be used.' In the post-constitutional era, this position was rejuvenated in the landmark judgment of *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA), wherein approximately one hundred people were removed from their homes on a vacant piece of land in Garsfontein, a suburb of Pretoria. They approached the High Court where common law spoliation order and the peremptory eviction proceedings were not pursued. In the process of removal, the materials used in the construction of their dwellings had been destroyed, with the result that they could not be restored to the possession of their homes. The High Court, following *Rikhotso*, held that because of this

destruction, it could not order restoration under the *mandament van spolie*. The matter subsequently was referred to the Supreme Court of Appeal wherein the court stated the following at paras 25 – 28: 'It is correct ... that the rule of law is a founding value of the Constitution. This would suggest that constitutional development of the common law might make it appropriate to adapt the mandament to include reconstituted restoration in cases of destruction. ... The occupiers must therefore get their shelters back. Placing them on the list for emergency *Grootboom* assistance will not attain the simultaneously constitutional and individual objectives that re-construction of their shelters will achieve. The respondents should, jointly and severally, be ordered to reconstruct them. And, since the materials belonging to the occupiers have been destroyed, they should be replaced with materials that afford habitable shelters. But because the occupiers are avowedly unlawful occupiers, who are vulnerable to a properly obtained eviction order under [Prevention of Illegal Eviction], the structures to be erected must be capable of being dismantled.'

### Analysis

It is conspicuous from the aforementioned legal authorities that there is conflict of decision pertaining to construction and application of the defence of impossibility. Through the principle of *stare decisis*, I have no doubt in mind that that the case of *Tswelopele* overwhelms all other decisions, inclusive of the conflicting decisions, and accordingly one can undoubtedly assert that the common law defence of impossibility has been developed to cater for the

replacement of the destroyed or alienated property. Furthermore, it vitiates the confusion that has been created by the conflicting decision. The overall inference I can draw pertaining to common law defence of impossibility is that it has been supplemented by the development of the common law and one cannot outright assert impossibility as an absolute defence to the spoliation application. I am of the view that due to the fact that the court can order the replacement or the supersession of the property or the article, the defence of impossibility does not hold water in our jurisprudence and is explicitly redundant and obsolete. For legal practitioners, judiciary, academics and legal advisers, it is essential that they conscientise themselves with this developments in our jurisprudence as they will be able to impart it to their external clients.

### Conclusion

The common law defence of impossibility has been developed by the courts to countenance the court to order the replacing of the destroyed or alienated item. The practical implication thereof is that the defence of impossibility is moot point in the current jurisprudence. In essence, the common law defence of impossibility is no longer rigorous as it was before because of the aforementioned development in our jurisprudence.

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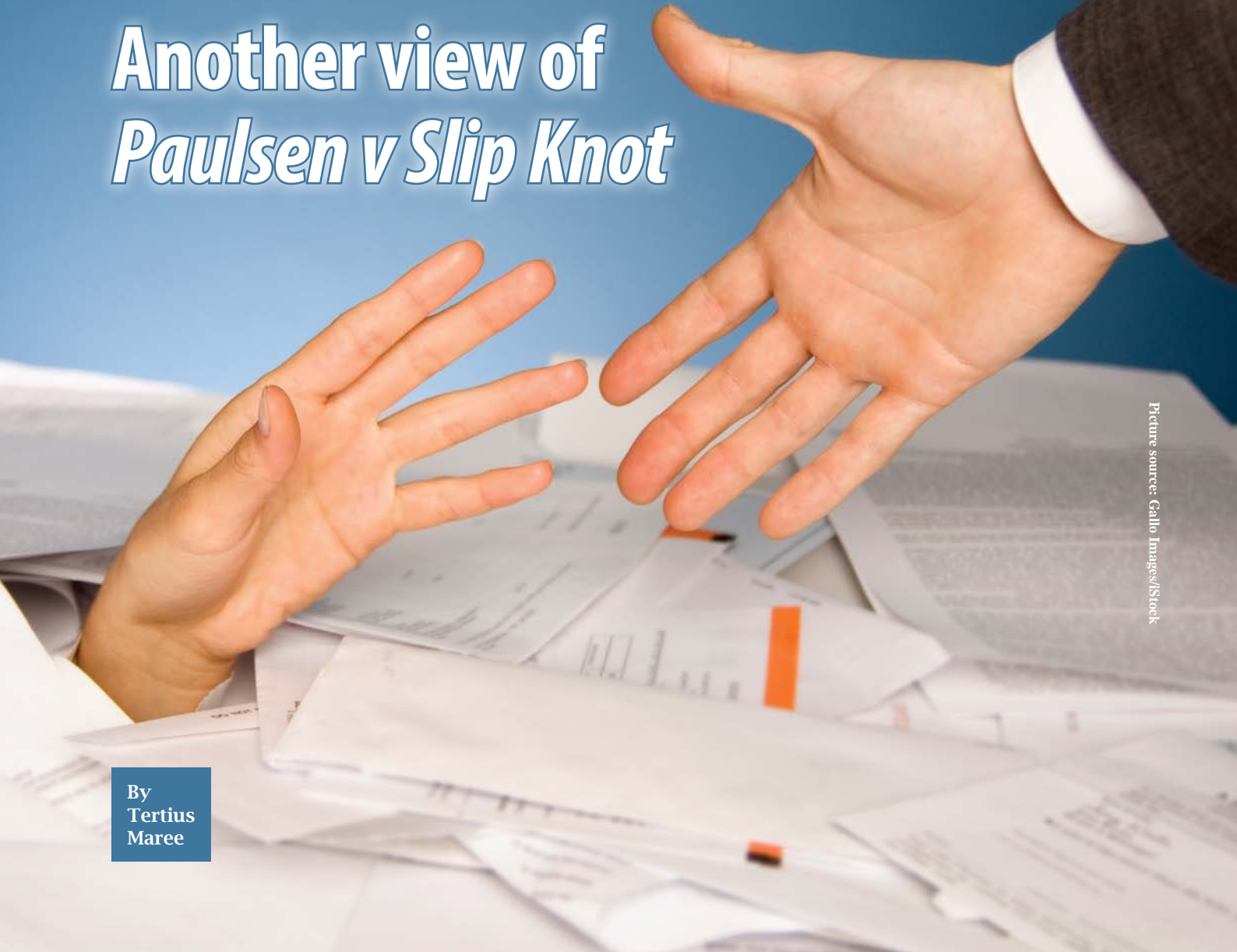
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# *In Duplum* rule:

## Another view of *Paulsen v Slip Knot*



Picture source: Gallo Images/Stock

By  
Tertius  
Maree

A slip knot is a simple-seeming knot, joining two rope-ends. It does not actually slip when tension is applied. The *in duplum* rule is a simple-seeming rule inherited from our Roman-Dutch legal history, but it gives rise to many thorny questions.

Is the *in duplum* rule suspended by summons or only by the (eventual) judgment?

How can a commonplace question such as ‘do I owe the interest’ give rise to so many important questions, including some of constitutional relevance?

Should, and how should, the *in duplum* rule be weighed up against the dictates of *pactum sunt servanda*?

Should the protective cap of the *in duplum* rule itself be ‘capped’?

If the *in duplum* rule is suspended by judgment, does post-judgment interest run on the whole of the judgment debt or only the original capital amount of the loan?

If the *in duplum* rule is suspended by judgment, does post-judgment interest run from the date of the judgment of the court of first instance, or from the date of the judgment of the apex court?

Can the Constitutional Court (CC) set

aside an earlier decision of the Supreme Court of Appeal (SCA), which is not before it on appeal?

How is it possible that a ruling, including diverging views of 15 judges, nine of whom of the highest rank, expressing opposing views on exactly the same issues, are so persuasive as to oblige agreement in two different directions?

How is it possible that a long-standing, well-known, often used and seemingly simple common law norm such as the *in duplum* rule can invite such divergence between so many judges and can even be labelled as a ‘polycentric morass’ in the majority ruling of the Highest Court?



Would a matter such as this have proceeded to the CC, and would the result have been the same if the applicable interest rate had been more in line with what may be regarded as 'normal' or 'reasonable'?

Would the approach and ruling of the majority judgment in the CC have been the same if the debt had been of a different kind, such as sectional title levies, and if not, how can this judgment be held to serve as a general principle as to how the *in duplum* rule should be applied?

What role does 'public policy' play in our common law and to what extent may the judiciary intervene to achieve public policy objectives?

To what extent are our courts allowed to develop our common law and may such expansion then be reversed by another court?

These questions and more arise from the judgment of the CC in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC). In fact, this is a tale so complex that I have reservations about adding my own views.

The case has in fact been discussed previously in *De Rebus*, but without dealing fully or convincingly with the double-edged nature of the *in duplum* problem, seen from a public interest, and from a legal viewpoint.

The Paulsens, husband and wife, signed as sureties on behalf of Winskor 139 (Pty) Ltd (Winskor) in respect of a 'bridging finance' loan agreement for R 12 million for a property venture. The agreed rate of interest was 3% per month, compounded monthly. As it turned out, Winskor did not make much 'wins' (profit), defaulted in payment of capital and interest and was in fact in the process of being liquidated at the time that proceedings were instituted by the creditor (Slip Knot), not against the principal debtor (Winskor), but against the sureties (the Paulsens) in the Western Cape Division of the High Court. The Paulsens defence relied on three arguments, namely that –

- in terms of the National Credit Act 34 of 2005 (NCA), which requires creditors to be registered, which Slip Knot was not, the loan agreement was invalid;
- if the agreement was held to be valid, the interest due was subject to an absolute limit of R 12 million in terms of the *in duplum* rule; and
- if the operation of the *in duplum* rule was suspended by the commencement of proceedings, the Paulsens' liability as sureties could in any event not exceed R 12 million as no proceedings had been instituted against Winskor, the principal debtor.

Judgment having been granted against them for R 72 million, made up of the capital amount and accrued interest. The Paulsens appealed to the full Bench,

which upheld the judgment, but found the third defence to be valid in that whereas the *in duplum* rule applied uninterrupted in respect of the principal debtor against whom no action had been instituted, the sureties could not be held liable for more than the principal debtor, and that interest due by the sureties was accordingly also capped at R 12 million.

Not satisfied with this partial success, the Paulsens then appealed to the SCA, against which a cross-appeal was made by Slip Knot in respect of the capping of interest in the court *a quo*. In terms of a majority decision at the SCA, the Paulsens' appeal was dismissed, with costs.

The majority at the SCA ruled that the loan agreement was not subject to the provisions of the NCA and, therefore, it was not necessary to consider whether Slip Knot was required to register as a credit provider in terms of the Act.

Slip Knot's cross-appeal was upheld by the majority, and the Paulsens' second defence was accordingly dismissed, the finding being that the operation of the *in duplum* rule is suspended by the institution of proceedings, with interest accruing afresh from that date. The minority disagreed with this view.

The majority at the SCA furthermore dismissed the Paulsens' third defence and ruled that they, as sureties, had become liable for further interest as from the date of summons and could not rely on the fact that the principal debtor had not been sued.

The Paulsens then applied for leave to appeal to the CC, founding their application, not on the constitutional relevance of the matter, but averring that it raised 'arguable points of law of general public importance which ought to be considered by that Court' as provided for in the amended s 167 of the Constitution.

In a majority ruling the CC judges found that although it had not been pleaded, the matter did in fact raise a constitutional issue regarding the interpretation of the NCA, which issue, however, could be disregarded for the purposes of the current matter. The court nevertheless also had jurisdiction beyond constitutional matters, holding that it did so because on the pleadings, not necessarily on the merits, the matter was indeed concerned with 'arguable points of law of general public importance which ought to be considered by that Court.'

Leave to appeal to the CC was accordingly granted.

In the majority ruling, delivered by Madlanga, J, it was pointed out in the majority decision that it was a long-standing and well-established part of our law with origins in classical Roman law, carried through to Roman-Dutch law, and confirmed by our courts to remain of current relevance, its purpose being to 'protect debtors from being crushed by

the never ending accumulation of interest on an outstanding debt.'

The problem to be considered stemmed from the 1998 decision of the SCA in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) in which it had been held that the *in duplum* rule was suspended by the commencement of litigation, accrual of further interest, therefore, resuming from that date onwards. This ruling had reversed the prevailing position at the time as expressed in the then leading case, *Stroebe v Stroebe* 1973 (2) SA 137 (T).

Madlanga J held that *Oneanate* had been wrongly decided both as far as the interpretation of Roman-Dutch authorities were concerned and in terms of public interest considerations.

In respect of public interest, the *Oneanate* approach whereby protection of the debtor was suspended on the institution of proceedings, was based on an acceptance of the view that 'interest and indeed compound interest is the life-blood of finance' and that it required a different approach in our 'modern conditions where finance plays an entirely different role' than in the times of two authoritative sources on Roman-Dutch law Ulrik Huber and DG van der Keessel.

Madlanga, J pointed out that while public policy requirements in an issue such as the protection of women as vulnerable members of society is beyond argument and points in one direction only, the same does not apply in respect of the issue at hand, being the application of the *in duplum* rule in which public policy points in two directions. The judge added:

'Where public policy considerations do not chart the path of desired common-law development with sufficient clarity, courts are not suitably placed to take the leap and make a judgment call one way or the other' (para 57).

'The question at stake in *Oneanate* (and here) is so heavily laden with polycentricism that a court ought not make a choice on what considerations best advance public interest' (para 58).

And:

'[In] *Oneanate* the Supreme Court of Appeal ought not to have taken the quantum leap of grafting into the long-established rule a suspension of the *in duplum* rule *pendente lite*' (para 93).

Accordingly, argued Madlanga J, the attempt in *Oneanate* to develop the common law cannot be supported. The problem facing this court was of course the fact that *Oneanate* was not before it on appeal:

'The question now is; are we prevented from setting right a wrong policy choice, because of the passage of years and the fact that *Oneanate* did not come on appeal?'

The judge pointed out that the CC had

never before been faced with the *in duplum* question, but that:

‘An incorrect decision cannot be allowed to bed down and become part of our common law purely because of the fortuitous nature of what lands on our plate for adjudication. Not being able to upset *Oneanate* just because it did not come before us on appeal would be inimical to this court’s status as the apex court in the judicial hierarchy.’

For these reasons the *Oneanate* judgment was overruled by the majority, with the result that the law reverted to what it had been before *Oneanate*, namely, that the *in duplum* rule is not suspended but continued *pendente lite* and interest is not permitted to run during the course of litigation. The judge denied that this finding amounted to a development of the common law, but that it merely amounted to a rejection of the *Oneanate* development.

As far as the calculation of interest was concerned, this was limited in the current instance to R 12 million, being the amount equal to the capital due interest to resume at the agreed rate as from the date of the judgment of the CC.

This judgment of course favoured the Paulsens. Madlanga J pointed out that it would similarly favour other debtors, except in concluded matters where no possibility of appeal remained.

Different to what Madlanga J had held,

Moseneke DCJ did not find that the opposite public policy considerations were many-sided and equally positioned, but in fact found that *Oneanate* was so clearly wrong that its precedent should be set aside.

The error of the latter view is demonstrated not only by the dissenting ruling of Cameron J, but by the clear and well-considered ruling by Madlanga J in the main judgment itself.

In the single dissenting judgment Cameron J argued that *Oneanate* had been correctly decided.

My own views on the chief issue debated in this vital judgment are as follows:

- the original object of and basis for the rule, namely, to prevent a defaulting debtor from being financially destroyed by the overwhelming accrual of interest, remains and should remain in our modern South African law; but –
- the *in duplum* rule has always been and remains a radical intrusion into the freedom to enter into contractual relationships, and particularly the rights of the creditor; and accordingly –
- the rule must be interpreted and applied conservatively in order to preserve the freedom of parties to conduct their financial affairs by means of valid contracts; leading to a conclusion that –
- the application of the *in duplum* rule should be limited to apply in respect of interest accruing up to the date of insti-

tution of proceedings by the creditor for recovery of the debt – the punitive consequence, to the creditor, of holding the opposite being clearly demonstrated by this very case; and –

- as well-considered, carefully positioned and eloquently expressed as the judgment of Madlanga J had been, it seems that it may itself have been influenced, if not driven, by sectorial public interest considerations; and lastly
- the majority ruling crucially lacks consideration of classes of financial relationships falling outside the model considered by the court at the time of this judgment, and should at least not have been held to serve as the norm for all types of interest-bearing debts.

#### See also:

- Law Reports ‘Credit law’ 2014 (Aug) DR 37;
- Law Reports ‘Interest’ 2015 (Aug) DR 45; and
- Kerry Edmunson ‘Interested about the interest in debt? The *in duplum* rule revisited’ 2015 (Aug) DR 38.

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# Legal practitioners fighting for constitutional democracy

By Paul Hoffman SC

**A**t the most recent KwaZulu-Natal Law Society annual general meeting the guest speaker was former President Kgalema Motlanthe. In the article, 'Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM' (2016 (Dec) *DR* 6), he is reported to have issued a challenge during his address:

'If we want to invest in the future, the future lawyers should have a culture of fighting for human rights and reinforcing constitutionalism. Lawyers of the future should be equipped with legal skills that will enable them to work towards the realisation of justice for all.'

Reinforcing the form of constitutionalism envisaged in our supreme law, the Constitution with its justiciable Bill of Rights, involves upholding the rule of

law, respecting the separation of powers and ensuring a multi-party form of democracy in which openness, accountability and responsiveness are the order of the day.

In such an order the various rights and freedoms in the Bill of Rights must be 'respected, protected, promoted and fulfilled' by the state in the manner contemplated in the Bill of Rights. Promoting equality, respecting human dignity and encouraging a non-racial non-sexist approach to governance in which the enjoyment of the various rights and freedoms guaranteed to all become a reality rather than a pious promise on paper is a vital part of the work of the attorneys of the land. Attorneys who fight for human rights are willing to tackle any failure of the level of service delivery that is contemplated by the Bill of Rights. Some rights, chiefly those of a socio-economic

kind, are progressively realisable within the available resources of the state. Others have been claimable in full since the dawn of constitutionalism, a most welcome substitute for the form of parliamentary sovereignty, which preceded the introduction of constitutionalism of the kind referred to by the former President in his address.

Cornerstones of the new order include our -

- free media;
- independent and impartial judiciary; and
- public administration that is bound by the wholesome values and principles set out in s 195 of the Constitution.

The state and state owned enterprises are bound by five simple criteria in the procurement of goods and services. They must do so in accordance with a system that is fair, equitable, transparent, com-





petitive and cost-effective. All too often these requirements are honoured in the breach. The attorneys of the future will equip themselves with the skills to see to delivery of human rights in a manner that involves procurement that is consistent with provisions of s 217 of the Constitution read with the Public Finance Management Act 1 of 1999.

The 'realisation of justice for all' is a huge project in a country known for its inequality. Our Constitution expressly states in s 9(1) that: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.' This is the first of the rights guaranteed to all in the Bill of Rights. Without it, the right of everyone to inherent dignity rings hollow. Section 9(2) goes on to say: '... To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or category

ries of persons, disadvantaged by unfair discrimination may be taken.'

Attorneys of the future, working towards justice for all, will have to re-examine the requirements of this section and hold up legislative and other measures taken since 1994 to critical scrutiny in order to determine their efficacy. Unfair discrimination is presumed and ought not to persist so long after liberation if effective measures to counter it are properly devised and implemented. This is most likely to involve education, skills development, training and mentoring rather than schemes, which have tended to enrich banks and the politically well-connected, while leaving the most seriously disadvantaged, the rural poor women of the land, no better off than they were under the old non-constitutional order in which deliberate discrimination was the order of the day.

Perhaps the greatest challenge facing the attorneys of the future relates to the incidence of corruption in the country. This scourge has received critical examination by our highest court, the Constitutional Court (CC), in the series of cases known as the *Glenister* litigation (see *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC)).

Most recently, in November 2014, the Chief Justice commenced the decision of the majority with these memorable words:

'[1] All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.

[2] We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate. And this in a way is the issue that lies at the heart of this matter. Does the South African Police Service Act (SAPS Act), as amended again, comply with the constitutional obligation to establish an adequately independent anti-corruption agency?'

What the court is envisioning with these dicta is a single, dedicated entity to deal with corruption effectively and efficiently, an entity, which enjoys adequate structural and operational independence to acquit itself of the vital task at hand. The entity, according to the criteria laid down in antecedent *Glenister* litigation, must be specialised, trained, enabled to function without fear, favour or prejudice, properly resourced and, importantly, its staff should enjoy security of tenure of office.

The Scorpions or Directorate of Special

Operations, a unit within the National Prosecuting Authority, was imbued with all of the characteristics required except the last. The Scorpions were a mere creature of statute, a majority in parliament was able to close them down, and did, after the African National Congress (ANC) at its elective conference in Polokwane in December 2007, resolved that this should be done as a matter of urgency.

The replacement of the Scorpions, the Hawks or Directorate of Priority Crime Investigation, a police unit, does not, arguably, comply with any of the criteria laid down by the court in its judgments.

The question posed by the Chief Justice in para 2 of the *Glenister* judgment – as quoted above – was answered in the negative by the CC, which then proceeded to amend the supposedly remedial legislation that was being impugned by the two applicants in the cases under consideration by it.

***'Perhaps the greatest challenge facing the attorneys of the future relates to the incidence of corruption in the country.'***

The benefits of hindsight and the after-acquired knowledge of the track record of the Hawks since 2014 indicate that the Hawks still do not comply with the constitutional obligation on the state to establish an entity that is adequately independent to function as an effective and efficient anti-corruption body.

The negative consequences of this failure were spelt out lyrically in the majority judgment of the court in the previous *Glenister* case (*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)) in the following words at para 166:

'There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime

flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.'

The stunting of sustainable development and economic growth do not only deleteriously affect the future lawyers envisaged by the former president in his speech, these negative consequences of not addressing corruption properly are felt by all of society. Direct foreign investment and indeed all investment dry up, ratings downgrades follow and then the spectre of becoming a failed state looms ominously.

It does not have to be so. The encouragement for the constitutional project from the former president should help more people, and most importantly, more future attorneys, to realise that the 'Zuma years' are an aberration on our path to a culture of the enjoyment of human rights in a country devoted to constitutionalism.

It is not as though we were not warned of what was to come should President Jacob Zuma enjoy electoral successes of the kind he had in Polokwane and again five years later in Mangaung. Writing the biography of former President Thabo Mbeki, 'The Dream Deferred' (Jonathan Ball 2007) Mark Gevisser observes that:

'[Mbeki] was deeply distressed by the possibility of being succeeded by Zuma ... he believed his deputy's play for the presidency to be part of a strategy to avoid prosecution ... Mbeki allegedly worried that Zuma and his backers had no respect for the rule of law, and would be unaccountable to the constitutional dispensation ... There was also the worry of a resurgence of ethnic politics, and – given his support from the left – that

Zuma's leftist advisors would undo all the meticulous stitching of South Africa into the global economy that Mbeki and his economic managers had undertaken over 15 years ... [T]he possibility of a Zuma presidency was a scenario far worse than a dream deferred. It would be, in effect, a dream shattered, irrevocably, as South Africa turned into yet another post-colonial kleptocracy; another "footprint of despair" in the path of destruction away from the promises of *uhuru*.'

It is up to the attorneys of the future to act on these dire warnings and to have regard to the failure of the Hawks to live up to the constitutional mandate that has been carved out for them by the CC.

One of the unavoidable consequences of constitutionalism is that the Constitution, in the final analysis, means what the CC says it means. In relation to corruption, the court has held that it is imperative to have adequate anti-corruption machinery of state both as a human rights issue (how can rights be respected and protected when corruption is diverting public money to the corrupt) and as a matter of complying with the international obligations of the state to keep adequately independent dedicated corruption busters of specialised and secure kind in place with adequate and guaranteed resourcing.

The Hawks do not fit the bill. Their work rate has always compared unfavourably with that of the Scorpions and in recent years it has tailed off in alarming fashion. The Hawks of 2016 seemed to be more pre-occupied with political intrigue than with dealing with the corrupt among us.

Future attorneys who are justifiably

alarmed by the trends discernible; those who, unlike President Zuma, think that the Constitution comes before the ANC and that it is not true (as the President has insisted in Parliament) that the majority has more rights than the minority, have to take a stand in favour of constitutionalism and effective corruption busting.

All attorneys should give serious consideration to putting their weight behind Accountability Now's call, currently under parliamentary scrutiny, for an Integrity Commission to corruption-bust. A new Chapter Nine Institution that complements the work of the Auditor General and the Public Protector (both of whom operate only in the public sector) is sorely needed. The machinery of Chapter Nine will adequately protect its independence, its accountability to parliament will effectively neutralise the malevolent effects of executive influence and interference and the calibre of its leadership will all combine to see off the scourge of corruption effectively.

The kind of attorney envisaged in President Motlanthe's subtle challenge is willing to stand up for human rights and against corruption. The two issues are inextricably interlinked. Corruption is a human rights issue because the corrupt, in effect, steal from the poor.

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# THE LAW REPORTS

March 2017 (2) South African Law Reports (pp 1 – 335); [2017] 1 All South African Law Reports December (pp 313 – 667); 2017 (4) Butterworths Constitutional Law Reports – April (pp 415 – 541)

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  
GP: Gauteng Division, Pretoria  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Administrative law

**Review of an administrative action:** In *Babaletakis and Another v Minister of Local Government, Environmental Affairs and Development Planning (Western Cape) and Others* [2017] 1 All SA 447 (WCC), the applicants were owners of two immovable properties situated on Victoria Road, Bantry Bay, Cape Town. Across the road from their properties was a property owned by the fourth respondent.

The respondent wished to renovate the old house which existed on his property, and obtained permission to do so. However, it later appeared that the structure of the building was too fragile to support the additional load. The fourth respondent, therefore, demolished the old house and erected a new

structure in its place – without obtaining a demolition permit in terms of the National Heritage Resources Act 25 of 1999. An interim prohibitory interdict was obtained pending the determination of this review application, by which time the structure was at an advanced stage of completion. The structure was non-compliant with various restrictions in terms of the zoning scheme regulations and the Cape Town City's Scenic Drive Regulations.

The applicants appealed in terms of s 44(1)(a) of the Land Use Planning Ordinance 15 of 1985 (LUPO), against the decision by the Planning and General Appeals Committee of the City of Cape Town to uphold the fourth respondent's application to depart from the Cape Town zoning scheme regulations, as well as against the consent granted to him by the City to deviate from the restrictions applicable to development along the scenic drive.

It needs to be mentioned in passing that the appeal in the present matter was lodged in November 2013. LUPO has

since been repealed in terms of s 77 of the Western Cape Land Use Planning Act 3 of 2014.

The appeal was rejected by the MEC for Local Government, Environmental Affairs and Development Planning (Western Cape). That led to the present application for review of the MEC's decision in terms of s 6(2)(h) and (e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Binns-Ward J held that s 6(2)(h) of PAJA pertains to the court's power to judicially review an administrative action if the exercise of the power authorised by the empowering provision in pursuance of which the administrative action was purportedly taken was so unreasonable that no reasonable person could have so exercised the power.

Section 6(2)(e)(iii) of PAJA empowers a court to review an administrative action, which took irrelevant considerations into account or in which relevant considerations were not considered.

The statutory question that the decision-maker was re-

quired to answer was whether it was 'desirable', within the meaning of s 36 of LUPO, to grant the departures that the fourth respondent had applied for. The decision whether or not to grant applications in terms of ch II of LUPO for departures from the land use provisions involved the exercise of a discretion by the decision-maker.

Examining each of the different categories of departures granted to the fourth respondent, the court was unable to hold that the decisions to grant the fourth respondent's application for the departures he required were decisions that a reasonable decision-maker could not have made. That finding applied equally to the decision made by the MEC on appeal.

The application for review was accordingly dismissed.

## Contempt of court

**Disobedience of court order:** The decision in *Kenton-on-Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others* 2017 (2) SA 86 (ECG) concerned the first respondent municipal-



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ity's (the municipality) perceived neglect of their sewage reticulation and the condition of the local sewage works, and the consequential impact on the Bushman's River estuary.

The present application turned on two aspects. First, the applicants applied for an order that the municipality be held in contempt of court. It allegedly failed to comply with an interdict, which was obtained against them under an earlier application. In terms of this interdict the municipality was ordered to implement measures improving sewage reticulation. The municipality failed to comply with the court order. That led to the present application for an order of contempt. However, after the application was launched, but before the hearing took place, the municipality remedied its conduct.

The question before Lowe J was whether the court could make a finding of contempt where the alleged contempt was later remedied.

It was trite that the municipality, in contravention of the court order, allowed sewage to spill over the top of the conservancy tank into the coastal wetlands. The municipality's explanation for this was inadequate. There was more than sufficient evidence on the affidavits in this matter to establish –

- that the municipality and the municipal manager received notice and had knowledge of the court order; and
- to reach the conclusions that the failure to comply with the order was beyond a reasonable doubt wilful and *mala fide*.

Once a party to any proceedings had shown that there was at any given time wilful and *mala fide* non-compliance with a court order, a finding of contempt of court could be made, notwithstanding the fact that the non-compliance was later rectified.

The municipality was found guilty of contempt and warned to report on affidavit to the court on the steps it plans to take in maintaining the pump station at the conservancy tank. The municipality was ordered to pay the costs of suit.

## Custody

### Variation of parenting plan:

The facts in *VN v MD and Another* 2017 (2) SA 328 (ECG) were as follows: VN (the mother) and MD (the father) were the biological parents of a minor child, in respect of whom they shared parental rights and responsibilities. In February 2014 the parents agreed on a parenting plan. It had been made an order of court. However, the father was dissatisfied with his rights of access in terms of the parenting plan and he sought a review of it by the Children's Court. The presiding magistrate ordered that a revised plan presented by the father should be made an order of court.

The mother appealed to the High Court against that decision.

Eksteen J upheld the appeal on various grounds and set aside the order granted. The court held that the record of the proceedings before the magistrate was inadequate. In particular, the court was dissatisfied with the magistrate's reasoning and held that the evidence apparent from the record did not support the magistrate's finding that it would be in the interest of justice to increase access to the father in the manner sought.

The court was further dissatisfied with the lack of input by a family advocate, social worker or psychologist in the preparation of the revised parenting plan. Section 33(5) of the Children's Act 28 of 2005 (the Act) does not pertinently require those persons' input in respect of the variation of a parenting plan. However, part 3 of ch 3 of the Act, is clear that, in pursuing any agreement in respect of the exercise of parental rights and responsibilities, the parties were required, before approaching a court, to consult the family advocate, social worker or a psychologist, who was qualified to provide guidance as to the best interests of the minor child.

Similarly, where the parenting plan was to be varied by virtue of the parties experiencing difficulty in exercising their rights and responsibilities,

the parties were again required to engage the services of such a qualified person before seeking the intervention of a court. This was particularly so where a significant period had elapsed since the previous parenting plan had been endorsed and where the parties had failed to reach agreement.

The order of the magistrate was accordingly set aside and the father was ordered to pay the cost of suit.

## Delict

### Liability of resort where guest is raped on its premises:

In *Bridgman NO v Witzenberg Municipality (JL and Another as third parties)* [2017] 1 All SA 466 (WCC) the facts were as follows: An 18-year-old woman (Ms L) suffering from a mild mental disability, was raped at the Pine Forest Resort outside Ceres. Ceres forms part of the defendant municipality. In his capacity as the curator *ad litem* of Ms L, the plaintiff sued the municipality for damages. The issue at stake was whether the rape was caused by the lack of ordinary care and diligence on the part of the municipality and its servants acting in the course and scope of their employment.

The municipality denied being liable for negligence. In the alternative, it contended that if negligence on its part did exist, the rape was caused partly through its own negligence and partly through the negligence of Ms L's adoptive parents and guardians (Mr and Mrs L) in failing to properly supervise their daughter despite knowing that she was vulnerable due to her disability.

Donen AJ held that the test to establish wrongfulness of the omission was based on the legal convictions of the community. These convictions, in turn, were underpinned by the norms and values of our society embodied in the Constitution. Because of its constitutional duties, and because it owned, managed and controlled the resort, the failure on the part of the municipality to prevent the rape was wrongful.

The question as to whether

the municipality acted negligently, the court pointed out that the rape was predated by a report on defective security at public resorts. A security expert who testified for the plaintiff was adamant that security at the resort was inadequate on the day in question.

The test for negligence, in turn, is that *culpa* arises for the purposes of liability is when a *diligens paterfamilias* in the position of the municipality would have foreseen the reasonable possibility of his conduct injuring another in his or her person or property and causing him or her patrimonial loss; and would take reasonable steps to guard against such occurrence; and the municipality failed to take such steps.

A large number of criminal incidents had occurred at the resort in the year before Ms L's rape. As a result, so the court reasoned, the rape of a resident at the resort was reasonably foreseeable.

The court further held that that there was a complete absence of the necessary personnel at the resort at the time of the incident, facilitating the misdeeds of the perpetrators of Ms L's rape. The municipality had thus caused the rape of Ms L through its omission. The plaintiff was, therefore, entitled to damages arising from the rape.

Finally, on the facts before the court, Ms L neither consented to sexual intercourse nor led the perpetrators to think that she had done so. It was clear that she was abducted against her will and then sexually assaulted.

The appropriate award of damages for *contumelia*, shock, pain, suffering, and disability in respect of Ms L's enjoyment of amenities of life was set at R 750 000. To that was added the future medical costs of psychotherapy.

The municipality was ordered to pay the plaintiff an amount of R 780 780 plus interest and costs of the suit.

## Insolvency

**Appointment of insolvency practitioners:** The appeal in *Minister of Justice and Constitutional Development and Another*

*er v South African Restructuring and Insolvency Practitioners Association and Others* [2017] 1 All SA 331 (SCA) concerned the constitutionality of a policy that sought to regulate the appointment of insolvency practitioners, primarily as provisional trustees and liquidators, but also as co-trustees and co-liquidators, as well as appointments to certain other comparable positions under various statutes.

Although the policy applied to various appointments, the court dealt with it as if it applied only to appointments of trustees on insolvency. The policy was determined by the Minister of Justice and Constitutional Development pursuant to his powers in terms of s 158(2) of the Insolvency Act 24 of 1936 (the Act). The first respondent, the South African Restructuring and Insolvency Practitioners Association (SARIPA), challenged the policy by way of an application in two parts –

- Part A being an interim interdict restraining its implementation; and
- Part B review proceedings directed at having it set aside.

The High Court held that the policy infringed the right to equality provided for in s 9 of the Constitution; it unlawfully fettered the discretion of the Master; is *ultra vires* the Act; and was irrational and invalid.

On appeal Mathopo JA confirmed that affirmative action measures are designed to ensure that suitably qualified people, who were previously disadvantaged, have access to equal opportunities and are equitably represented in all occupation categories and levels. SAIPRA, however, submitted that the policy was rigid in its application and calculated to establish a barrier to the future advancement of affected people, contrary to s 9(2) of the Constitution.

The policy empowered the Master to appoint provisional trustees on a rotational basis in line with the categories set out in clauses 6 and 7, which were based on race and gender. The policy did not provide for the wishes of creditors to be taken into account in such discretionary appointments.

The court reasoned that remedial measures (such as those contained in the present policy) must operate in a progressive manner assisting those who, in the past, were deprived of the opportunity to practise in the insolvency profession. However, such remedial measures must not encroach, in an unjustifiable manner, on the human dignity of those affected by them. The policy provided for a strict allocation of appointments in accordance with race and gender. Insolvency practitioners were for that purpose divided into four groups stratified by race, gender and age. Appointments were to be made from these groups in strict order.

The rigid and unavoidable appointment process prescribed by the policy was arbitrary and capricious because it had been formulated with no reference to its impact when applied in reality.

The policy was thus held to be unconstitutional.

- See law reports 'Insolvency law' 2015 (June) DR 34 for the WCC judgment.

## Intellectual property

**Requirements for breach of copyright:** In *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) the court laid down important guidelines regarding the level of proof required in establishing breach of copyright.

The facts were that the appellant, Media24, alleged that the respondent, Oxford University Press (OUP), published a dictionary (the OUP dictionary), which was allegedly copied from Media24's own Afrikaans-English/English-Afrikaans dictionary, which had been published earlier (the Media24 dictionary). Both dictionaries were aimed at schoolchildren aged ten to 16, were small in size with no more than 4 000 – 5 000 entries in each language, and straightforward in complexity. The dictionaries, in respect of each word entry, provided short, simple sentences illustrating the use of the word in context (so-called 'example sentences').

Media24's allegation of breach of copyright turned on the numerous 'correspondences' between the example sentences appearing in the two dictionaries. The compilers of the OUP dictionary attested in affidavits on behalf of OUP as to the methods they used in compiling their dictionary and denied copying from the Media24 dictionary.

As to the similarities between the dictionaries' example sentences, OUP provided the following explanation for this, through affidavits attested to by its expert witnesses. First, both dictionaries were elementary and of limited scope. As a result, so OUP argued, the required basic illustration of meanings by way of example sentences resulted in the use of well-known common concepts. The dictionaries were thus likely to show strong similarity. Secondly, OUP's experts set out possible scenarios in which copying could have taken place and why each was improbable. Media24's response to OUP's evidence was simply to insist that the correspondences were so blatant, and the possibility of their having occurred in the ordinary course of compilation of a dictionary of this type so far-fetched, that the evidence could be rejected on the papers. Importantly, Media24 failed to provide a clear indication as to how the alleged copying occurred.

The court *a quo* decided against Media24.

On appeal to the SCA, Wallis JA held Media24 had established that OUP had access to the Media24 dictionary and that there were sufficiently substantial similarities between the example sentences to raise a *prima facie* case of copying. It was then for OUP to show how its dictionary was produced without copying. A mere denial of having copied was unlikely to displace the inference arising from proof of similarity and access to Media24's dictionary. OUP had to provide an explanation of the process adopted by it in producing its dictionary that plausibly explained the reasons for the similarity between the two

dictionaries. But the onus of proof was not thereby shifted to OUP. It remained for Media24 to establish copying on the ordinary standard of proof, namely on a balance of probabilities.

The court reasoned that Media24 adopted an incorrect approach in insisting that the correspondences between the two dictionaries were so extensive as to rebut any evidence or any probability pointing towards an explanation that excluded copying. Media24 fell into the trap of being misled by what the court referred to as 'similarity by excision'. In order to establish breach of copyright all evidence had to be examined, not only that which pointed in the direction of copying. In order to deal with the contention that the correspondences alone sufficed to carry the day in favour of copying, the court had to look at the evidence which was adduced on behalf of OUP that its dictionary was compiled without copying. Only then could the merits of the argument that OUP's evidence had to be rejected, based on the correspondences alone, be assessed.

Media24 had approached the court on motion. As a result, so the court reasoned, it (the court) had to be convinced of three matters before finding in Media24's favour. First, that the correspondences alone were inexplicable unless copying had occurred. Secondly, it argued that the compilers of the OUP dictionary be disbelieved. And thirdly, that OUP's explanation for the existence of the correspondences be excluded as a credible possibility.

The court decided that on the evidence produced by OUP showing that copying had not occurred, as well as OUP's explanation for the similarities between the example sentences, that the correspondences alone – and without the advantages of a trial in which OUP's witnesses could be tested – was not sufficient for it to reject OUP's evidence as far-fetched.

The task that Media24 set for itself in trying to discharge the onus of proving copying on the papers without oral evidence was an on-

erous one. And one in which it failed.

The appeal was accordingly dismissed with costs.

## Law of succession

**Intestate succession by partners in permanent same-sex life partnership:** In *Laubscher NO v Duplan and Others* 2017 (2) SA 264 (CC); 2017 (4) BCLR 415 (CC) the late Cornelius Laubscher (the deceased) and Eric Duplan (the first respondent) were permanent same-sex life partners. They undertook reciprocal duties of support, but neglected to solemnise and register their partnership under the Civil Union Act 17 of 2006. The deceased died intestate. He had no descendant or surviving parent. He did though have a brother, Dr Rasmus Laubscher, the applicant, who was the executor of his estate, and who in that capacity appears to have instituted proceedings in the High Court for a determination of whether he in his personal capacity or Duplan was entitled to inherit.

The relevant legal principles and case law at the time the present matter was heard in the CC were as follows:

- Section 1(1)(a) of the Intestate Succession Act 81 of 1987 (the Intestate Succession Act) provides that: 'If ... a person ... dies intestate ... and is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate ...'.
- In *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) the court held that the words 'or partner' had to be read in after the word 'spouse' in the definition contained in s 1(1)(a).
- Section 1 of the Civil Union Act provides that: "Civil union" means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others'.
- Section 1 of the same Act provides that: "Civil union partner" means a spouse in

a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act'; while s 13(2)(b) provides that: '... [A]ny reference to ... spouse in any other law, including the common law, includes a civil union partner'.

The applicant's contention in the High Court was that only civil union partners could inherit; while Duplan asserted that the decision in *Gory* entitled him to inherit. The High Court held that it was bound by *Gory*, and ordered that Duplan was the intestate heir.

The applicant then applied to the CC for leave to appeal, where the issues were as follows:

- First, whether the *Gory* order was of interim or indefinite duration.
- Secondly, whether, under the *cessante ratione* rule (ie, 'when the reason for a law ceases, the law ceases to exist') the *Gory* order had ceased to exist.
- Thirdly, whether the Civil Union Act had impliedly repealed the *Gory* order.
- Fourthly, whether the decision in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) was distinguishable.

The majority *per Mbha AJ* answered these four questions as follows:

- First, on interpretation of *Gory* the court held that the 'reading-in' would stand until Parliament amended or repealed it.
- Secondly, it held that the *Gory* order had not ceased to exist, in that its reason endured. That was to allow all same-sex permanent partners to inherit intestate (ie, those in civil unions, as well as those who were not). The principle laid down in the *Gory* case was confined to remedying the unconstitutionality in s 1(1) of the Intestate Succession Act, and that permanent same-sex life partners were barred from marrying. The *Gory* case did not address the situation of partners who, after removal of the barrier, did not get married.
- Thirdly, it held that the Civil Union Act had not impliedly repealed the *Gory* order. The Civil Union Act and the *Gory*

order were in any event reconcilable; and Parliament had not intended such a repeal.

- Fourthly, the court held that the decision in *Volks* was distinguishable. It concerned a benefit under another Act; the deceased there had made a will; and it was an equality challenge, rather than an interpretation of an order as here. Further, the *Volks* case contained the principle that it was legitimate for the law to give benefits to married people that it did not give to unmarried people. The consequence of this would be that s 13(2)(b) of the Civil Union Act legitimately excluded unmarried people from benefiting under the Intestate Succession Act.

Without the incorrect decision in *Volks*, unmarried same- and opposite-sex partners with reciprocal duties of support were entitled to inherit from their deceased partner's intestate estate. Duplan fell within this category and thus should inherit.

The appeal was accordingly dismissed and each party was ordered to pay its own costs.

## Prescription

**It commences when 'the debt is due':** In *Fluxmans Incorporated v Levenson* [2017] 1 All SA 313 (SCA) the facts were as follows: The respondent, Levenson, had concluded a contingency fee agreement with the appellant attorneys' firm, Fluxmans, in dealing with a delictual claim. Fluxmans duly deducted the contingency fee when Levenson's claim was successfully settled. Unbeknown to Levenson, and relying on the expertise of Fluxmans, the agreement was void as it was not in writing and signed by the parties as required by the Contingency Fees Act 66 of 1997 (the Act). The contingency fee claimed was also in excess of the fee allowable.

Five years after payment of the fee Levenson became aware that the agreement was void as a result of the decision in *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) where it was held that any contingency fee agreement outside the Act is invalid, null and void.

Levenson's claim against Fluxmans for repayment of the full fee was met with the defence that the claim had prescribed. The court *a quo* held that although the Levenson's enrichment claim became due immediately after payment, prescription only began to run when he became aware that the agreement was void as this was one of the facts that had to be known.

On appeal Mpati AP held that the agreement was void as it did not comply with the Act. Section 12(3) of the Act determines that a debt must not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor must be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

A debt is due when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

The court referred with approval to *Claassen v Bester* 2012 (2) SA 404 (SCA) where it was stated that knowledge of legal conclusions was not required before prescription started to run. Levenson had knowledge of all the facts necessary to sustain his claim immediately after payment of the contingency fee, even though he did not appreciate the legal implications of such facts, that is, he did not know that the agreement was invalid.

The court concluded that the running of prescription was not postponed until the creditor became aware of the full extent of his or her rights, or until he or she had evidence that would have proven a case 'comfortably'.

The court further confirmed that the invalidity of contingency fee agreements did not arise with the *Bobroff* case, but has been firmly established since the decision eight years earlier in *Price*



*Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] 3 All SA 20; 2004 (6) SA 66 (SCA).

The majority of court held that the claim had become prescribed and the appeal was allowed with costs.

• See law reports 'Attorney' 2015 (Aug) DR 45 for the GJ judgment.

**Requirements for prescription:** The facts in *Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd and Others* [2017] 1 All SA 401 (SCA) were as follows: A proposed development of agricultural land gave rise to three agreements. The first was a sale agreement in terms of which the appellant (Nuance) purchased certain immovable property. The second was a development agreement in terms of which it was agreed that Nuance would undertake the proposed development in keeping with an agreed development structure. The third agreement was a lease agreement between Nuance and the first respondent (Maghilda).

Three of the portions of land were transferred into Nuance's name in May 2008 after payment of R 60 million by Nuance to Maghilda and the second to fourth respondents (Sanjont). It was common cause that there was no compliance with the provisions of s 3 of the Subdivision of Agricultural Land Act 70 of 1970 before the sale and lease agreements were concluded in that the written ministerial consent prescribed in ss 3(d) and (e) had not been obtained.

In May 2009, Maghilda and Sanjont accused Nuance of breach of the agreements in several respects and demanded that Nuance remedy the respective breaches. Nuance argued that due to their non-compliance, the agreements (which were part of a single transaction) were null and void. It issued summons against Maghilda and Sanjont. In their plea, Maghilda and Sanjont averred that the sale agreement was both illegal and invalid, and simultaneously raised a special plea of prescription in terms of s

11(d) read with s 12(3) of the Prescription Act 68 of 1969.

For space considerations the remainder of this discussion will focus on the aspect of prescription.

The High Court upheld the plea of prescription and dismissed Nuance's claim for repayment. It also ordered rectification of the Deeds of Transfer. The effect of the order was that Maghilda and Sanjont would retain the amount of R 60 million and that the land would also be re-registered in their name. That decision led to the present appeal.

Tshiqi JA held that Maghilda and Sanjont bore the onus in proving that the claim had prescribed. Section 12(3) of the Prescription Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. A creditor shall be deemed to have such knowledge if it could have acquired it by exercising reasonable care.

In order to meet the requirements of s 12(3) of the Prescription Act, Maghilda and Sanjont had to show the facts that Nuance was required to have knowledge before prescription could commence running. They also had to prove that Nuance knew those facts before the date on which prescription was alleged to have commenced running. The facts that must have been known were those that were material to the debt. There was no evidence at all that Nuance knew that Maghilda and Sanjont had failed to obtain the ministerial consent. Time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights. Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient



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of first-hand evidence about them.

Conversely, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge. It was thus accepted that until the lack of the ministerial consent for the sale was mentioned for the first time in a letter dated 23 June 2009 from Nuance's attorneys all the parties were under the impression that the agreements were valid.

The next question was whether Nuance could, by the exercise of reasonable care, have known that the ministerial consent had not been obtained before the agreements were signed. The court held that Nuance could not have done anything more than it had in the circumstances. The special plea of prescription was dismissed.

The appeal was upheld with costs.

## Property law

**Rates clearance certificate:** The matter in *Jordaan and Another v The City of Tshwane Metropolitan Municipality and related matters* [2017] 1 All SA 585 (GP) concerned five applications. The first two were against the City of Tshwane Metropolitan Municipality and the remaining three were against the Ekurhuleni Metropolitan Municipality (the municipalities).

The applicants sought a declaratory order relating to the municipalities' alleged obligation to render municipal services and to open a service account under circumstances where there is a debt outstanding in respect of the property concerned beyond

the two year period provided for in s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Act).

The applicants also attacked the constitutionality of s 118(3) of the Act. Section 118(3) provides a municipality with security for repayment of an unpaid debt in respect of a rateable property and enjoys preference over any mortgage bond registered against the property.

The first three applicants each bought immovable property at a sale in execution; while the fourth applicant bought a property from a company in liquidation. In all these cases the applicants took transfer of the immovable properties after a certificate in terms of s 118(1) of the Act had been issued by the municipality. In terms of the certificate the municipality certified that municipal service fees as well as property rates and taxes (hereafter: municipal costs) during the two years preceding the date of application for the certificate, had been fully paid.

In all the cases there were historical debts outstanding with regard to each of the properties. These were debts which had been incurred by previous owners prior to the two year period envisaged by s 118(1) of the Act.

The municipalities relied, *inter alia*, on their policy to demand that all historical debts in respect of a property be paid before entering with a service agreement with the new owner of the property. They regarded historical debts as 'a charge upon the property' as contemplated in s 118(3) and as such had survived transfer of ownership.

The main issue concerned

the constitutionality of s 118(3) of the Act.

With regard to the constitutionality of s 118(3), Fourie J noted that the section enjoys preference over any mortgage bond, does not have a time limit and operates irrespective of who the present owner is. This is in contrast with s 118(1) that has a two-year time limit.

The court reasoned that in some cases s 118(3) could result in a loss of ownership (when the historic debts cannot be paid by the new owner and the property is sold in execution to recover the debt).

The court further decided that s 25(1) amounts to a deprivation. In deciding whether the deprivation was arbitrary, it followed the guidelines laid down in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). In this case the court held that in order for the deprivation not to be arbitrary there must be sufficient reason for the deprivation. Whether there were sufficient reasons for the deprivation would depend on -

- the extent of the deprivation;
- the relationship between the purpose for the deprivation and the person whose property was affected; as well as
- the relevant facts of each particular case.

In applying these three factors the court in *Jordaan* held that the extent of the deprivation is a contextual question that nonetheless allowed for instances of total, permanent loss of ownership.

This is drastic, especially in view of the fact that the new owner could not take steps to reduce his risk with regard to historic debts, while the municipality does have the means to collect outstanding debts. The deprivation is, therefore, substantial.

With regard to the purpose for the deprivation, the court commented on the fact that s 118(3) created a statutory hypothec in favour of the municipality. This form of security relates to the property and affects not only the owner incurring the debts but all successors in title. The court held that the municipality had sufficient means to recover the debt from the owner incurring the debt, without it becoming the problem of the new owner.

The court concluded that municipalities may thus not refuse municipal services to a new owner because of historical debts still outstanding with regard to the property.

The application was granted with costs.

**Note:** The SA citation for this matter is: *Jordaan and Another v Tshwane City and Another, and Four Similar Cases* 2017 (2) SA 295 (GP).

## Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, advocates, civil procedure, constitutional law (the right to assemble and protest), family law, interpretation of statutes, lease, practice, prescription and the public protector.



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

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By  
Martin  
Labuschagne

# Witchcraft as misconduct

*National Sugar Refining and Allied Industries Union obo Mngomezulu v Tongaat Hulett Sugar Ltd (Darnall) [2016] 11 BALR 1172 (NBCSMRI)*

Whatever one's opinion of the so-called *Fallist*-movement and its rallying call for *decoloniality* is, it has achieved one lasting success and that was to put the fault lines between the Western understanding of the world and that of the African experience in greater relief.

These fault lines confronted Commissioner Karen Charles of the National Bargaining Council for the Sugar Manufacturing and Refining Industry in the above referenced case. The case revolved around the use of witchcraft by one employee on another.

The salient facts of the matter were the following: Nokukhanya Nxele was the Human Resources Manager for Operations of the respondent. Louis Mngomezulu was a boiler panel operator and a shop steward.

According to Ms Nxele, the relationship between her and Mr Mngomezulu was an acrimonious one, while the latter denied this at the arbitration.

On 24 March 2014, Ms Nxele discovered a slimy substance on the handle of her motor vehicle, which she described as 'like Vaseline but was black'. Ms Nxele then had 'an urge in her spirit to pray.' She also indicated that when she made contact with the substance she 'had not felt right'. A colleague of hers, a one 'Patrick', approached and advised her to wash it off in order to reduce its power. Patrick also pointed to a block of the same substance behind the front wheel of her vehicle.

Although Ms Nxele professed to be a Christian, the suspected muti still caused her distress. Ms Nxele later on consulted a sangoma, who indicated that although she did not see the substance herself, from the description of Ms Nxele she could identify it as muti. The respondent's attorneys also enlisted the expertise of a sangoma, Gloria Mkhize to confirm that the substance was on a balance of probabilities muti (there was a dispute whether Mr Mngomezulu indeed did put muti on the handle of Ms Nxele's vehicle, but this is beyond the scope of this article as the purpose of this article is to discuss the law only).

Mr Mngomezulu was charged, as per the charge sheet, with placing the safety, health and or/ life of Ms Nxele at risk in that by 'knowingly and deliberately placed some black, gummy substances on the door and key hole of Ms Nxele's

silver grey BMW, ... and in line on the ground.

In doing so, it was his intention through the practice and belief in witchcraft to cause either spiritual, mental or physical harm to her.

As a consequence of your action and in your capacity as a senior shop steward familiar with the rules of conduct in the workplace, you breached the relationship of trust and good faith existing between yourself and the company and made the ongoing employment relationship untenable.'

Mr Mngomezulu was found guilty and dismissed from the employ of the respondent.

It is necessary to reiterate that whether the witchcraft is in reality effective or not, was not to be adjudicated on. One must mention that in fact, the Supreme Court of Appeal in the matter of *Kievits Kroon Country Estate (Pty) Ltd v Mmole-di* 2014 (1) SA 585 (SCA) has cautioned courts and by extension, tribunals, not to make pronouncements on spiritual or cultural matters. Cachalia JA stated as follows in para 27:

'Our courts are familiar with and equipped to deal with disputes arising from conventional medicine, which are governed by objective standards, whereas questions regarding doctrine or cultural practice are not. Courts are therefore unable and not permitted to evaluate acceptability, logic, consistency or comprehensibility of the belief. They are concerned only with the sincerity of the adherent's belief, and whether it is being invoked for an ulterior purpose. This of necessity involves an investigation of the grounds advanced to demonstrate that the belief exists.'

The issue at hand was the fact that the use of muti intimidated Ms Nxele. As Commissioner Charles stated in paras 301 and 302:

'The act of witchcraft does not have to achieve its purpose (because only the perpetrator and the Sangoma will know the exact effect he desired) for it to become an act of misconduct. I agree with Lawrence [attorney for the respondent] that the mere use of muti or traditional preparations to intimidate, scare or threaten another person is sufficient.'

Ms Nxele had a sincere belief in the power of witchcraft and it frightened her or at least made her feel very uneasy. This was due to the fact that Ms Nxele came from a cultural background where the belief in witchcraft was part of her

cultural heritage. As the commissioner indicated in para 299:

'In the African context, witchcraft, whether one is Christian or not, is still a strong force to be reckoned with.'

In my view, because the act is one of intimidation, the misconduct of witchcraft does not even require the perpetrator to believe in it. For instance, I may not believe in the power of witchcraft, but I know that X does. In order to intimidate him or her, I purportedly cast a spell on him or her in his or her presence with the view of causing him or her fear or apprehension. This would also constitute misconduct in the form of intimidation.

In the event where the perpetrator believes in witchcraft, but the 'victim' does not, the action may still be a misconduct, but not intimidation. It can still be construed as insulting and, therefore, a form of 'insolence'.

Conversely, in my opinion, false accusations of witchcraft in the workplace should also be viewed in a serious light and ought to attract a sanction of dismissal, should the particular employee be found guilty. This can be compared with false accusations of racism, which have at times been compelling reasons to have an employee dismissed (see *SA Chemical Workers Union and Another v NCP Chlorchem (Pty) Ltd and Others* (2007) 28 ILJ 1308 (LC)). In South Africa, accusations of witchcraft may not only be an insult, it can be life-threatening as purported witches are sometimes murdered by communities.

Moreover, it can also be a contravention of s 1(a) of the Witchcraft Suppression Act 3 of 1957 as amended, which reads as follows:

'Any person who -

(a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;

...

shall be guilty of an offence ...'

It goes without saying that when false accusations of witchcraft also constitute a crime, they may be cause for a disciplinary hearing against the offending employee.

**Martin Labuschagne BA BLC LLB (UP) is the Manager: Disciplinary and Incapacity Enforcement section in the Directorate: Employee Relations and Wellness at the University of South Africa.** □



By  
Yashin  
Bridgemohan

# Consequences of an arbitrator's failure to consider s 193(2) of the Labour Relations Act

*Moodley v Department of National Treasury and Others* (LAC) (unreported case no JA13/2016, 10-1-2017) (Coppin JA) (Ndlovu JA and Savage AJA concurring)

Section 193(2) of the Labour Relations Act 66 of 1995 (LRA) provides that the Labour Court (LC) or arbitrator (which includes a Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner) '... must require the employer to reinstate or re-employ the employee unless –

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

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

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

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

The Constitutional Court in the case of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC) at para 44 held that the commissioner failed to make the s 193(2) determination and had, in fact, ignored and failed to take into account evidence that the reinstatement or re-employment of the employee would be intolerable and that the failures were unreasonable. Mogoeng CJ provided:

'After concluding that Mr Kruger's dismissal was unfair, the arbitrator immediately ordered his reinstatement without taking into account the provisions of section 193(2). She was supposed to consider specifically the provisions of section 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering Sars to reinstate Mr Kruger despite its contention and evidence that his continued employment would be intolerable. She was required to say whether she considered Mr Kruger's continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. And those are the key factors she ought to have considered before she ordered SARS to reinstate Mr Kruger.'

## Facts

In August 2007, the first respondent em-

ployed the applicant as a Director of Facilities Management. On 19 April 2011, the first respondent charged the applicant with 11 counts of misconduct relating mainly to non-compliance with procurement procedures and the failure to disclose her interests relating to certain transactions and the receipt of a gift.

The disciplinary hearing was chaired by the fourth respondent, an independent advocate. The chairperson found the applicant guilty of nine of the 11 charges. The chairperson imposed a sanction in respect of each charge and further imposed an overall sanction in respect of all the charges, which was dismissal with an alternative of demotion.

The applicant, through her legal representative, in a letter dated 15 February 2012, forwarded to the first respondent, acceptance of the lesser sanction of demotion. Notwithstanding the lesser sanction imposed by the chairperson, and the applicant's acceptance thereof, the Director-General of the first respondent informed the applicant that she was discharged from the Public Service on account of misconduct and her dismissal was effective immediately.

The applicant's dispute of unfair dismissal which was referred to the General Public Service Sector Bargaining Council (GPSSBC), proceeded to arbitration. The main point of the applicant's complaint was that the department could not have substituted the chairperson's lesser sanction of demotion with a dismissal and that such a substitution was inherently unfair.

The arbitrator made the following award:

- The sanction of demotion should stand and the respondent is ordered to reinstate the applicant retrospectively.
- The respondent is ordered to pay the applicant her salary from 21 February 2012 calculated at the salary scale of the applicant at the time of her dismissal.
- The said amount must be paid on or before 30 July 2012.

The first respondent then made application to the LC on 21 September 2012 to review and set aside the award made by the arbitrator. The first respondent further sought to have the matter remitted to the GPSSBC for a hearing *de novo* before a new arbitrator.

The court *a quo* found that the arbitrator's award did not fall within the

bounds of reasonableness. The court *a quo* found arbitrators are required to determine, having regard to a variety of factors (including those in Schedule 8 of the LRA), whether the sanction of dismissal was fair. It was required of the arbitrator to determine what was fair and did not require the arbitrator to defer to the employer's decision, but to consider all relevant circumstances.

The applicant then sought leave to appeal from the court *a quo*, which was granted.

## Labour Appeal Court's (LAC) judgment

Coppin JA found the arbitrator's award did not refer at all to s 193 of the LRA. Similar to the arbitrator in the *South African Revenue Services* case, the arbitrator did not seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. The arbitrator's omission to do so, in circumstances where he or she, was legally obliged to have done so, was justifiably criticised as being unreasonable and as a failure of the arbitrator to apply his or her mind to the issues.

Coppin JA further disagreed with the reasoning of the court *a quo* on the merits, found its conclusion that the arbitrator's award had to be set aside was correct.

The LAC accordingly dismissed the applicant's application.

## Conclusion

The judgment is important as it confirms that when dealing with unfair dismissal disputes relating to misconduct, where an employer changes a chairperson's final sanction, there is a duty on arbitrators to consider s 193(2) of the LRA. Failure to do so by an arbitrator vitiates the arbitration award. An employer aggrieved by said failure may make application to the LC to have the arbitration award reviewed and set aside.

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## Dishonesty in the fulfillment of a suspensive condition

In *Kawalya-Kagwa v Development Bank of Southern Africa* [2017] 1 BLLR 33 (LC), the applicant and the bank entered into a fixed term contract of employment in which the applicant would be employed as a General Manager, subject to the condition that he obtain a valid work permit. While the applicant was in the process of obtaining his work permit, he suggested that he continue to work for the bank without pay. The bank agreed to the applicant's proposal but set a deadline for him to secure a valid work permit, failing which the offer of employment would lapse with immediate effect. When the applicant ultimately presented a copy of his work permit to the bank, the bank addressed a letter to the applicant, welcoming him to the bank and confirming his fixed term contract of employment.

Subsequently, the bank formed suspicions about the authenticity of the applicant's work permit and was advised by an immigration law expert that the work permit was in fact fraudulent. The bank informed the applicant that he need not report for duty and his salary was stopped. Following this, the bank instructed the applicant to provide it with information relevant to the investigation into the validity of his work permit. When the applicant refused, the bank informed the applicant that he had failed to comply with a reasonable instruction and that it would take appropriate disciplinary action against him.

The applicant then referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that the bank had committed an unfair labour practice by unfairly suspending him without pay. Simultaneously, the applicant launched an urgent application to the Labour Court (LC) seeking interim relief that the bank pay him his salary of which he had been deprived from the date he presented his permit, pending the outcome of the unfair labour practice dispute. The bank opposed the applicant's claim, alleging that the appli-

cant had failed to fulfil the suspensive condition in his employment contract by not obtaining a valid work permit.

The question before the LC was whether, on production of the work permit, the suspensive condition in the employment contract was fulfilled and the applicant became an employee of the bank. In the court's view, the bank had acknowledged that the applicant had satisfied the suspensive condition when he presented a copy of his work permit. The fact that the bank harboured suspicions about the authenticity of the permit could not in itself establish that the suspensive condition had not been fulfilled and at no stage did the bank categorically inform the applicant that the permit he had presented was invalid.

The conclusion that the applicant was in fact an employee was further supported by the bank's threat of disciplinary action. In this regard, the court held that the bank could not have it both ways – it could not contend that the applicant was not an employee and at the same time, that he was subject to its disciplinary code and procedures. Accordingly, for purposes of the application, the court had to accept that the bank did, on face value, accept that the work permit was valid and that the applicant was an employee of the bank.

Although the court found that the applicant was indeed an employee of the bank, the applicant failed to discharge all the requirements for the urgent interim relief in that he had not produced evidence of irreparable harm or that there was no alternative satisfactory remedy. The application was accordingly dismissed.

## The sanctity of settlement agreements

In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* [2017] 1 BLLR 1 (CC), the employee was employed as a Regional Human Resources Director. It subsequently came to the employer's attention that during the employee's appointment interview, he had untruthfully identified Unilever as his then employer, whereas in truth it was Standard Chartered Bank. This misrepresentation had induced the employee's current employer to pay him a sign-on bonus of US\$ 40 000. Before the employee was dismissed for misrepresenting the identity of his then employer, he concluded a 'mutual separation' agreement in which he, *inter alia*, waived all rights to contest his dismissal under the

Labour Relations Act 66 of 1995 (LRA).

The employee later claimed that he was coerced into signing the separation agreement and referred an urgent application to the Labour Court (LC) for a declaratory order to this effect. The employee's application to the LC was dismissed, as was the employee's appeal to the Labour Appeal Court (LAC). On a further appeal to the Constitutional Court (CC), the employee contended that he had been denied a fair pre-dismissal hearing and that the separation agreement denied him his constitutional right to approach the Commission for Conciliation, Mediation and Arbitration or the LC.

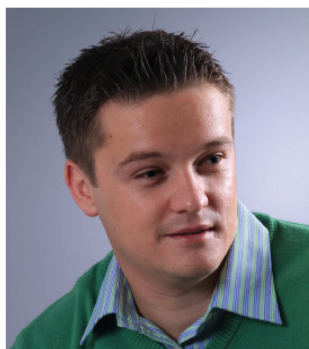
The CC found that the only issue worth pursuing was whether the separation agreement was against public policy for excluding judicial duress. In this regard, the LAC had held that the bar to redress under the LRA was permissible, given the relationship between the contracting parties. While the CC had already issued a warning against contractual provisions, which excluded one's access to courts, it found that it was still required to consider the importance of giving effect to agreements solemnly concluded by parties with similar bargaining power and the need for parties to settle their disputes on terms agreeable to them.

In the present matter, the employee had engaged in outright deceit and misrepresentation. Knowing that he had no defence to the employer's accusations, he agreed to part ways with his employer on terms that were final, and that protected him from further action by his employer. He had thus voluntarily entered into a separation agreement to put the present dispute to bed.

The CC held that the public and the courts have a powerful interest in enforcing agreements of this sort. When parties settle an existing dispute in full and final settlement, none should be lightly released from such a serious undertaking. This is particularly so if the agreement was for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts was on its own invalid and unenforceable, the employee must still fail because he concluded an agreement that finally settled his dispute with his employer.

In light of this finding, the CC declined to consider the employee's other grounds of appeal and the application for leave to appeal was dismissed with costs.





# New legislation

Legislation published from  
2 – 31 March 2017

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## Bills introduced

Plant Health (Phytosanitary) Bill B7 of 2017.

Refugees Amendment Bill B12B of 2016.  
Extension of Security of Tenure Amendment Bill B24A of 2015.

Extension of Security of Tenure Amendment Bill B24B of 2015.

## Commencement of Acts

**Insurance Laws Amendment Act 27 of 2008, ss 1(f) and 27(a).** *Commencement:* 1 April 2017. GN298 GG40749/30-3-2017.

**Financial Services Laws General Amendment Act 45 of 2013, s 264 insofar as it amends s 1 of the Medical Schemes Act 131 of 1998.** *Commencement:* 1 April 2017. GN298 GG40749/30-3-2017.

## Selected list of delegated legislation

**Agricultural Product Standards Act 119 of 1990**

Amendment of regulations regarding inspections and appeals: Exports. GN R257 and 258 GG40713/24-3-2017.

**Animal Identification Act 6 of 2002**

Amendment of regulations. GN181 GG40660/3-3-2017.

**Compensation for Occupational Injuries and Diseases Act 130 of 1993**

Classification of industries. GN216 GG40675/10-3-2017.

Annual increase in medical tariffs for medical service providers in respect of services rendered on or after 1 April 2017. GenN259 to GenN268 in GG40736/30-3-2017 to GG40745/30-3-2017.

**Children's Act 38 of 2005**

Amendment regulations relating to adoption fees for accredited child protection organisations in respect of adoption services. GN282 GG40733/31-3-2017.

**Dental Technicians Act 19 of 1979**

Amendment of regulations relating to the registration of dental laboratories and related matters. GN206 GG40669/8-3-2017.

**Electronic Communications Act 36 of 2005**

Increase of radio frequency spectrum licence fees. GenN237 GG40719/24-3-2017.

Amendment regulations on the establishment of the consumer advisory panel. GenN241 GG40725/28-3-2017.

**Engineering Profession Act 46 of 2000**

Code of Conduct for registered persons. BN41 GG40691/17-3-2017.

Procedure for lodging an appeal against decisions of the Engineering Council of South Africa. BN40 GG40691/17-3-2017.

**Income Tax Act 58 of 1962**

Determination of the daily amount in respect of meals and incidental costs for purposes of s 8(1) as from 1 March 2017. GN194 GG40660/3-3-2017 (also available in Afrikaans).

Fixing of rate per kilometre in respect of motor vehicles for purposes of s 8(1)(b) (ii) and (iii) as from 1 March 2017. GN195 GG40660/3-3-2017 (also available in Afrikaans).

List of persons or entities that may administer financial instruments or policies as a 'tax free investment' for the purposes of s 12T. GN308 GG40757/31-3-2017.

Amendment of the regulations in terms of s 12T(8) of the Act on the requirements for tax free investment. GN R309 GG40758/31-3-2017.

**Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008**

Inclusion of the National Health Laboratory Service as a sch 1 institution. GN234 GG40691/17-3-2017.

**Liquor Products Act 60 of 1989**

Amendment of regulations (fees). GN238 GG40694/17-3-2017.

**Military Ombud Act 4 of 2012**

Renumeration and other terms and conditions of service for the Military Ombud and the Deputy Military Ombud. GN183 GG40660/3-3-2017.

**National Forests Act 84 of 1998**

Declaration of a lists of national forest types as natural forests. GenN167 GG40660/3-3-2017.

**National Health Act 61 of 2003**

Amendment of the regulations regarding the general control of human bodies, tissue, blood products and gametes. GN244 GG40700/17-3-2017.

**National Heritage Resources Act 25 of 1999**

Regulations in accordance with s 9. GenN218 GG40691/17-3-2017.

**National Nuclear Regulator Act 47 of 1999**

Fees payable to the regulator in respect of any application for the granting of a nuclear authorisation and any annual nuclear authorisation fee. GenN185 and 186 GG40673/10-3-2017.

**Natural Scientific Professions Act 27 of 2003**

Recommended fees. BN15 GG40660/3-3-2017.

**National Water Act 36 of 1998**

Regulations regarding the procedural requirements for water use licence applications and appeals. GN R267 GG40713/24-3-2017.

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

Incorporation of Health and Safety Standards into Pressure Equipment Regulations, 2009. GN R262 GG40713/24-3-2017.

Guidelines for Driven Machinery Regulations, 2015. GN R288 GG40734/31-3-2017.

**Plant Improvement Act 53 of 1976**

Amendment of the regulations relating to establishment, varieties, plants and propagating material. GN182 GG40660/3-3-2017.

**Private Security Industry Regulation Act 56 of 2001**

Amendment of regulations (fees). GenN242 GG40728/28-3-2017.

**Safety at Sports and Recreational Events Act 2 of 2010**

Safety at sports and recreational events regulations, 2017. GN R200 GG40661/3-3-2017.

**Small Claims Courts Act 61 of 1984**

Establishment of a small claims court for the areas of Stutterheim, Cathcart and Komga. GN190 GG40660/3-3-2017.



Establishment of a small claims court for the areas of Hofmeyr. GN230 GG40691/17-3-2017.

Establishment of a small claims court for the areas of Welkom, Hennenman, Virginia, Ventersburg, Odendaalsrus and Theunissen. GN304 GG40752/31-3-2017. Alteration of the area of the small claims court for Bloemfontein and establishment of a small claims court for the area of Reddersburg. GN303 GG40752/31-3-2017.

Establishment of a small claims court for the areas of Senekal, Paul Roux and Winburg. GN302 GG40752/31-3-2017.

#### **Social Assistance Act 13 of 2004**

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Draft National Biodiversity Offset Policy in terms of the National Environmental Management Act 107 of 1998. GN276 GG40733/31-3-2017.

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By  
Meryl  
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Abbreviation	Title	Publisher	Volume/issue
<i>EL</i>	Employment law	LexisNexis	(2017) 33.1
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<i>PER</i>	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2017) March
<i>PLD</i>	Property Law Digest	LexisNexis	(2017) 21.1
<i>SACJ</i>	South African Journal of Criminal Justice	Juta	(2016) 29.3
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<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	LexisNexis	(2017) 80.1

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# South Africa/Russia nuclear power deal: A mockery of the constitutional procurement principles

By Dr  
Prenisha  
Sugdhav-  
Sewpersadh

**O**n 21 September 2014 South Africa (SA) entered into an international government agreement with Russia pertaining to the purchase of 9.6GW of electricity to be generated through nuclear energy. The estimated cost of this procurement is said to be in excess of R 1 trillion. (Founding Affidavit of Earthlife Africa in the matter of *Earthlife Africa - Johannesburg and Another v The Minister of Energy* (WCC) (case no 19529/2015)).

The conclusion of the Russian agreement was met with huge public outcry as it signalled significant deviations from legitimate procurement processes. Indeed, I submit that the Russian agreement, not only represents violations of a fair and open public procurement process, but actually goes so far as to make a mockery of constitutional procurement principles.

## What is public procurement and its legislative framework?

It is prudent to begin with a brief explanation of public procurement in SA and the laws which govern it. Procurement is generally described as the function of purchasing goods and services from an outside body (Phoebe Bolton 'Grounds for Dispensing with Public Tender Procedures in Government Contracting' *PER* 2006 (9) 2). Public procurement is, therefore, the purchasing of goods and services by public entities, such as government, from outside bodies. Government generally purchases goods and services in order to meet its service delivery mandate. In SA, the public procurement sector or government procurement is estimated to amount to approximately 14% of the gross domestic product (Bolton *op cit*). Naturally the spending of public funds must be undertaken within a defined legislative framework with appropriate checks and balances. In SA public procurement is extensively regulated. However, the Constitution sets out

clear procurement principles, which all procurement models and decisions must adhere to in order for such model or decision to be valid.

## The constitutional procurement principles

Section 217 of the Constitution provides that when an organ of state contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. There is a school of thought that fairness within the context of s 217 refers only to procedural fairness. (Phoebe Bolton *The Law of Government Procurement in South Africa* (Durban: LexisNexis 2007)). However, it may be cogently argued that the principle of fairness as contained in s 217 may be interpreted to mean something more than only procedural fairness. Transactions entered into by virtue of public procurement result in contracts. However, such contracts are not entirely akin to contracts within the private sector, wherein contracting parties are bound and obligated only to one another, to the exclusion of non-contracting parties. Government, as the custodian of public funds, can be said to always have a fiduciary duty to the general public in all of its decisions, actions and/or conduct, including when it contracts for goods and services. The necessity for substantive fairness in addition to procedural fairness is therefore clear.

The principle of equity addresses issues of redress in order to balance the effects of past discriminatory practices. Transparency is viewed as probably the most important procurement principle, which ensures that processes are not carried out in secret. Transparency, however, entails more than the mere right to access to information. It has been said that the underlying aim or rationale for a transparent procurement system is to ensure that interested or affected parties, like the media, the legislature, potential contractors and the public as tax payers, are free to scrutinise the

procedures followed (Bolton *op cit*). Therefore, I submit that a transparent procurement system, in addition to ensuring that procedures are open to the public, is to ensure that actual reasons and underlying principles in terms of which decisions are made are fair, lawful, rational and free of any venal intent.

The principles of competition and cost-effectiveness are concerned largely with the attainment of value for money. This ensures the responsible use of public funds and encourages commercial competition among potential bidders. These principles, correctly applied, should result in the best possible good or service procured at the most cost-effective price.

## Legislation enacted to give effect to constitutional principles

Certain key public procurement legislation have been enacted. Some of these will be mentioned briefly. At national and provincial level, public procurement is regulated by the Public Finance Management Act 1 of 1999 (PFMA) specifically reg 16A thereof. At local government level, public procurement is regulated by the Municipal Finance Management Act 56 of 2003 (MFMA), specifically its municipal supply chain management regulations. Further to this there is a plethora of National Treasury prescripts, which regulate public procurement. The Preferential Procurement Policy Framework Act 5 of 2000 applies to all levels of government and it provides a framework for the recognition of socio-economic components and the setting and evaluation of award criteria.

The procurement regulations of the PFMA, as well as those of the MFMA make provision for various procurement models depending on the expenditure involved. For contracts in excess of R 200 000 the competitive bidding model is prescribed. This model is commonly known as the tendering process.

While the tendering process may take various forms such as a two stage bidding

process, or a closed bidding process, the procurement regulations stipulate certain features, which must be inherent in every tendering process. Essentially the tendering system is characterised by a bid committee system, wherein project specifications are formulated by a bid specification committee, tender adverts are publicly published and evaluation of bids are undertaken by two committees functioning independently of one another, viz a bid evaluation committee and a bid adjudication committee. The roles of bid committees are to ensure that fair and transparent tendering processes have been followed, that no bidder was unduly advantaged and to make or recommend the making of an award accordingly.

South African law does make provision for the deviation from the normal procurement processes in certain defined circumstances, such as reg 36 of the MFMA regulations. Notwithstanding such deviations the principles enunciated in s 217 of the Constitution must still be shown to have been respected and adhered to.

## The SA/Russia nuclear power deal

In terms of s 34 of the Electricity Regulation Act 4 of 2006 (ERA) the Minister of Energy may, in consultation with the National Energy Regulator of SA, make certain determinations prior to the procurement of new generation capacity. Such determinations are set out in s 34(1)(a) to (d) of the ERA, but include a determination that new generation capacity is needed and a determination of the types of energy sources from which electricity must be generated. Once these ministerial determinations are done and gazetted, s 34(1)(e) of the ERA requires that such new generation capacity be established through a tendering system which is fair, equitable, transparent, competitive and cost-effective. There is, therefore, no permissible side-stepping of the constitutional principles.

National Treasury has divided the supply chain management process governing tenders into the following broad phases:

- demand management;
- acquisition management;
- logistics management; and
- disposal management.

The purpose of proper demand management is to ensure effective procurement planning and to ensure that the demand for the goods or service really does exist and in what quantities. Clearly this is the purpose of the s 34 ministerial determinations in terms of ERA. It is clear that this section mandates the minister to make these determinations prior to embarking on any procurement

process. Further to this, a clearly defined procurement process, which adheres to all constitutional principles, must be established prior to any procurement action being taken.

Notwithstanding the above legislative requirements it appears that the Minister of Energy, authorised by the President in his capacity as Head of the Executive, has seen it fit to enter into a legally binding contract with Russia for the procurement of nuclear power plants (founding affidavit (op cit)). The interesting features of this agreement lie in its comprehensiveness and detailed provisions. It is in fact indicative of the type of contract, which would be entered into with a successful bidder after an open and fair tender procedure has taken its course. In this instance, however, no valid tender process has yet been established, let alone implemented.

According to High Court papers filed by Earthlife Africa and the Southern African Faith Communities' Environment Institute against the Minister of Energy in a case against the entering into of this agreement, the following salient details may be extracted from the Russian agreement: The preamble recognises the relationship between the parties as that of a 'strategic partnership'. This is notwithstanding that this is the term used by government to refer to the party that will ultimately construct the new nuclear power plants through a legitimate procurement process. The agreement clearly sets out that the partnership will be, *inter alia*, in the area of design, construction, operation and decommissioning of the NPP (new nuclear power plant) units based on the VVER reactor technology in the Republic of South Africa, with a total installed capacity of about 9.6 GW. I submit that such technical detail may only be established after the s 34 ministerial determinations have been published, and further after a set of bid specifications have been drafted by a properly constituted committee. In practice, government departments generally make use of consultants for the drafting of highly technical bid specifications, with the rule that such consultants may obviously then not bid for the same tender.

In the present case, it appears that the entire tender process has been condensed into one document, which is the Russia agreement. It appears that demand management and bid specifications have been drafted in consultation with Russia, that it was agreed Russia was the only country from which the particular reactors may be purchased and that award was therein made to Russia. All of this having been done without a single bid committee having been established or any other legitimate procurement process been followed.

A more blatant disregard for constitutional provisions has never before been seen in public procurement. It can never be argued by government that it sought the guidance from Russia as a strategic partner. The use of Russia in this sense, would then preclude it from all bidding processes with regards to the purchase of nuclear power, as the principle of fairness would demand their preclusion. The entering into of the agreement with Russia is prejudicial and unfair to other prospective bidders as the procuring entity has now fettered its discretion by entering into a prior agreement with Russia. Whichever way one looks at this scenario, fairness, both procedurally and substantively, is compromised.

In my opinion, a reading of the Earthlife High Court papers referred to above, reveals the clandestine manner in which the Russia agreement was entered into. To date the minister has failed to produce the s 34 determinations mentioned above. No procurement model, as envisaged in terms of s 34(1)(e) has been produced either. It is, therefore, impossible for the public to scrutinise the process followed. Transparency has been overshadowed by seemingly dark and sinister actions, and incoherent press reports. It appears that the signing of the Russia deal has turned the constitutional procurement process on its head. A contract has been entered into, and what remains to be determined is the process of procurement, which would have justified the entering into of such a contract.

It appears that the national executive, as the only authority designated by the Constitution to sign international agreements, has used this power to bind the country in the largest procurement deal without a single legitimate procurement process having been followed.

## Conclusion

South Africa has a highly regulated public procurement system governed by constitutional principles. Notwithstanding this, the government has entered into a binding contract with an outside party, which is envisaged to cost the country in excess of R 1 trillion. No legitimate procurement process has been identified. The validity of the agreement entered into with Russia makes a mockery of the constitutional procurement principles of SA.

**Dr Prenisha Sugudhav-Sewpersadh LLB LLM PhD (UKZN)** is an attorney practising at Dr Sugudhav-Sewpersadh Attorneys in Port Shepstone.



For any legal practitioner, the law of real security is critical to understand, specifically how this area of law interacts and dovetails with other areas of law such as insolvency, the law of property, as well elements of the National Credit Act 34 of 2005 (NCA), to name a few. This book is highly recommended for attorneys who have contact with the law of real security through these lenses. It simplifies the interface between credit providers and debtors, which makes it a highly accessible publication for any practicing attorney, yet is sufficiently detailed to provide an accurate synthesis of the law of real security in South Africa (SA).

The topic of mortgages, one of the most crucial forms of real security, is covered in great detail in the book. Specifically, cession of rights, foreclosures and executions against a home, with reference to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Reference is also made to law in foreign jurisdictions where the law is particularly relevant.

The topic of pledge is covered in a significant amount of detail, despite its limited commercial usefulness. The book concisely and accurately describes the recent jurisprudence surrounding the uncertainty in relation to *parate executie* clauses in the context of pledge.

Another commendable feature of this book is its continuous reference to the provisions of the NCA and its impact on the various forms of real security. However, as a result of this structure, where the book could be mildly faulted is the lack of a dedicated chapter on the NCA for ease of reference. However, all the relevant information surrounding

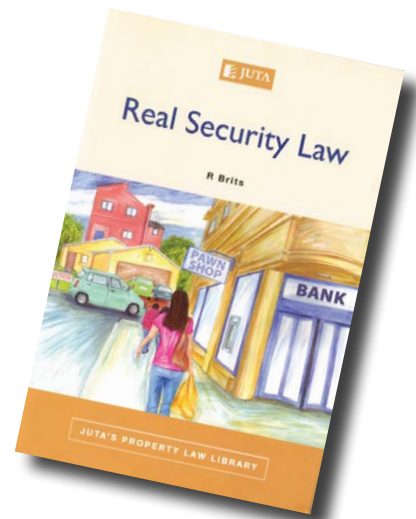
the NCA and its specific impact, can be found throughout the book, depending on the type of real security it influences.

A particularly strong feature of this publication is the chapter on notarial bonds. The chapter not only emphasises the commercial viability of notarial bonds in comparison to pledge, but highlights the limitations of a general notarial bond, the salient features of a perfection clause and the usefulness thereof. This chapter does an excellent job of navigating the somewhat complicated historical legal treatment of this topic, as well as synthesising the nuanced arguments that emerge from the law reports.

The consistent references throughout the book to the law of real security in various jurisdictions, as well as the careful analysis of the limitations of certain types of security, differentiates it from a pure reference publication. This, in addition to the several references as to the direction in which the law is anticipated

# Real Security Law

By Reghard Brits  
Cape Town: Juta  
(2016) 1st edition  
Price: R 750 (incl VAT)  
680 pages (soft cover)



to take in this regard makes *Real Security Law* a fantastic addition to the collection of any legal practitioner.

As far as a step-by-step practical guideline on how to execute against property subject to a notarial bond or mortgage on immovable property, there are arguably better sources available, however, should one be looking for an up to date book, which simply and accurately explains the law relating to real security in SA, one would be hard pressed to find a more comprehensive publication in this area of South African law.

Jenna Leonard is a candidate attorney at Webber Wentzel in Johannesburg. □

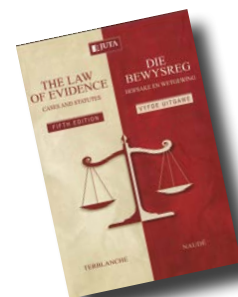
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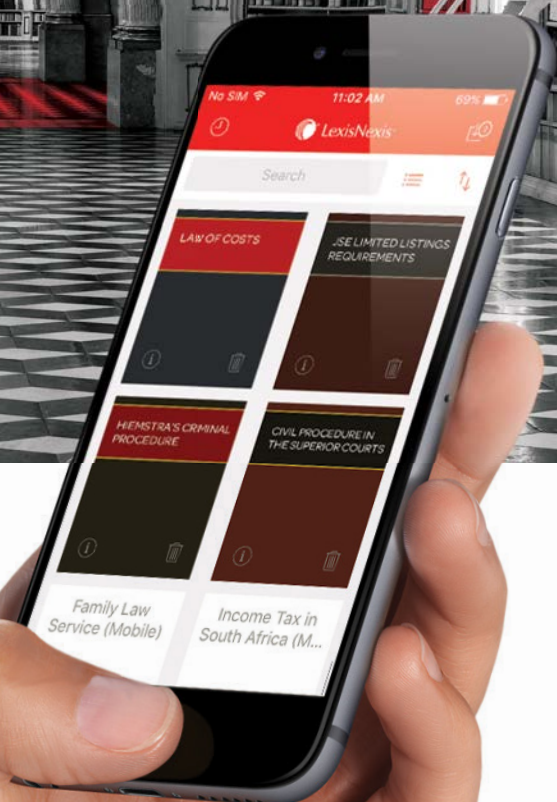
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# RISKALERT

MAY 2017 NO 2/2017

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## RISK MANAGEMENT COLUMN

### A NOTE FROM THE EDITOR

Welcome to the second edition of the *Bulletin* for 2017.

We are fast approaching the middle of the year and, with that, the roll out of a new AIIF insurance year. The AIIF insurance scheme year runs from 1 July of each year to 30 June of the following year. Please keep a look out for the new Master Policy which will be published in a special edition of the *Bulletin* on 1 July 2017. It is rather concerning to note that there are still many practitioners who do not read the *Bulletin* or any of the other AIIF publications and thus claim to have no knowledge of policy changes, as and when made at the beginning of each insurance year. In one instance, a practitioner has even tried to argue that the policy was not gazetted and he sought, unsuccessfully, to challenge the repudiation of a claim on that basis. The duty lies with practitioners to familiarise themselves with the contents of the AIIF Master Policy (on the professional indemnity (PI) side of the business) and the terms and conditions applicable to the granting of bonds of security to executors.

Prior to the implementation of the changes to the professional indemnity policy on 1 July 2016, the AIIF had spent almost a year publicising the impending changes through various media and forums. The changes to the terms and conditions under which bonds of security are issued were similarly publicised. A report by the AIIF, sent to the four statutory law societies in 2015 for circulation to their members, included an update on the pending policy changes. In the last four years, we have also attended some of the law society AGM's and addressed the practitioners in attendance with regards to problem



Thomas Harban,  
Editor

claim areas and the changes to the AIIF policies. Attorneys are thus encouraged to read all communication sent out by their law societies, the Attorneys Fidelity Fund (the Fund) and the AIIF.

Since the beginning of this year we have addressed practitioners who have attended the Risk Management and Insurance module (Module 2) of the Practice Management and Training (PMT) programme offered by LEAD in various centres around the country. On the one hand, it is always exciting to address new practitioners on the respective roles and functions of the Fund and the AIIF, alerting them of the potential risks faced in practice and suggesting measures that could be implemented in their respective practices in order to mitigate against these risks. However, on the other hand, it is rather concerning that many practitioners still have little or no appreciation of the importance of implementing risk management measures in their practices. Very few of the practitioners attending the PMT courses showed even a basic knowledge of the Attorneys Act 53 of 1979 and the Legal Practice Act 28 of 2014. One would expect

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## RISK MANAGEMENT COLUMN continued...

that, being legal practitioners, a reading of the current and incoming legislation governing the profession in which they operate would have been undertaken as a priority.

Law firms are urged to develop and implement an internal risk management culture. As at 31 December 2016, the AIIF's outstanding claims liability has been actuarially assessed at R391 million. The outstanding claims liability continues to grow as new claims are notified to the company on a daily basis. What can be gleaned from assessing the claims notified is that most of the claims could have been avoided by practitioners implementing internal risk management measures and practices. As I have previously mentioned in some of the forums that I have addressed, by drilling down into the underlying reasons for the claims, it will be noted that in many instances the underlying conduct of the

insured firm which leads to the claim is clearly reckless. A drastic change in the general attitude to the risk of claims needs to take place in the interests of the firms concerned, the legal profession and the long term sustainability of the AIIF.

We continue to tender our services (at no cost) to assist individual firms with the development and implementation of appropriate risk management measures but, unfortunately, the uptake of this offer from firms has been very slow. Practitioners are, once again, urged to take a pro-active approach to risk management. At the end of the day, pro-active risk management will assist in the prudent running of your law firm as a business enterprise, save your money (in respect of paying an excess on claims or an amount above the AIIF limit of indemnity) as well as your reputation. All staff in the firm should be actively involved in the effective management of risk.

Unfortunately, despite the warnings published by us in various media, many practitioners are still falling victim to scams. Practitioners are urged to have regard to past editions of the *Bulletin* (available on our website [www.aiif.co.za](http://www.aiif.co.za)) and to the article "*Susceptible to scams?*" published by the Risk Management Unit of the Fund in the December 2016 edition of *De Rebus*.

In this edition we introduce Cynthia Mofokeng, a new member of the AIIF team and also address some 'boiler plate' risk management issues.

Practitioners are also urged to contact us with suggestions on any risk related issue they would like us to address in the *Bulletin*.

Kind regards

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## INTRODUCING CYNTHIA MOFOKENG

It gives us great pleasure to introduce a new member of the AIIF team, Cynthia Pheello Mofokeng. Cynthia joined the AIIF at the end of January 2017 as a Legal Advisor and deals with claims brought against insured attorneys. Her previous employment was with the South African Post Office (SAPO) where she held the role of Legal Manager. Cynthia is an admitted attorney and possesses a LLB degree from Vista University, a Diploma in Drafting and Interpretation of Contracts from the University of Johannesburg and she is currently reading towards a LLM in corporate law.

Please join me in welcoming Cynthia to the AIIF team.



## THE IMPORTANCE OF INTERNAL CONTROLS IN FIRMS

The importance of internal controls cannot be over emphasised.

In so far as the proper administration of the finance functions in the firm are concerned, it is important that all applicable accounting and bookkeeping measures are implemented and that staff are properly trained. A proper segmentation of duties needs to be put in place. We have seen claims where misappropriation of funds has occurred because the practitioners concerned simply authorised payment requests without properly interrogating the reason for the payment, the details of the payee or requesting to see the underlying documentation in

support of the payment.

It has been noted that "*very often it is not lack of legal knowledge that leads to professional negligence claims, but non-adherence to basic office management procedures*".

In order to avoid or mitigate the risk not only of PI claims, but also misappropriation of trust funds, practitioners thus need to develop and implement appropriate systems of internal controls. Such systems will avoid or mitigate the risks, not only of professional indemnity claims, but also the risks associated with the misappropriation of funds.

The graph on the next page shows a breakdown of 420 PI claims notified to the AIIF in the 2016 financial year:

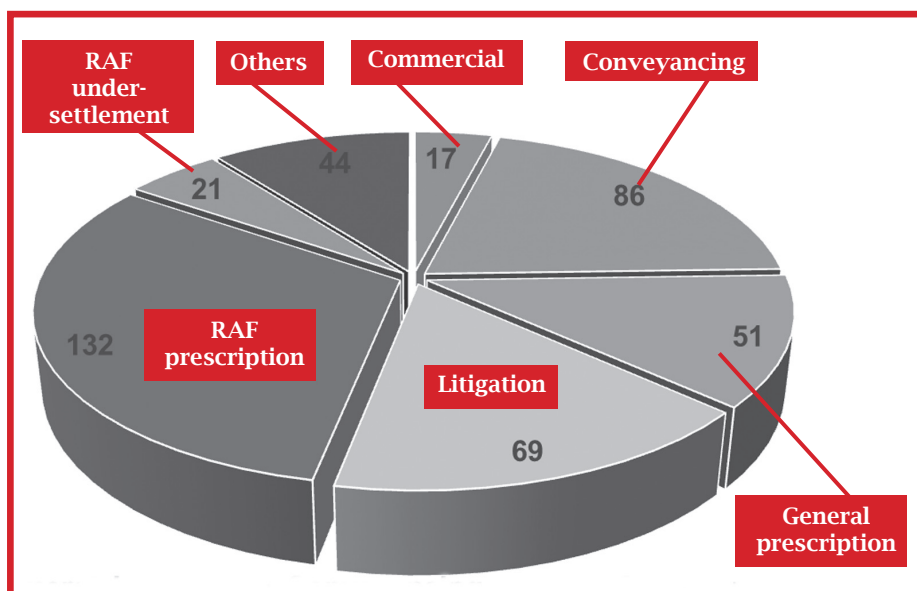
Relating each of the largest four claim types to internal control measures that firms could implement, it will be noted that:

**1 Road Accident Fund (RAF), litigation and general prescription claims**- these claim types have been consistently high since the formation of the AIIF. Practitioners can avoid the risk of such claims by, for example:

**1.1** Registering their matters with the Prescription Alert system.

## RISK MANAGEMENT COLUMN continued...

### NUMBER OF CLAIMS REPORTED - 2016 FINANCIAL YEAR



The Prescription Alert system is a back-up diary system offered by the AIIF (at no cost) to the profession for any time-barred matters. The Prescription Alert unit sends periodic reminders to practitioners warning them of the looming prescription date. Reminders received from the Prescription Alert unit must be adhered to. A failure to register RAF claims with the Prescription Alert unit or to comply with reminders sent by that unit, will attract an additional 20% in the excess payable. Firms also need to implement their own reliable internal diary systems. The adoption of a dual diary system with your secretary/ PA is a prudent practice. Prescription dates should also be noted prominently on all applicable files. It is equally important that the correct date on which the cause of action arose is accurately recorded, both on the office file and also when registering the matter with the Prescription Alert unit. An incorrect date for the cause of action will give an incorrect commencement date for the calculation of prescription;

**1.2 Proper supervision of staff-** junior and administrative staff dealing with files must be adequately and effectively supervised. In many of the prescription claims notified to the AIIF, practitioners indicate that the matter had been dealt with by some or other person previously employed in the

firm who has since left and it appears from the documentation supplied to us that there was no proper supervision or oversight of the person who dealt with the matter in the firm. Proper and effective supervision of staff will mitigate this risk. Detailed file notes in respect of all consultations, telephonic discussions, research, next steps to be taken and all other attendances need to be included in the files. Relying on the use of precedents without properly assessing their applicability to the facts at hand is another danger of which heed must be taken. Note should also be taken of the comments of the Constitutional Court in the *South African Liquor Traders Association* matter (quoted below in the discussion of the *Ramoshaba* matter) that the filing of correspondence without reading it constitutes 'negligence of a severe degree'. Firms should also have documented minimum operating standards/standard operating procedures and staff be trained thereon. The practitioner will be ultimately responsible should something go wrong in a matter;

**1.3 Periodic file audits-** periodic audit of files in a practice will not only give a practitioner a good insight into the state of matters being handled in the firm, but will also enable them to identify matters where prescription is imminent. We have published a pre-

cedent that practitioners may consider adapting to their individual practices for file audits. The audits could also be made part of the supervision process referred to in 1.2 above;

**1.4 Not accepting instructions close to the prescription date** - in some instances practitioners have accepted instructions from claimants to pursue claims though the instructions are given close to the prescription date. Always advise the client of the dangers of the looming prescription date. Sufficient information in order to institute action and interrupt the running of prescription must be obtained as early as possible. Considerations that need to be considered in deciding whether or not to accept an instruction include whether or not you have the available time, appetite, resources and expertise/ ability to carry out the mandate timeously. Regard must also be had to two very important decisions we have previously reported on in this regard: *Mazibuko v Singer* 1979 (3) SA 258 (W) and *Mlenzana v Goodrick and Franklin Inc* 2012 (2) SA 433 (FB). A client who has terminated the mandates of several other attorneys in respect of the same matter before instructing you should be a cause for concern.

**2 Conveyancing matters** - Unfortunately, despite the numerous warnings that we have published, many of the conveyancing claims notified to the AIIF still arise out of practitioners falling victim to cyberscams. Education and supervision of staff in respect of the scams would, in many cases, avoid the risk of falling victim thereto. A documented policy should be put in place in respect of any instructions to change beneficiary banking details. The beneficiary should always be contacted, independently of the potentially spoof email, in order to verify the purported instruction to change the banking details. Only original documents should be accepted and a firm should have a proper documented FICA process/ checklist in place. Proper supervision of staff and regular file audits should also be instituted for conveyancing matters as suggested in 1.2 and 1.3 above.

**3 Under settlement of RAF claims** - the comments in the article below on settlement negotiations will be applicable to the settlement of RAF claims.

## RISK MANAGEMENT COLUMN continued...

### EXECUTOR BONDS: A PLEA TO PRACTITIONERS

**T**he AIIF grants bonds of security (in favour of the Master of the High Court) to practitioners appointed as executors of deceased estates. As with all the other services provided by the AIIF, this service is currently granted at no cost to the profession or the estate. We grant bonds up to a maximum of R5 million per estate and to a limit of R20 million to each firm at any time. The exposure in respect of this line of business has grown substantially since the service was introduced in 1998. We currently have an exposure in excess of R11 billion on this line of business. The challenges faced in respect of service include its long tail nature- we currently have bonds issued in 2000 which are still recorded as active in our books- and the fact that practitioners do not update us on the status of matters or where the Master has issued a release/ filing slip. Bonds can only be closed on our side where:

- (i) A release has been issued by the Master after the administration of the estate has been finalised;
- (ii) The Master advises us in writing that we may cancel or reduce the bond.

In engaging with the Master's offices and inspecting the files in respect of which we have issued bonds, it has been noted that in many instances, practitioners have not responded to queries issued by the Master. The result is that, to the prejudice of the estate beneficiaries, the AIIF and the Master, the administration of the estates cannot be finalised.

A further challenge is that some practitioners do not respond to our requests for updates on the matters in respect of which we have issued bonds. No bonds will be issued to practitioners who do not comply with our requests for updates. In addition thereto, where appropriate,



we will report the conduct of such practitioners to the law society having jurisdiction over the attorney.

Practitioners in whose favour bonds have been issued also sometimes move between firms without informing us and take the estate files with them. In these circumstances, our records will reflect that the matter is still being handled by at a particular firm when this is not the case. Where the estate matters are assigned to junior or support staff, we often note that there is inadequate supervision by the senior practitioner/s in the firm-remember that the proverbial buck stops with you!

The terms and conditions issued by the AIIF in respect of the granting of security were developed and implemented in an attempt to curtail the exponen-

tial growth in the exposure and also to better manage our risk. The terms and conditions are aligned to the provisions of the Administration of Estates Act 66 of 1965.

The claims notified to the AIIF in respect of this area mainly arise out of the misappropriation of estate funds or property. The claims statistics issued by the Fund that claims arising out of the misappropriation of estate funds make up one of the largest claims categories for that entity as well.

In order to protect themselves, practitioners should report estate funds to their auditors and request that an audit of these funds be included in the annual audit.



## GENERAL PRACTICE

**F**or purposes of this article, we use the word “attorney” to refer to the practitioner as well as the firm in which he/she practices.

As the year-end audits are now upon law firms, attorneys need to ensure that they have fully complied with the requirements of the Attorneys Act, as well as the Uniform Rules that became applicable with effect from 1 March 2016. The Independent Regulatory Board for Auditors (IRBA) has issued a new guide which will henceforth be applied by auditors in performing trust account audits. The following paragraphs deal with some areas that will be subject of the audits to be undertaken.

- Attorneys are required to maintain accurate accounting records for both their trust and business accounts. Trust accounting records include accounting records for s78(1), s78(2)(a) and s78(2A) bank accounts.
- In addition to these trust accounts, attorneys are also required to maintain separate trust accounting records for estates as well as other entrusted assets, and to report on these. Estate matters refer to all trust liabilities in respect of which the

### IN PREPARATION FOR THE YEAR-END TRUST AUDIT

practitioner is the executor, trustee or curator or which he administers on behalf of the executor, trustee or curator for which consent has been obtained from the Master of the High Court to deal with through the attorney’s trust account. Other entrusted assets relates to the liability originating from any asset entrusted to the practitioner other than in terms of s78(1), s78(2)(a) s78(2A) and estates, supported by a detailed schedule of the nature of such liability.

- Attorneys are further required to prepare an Attorneys Annual Statement on Trust Accounts in support of his/her application for a Fidelity Fund Certificate (FFC). The auditors will agree the information extracted from the accounting records and included in the Attorney’s Annual Statement on Trust Accounts to the underlying records that were the subject of the engagement on the compliance of attorneys’ trust accounts with the Attorneys Act and the Rules, and then report as required.
- The attorney shall allow the auditor

access to such of the attorney’s records as the auditor may deem necessary to examine, for the purposes of discharging the auditor’s duties. The attorney shall furnish the auditor with any authority that may be required to enable the auditor to obtain such information, certificates or other evidence as the auditor may reasonably require for purposes of the engagement.

- The attorneys shall grant the auditor access to the business books and records to the extent the auditor considers necessary to obtain sufficient appropriate evidence regarding trust account transactions.
- An attorney is required to issue a written representation in which the attorney confirms compliance with all requirements, including, but not limited to, non-limitation of access to auditors.

**Simthandile Kholelwa Myemane**  
Lead Financial Forensic Investigator  
Attorneys Fidelity Fund

## ANOTHER IMPORTANT JUDGEMENT ON PRESCRIPTION

**W**arnings have previously been published by the AIIF on considerations to be taken into account by plaintiffs and their attorneys when instituting PI claims (see, for example, the article “*Instituting a PI claim on behalf of a client: Some considerations to be taken into account*” published in the March 2017 edition of *De Rebus*).

The unreported judgement of the Limpopo Division of the High Court in the matter of *Mapula Pondy Ramoshaba v Stephan van Rensburg* (Case No: 167/2016) sets out some important principles.

The matter was first reported to the AIIF during March 2016. The allegations were that the insured attorney had allowed a client’s claim to prescribe by failing to issue summons against the RAF.

The plaintiff was involved in an accident

on or about 27 May 2000, when the vehicle in which she was travelling as a passenger lost control and overturned. It was alleged that the collision was caused solely by the negligent driving of the said vehicle. The insured attorney was instructed to pursue a claim against the RAF on behalf of the plaintiff.

The insured attorney timeously lodged the claim with the RAF, but failed to issue summons by 26 May 2005 and the plaintiff’s the claim against the RAF thus prescribed. For many years nothing transpired until March 2016 when the plaintiff issued summons against her erstwhile attorney (the insured) claiming payment in the sum of R 3,6 million for damages she allegedly suffered due to the alleged negligence of the insured attorney in allowing her RAF claim to become prescribed.

It was evident at that point, having read

the particulars of claim, that despite any alleged professional negligence, the claim was always limited to R 25, 000.00 by virtue of the fact that the plaintiff was injured whilst a passenger in a single vehicle collision and conveyed for reward under the old RAF Act (the old Section 18). No explanation had been tendered by the plaintiff in order to explain the lapse in time from 26 May 2005 to March 2016 when she issued summons. The plaintiff had waited for 11 years to issue her summons and her new attorney of record did not respond to invitations to provide reasons as to why the PI claim had not prescribed against the previous attorney.

The plaintiff’s new attorney of record was informed during March 2016 that the claim was limited and further that the claim against the insured attorney had prescribed. No response was forthcoming

## GENERAL PRACTICE continued...

from the new attorney. In August 2016, a special plea of prescription was filed on behalf of the insured attorney and the matter was enrolled for hearing. The plaintiff did not file a replication or tender any explanation to overcome the special plea.

The Court (per Mokgohloa DJP) in deciding whether or not the plaintiff's claim against the insured had prescribed applied the well-known principles expressed in the case of *Truter v Deysel* 2006 (4) SA 168 (SCA) at paragraph 16:

*A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.*

The Court then stated that (paragraph 11):

*There is no evidence nor any allegation in the particulars of claim as to when the plaintiff came to know of the existence of the debt. There is further no suggestion that the defendant prevented the plaintiff from coming to know of the existence of the debt. Therefore, I find that the debt became due on 26 May 2005 when the plaintiff's claim prescribed. The inexorable conclusion, in my judgment, is that the plaintiff's claim against the defendant was thus extinguished by prescription on 25 May 2008 three years after her claim against the RAF prescribed.*

The issue then turned to costs and whether the plaintiff's current attorney should be ordered to pay the costs on a *de bonis propriis* basis.

The general principle at common law is that a party who litigates in a repre-

sentative capacity cannot be ordered to pay costs *de bonis propriis* unless he or she has been guilty of improper conduct – see *Cooper NO v First National Bank of SA Ltd* 2001 (3) 705 (SCA). Orders of this nature have been made against attorneys who have conducted themselves in an irresponsible and grossly negligent manner in relation to the litigation. Such cost orders mark the court's disapproval of the said conduct.

Mokgohloa DJP referred to the remarks made by the Constitutional Court in the matter of *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 54:

*An order of costs de bonis propriis is made against attorneys where a court is satisfied that there had been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree....*

The Court then proceeded to note that:

*Similarly, in casu, the plaintiff's claim against the defendant relates to an accident that occurred during May 2000. The claim is further based on an alleged agreement entered into between the plaintiff and the defendant during June 2001. The summons were issued on 02 February 2016 almost sixteen years after the accident. The defendant raised a special plea of prescription in his plea dated 10 August 2016. The Plaintiff did not serve a replication.*

*There is no explanation as to what transpired from June 2001 until the claim prescribed on 26 May 2005. Whether the*

*plaintiff made any attempts to enquire from the defendant about the progress of her claim. It is not explained when the plaintiff came to know that her claim has prescribed. Certainly, the plaintiff's attorney with all the experience and expertise should have obtained all the information from the plaintiff prior to him signing the particulars of claim sixteen years after the date of the accident.*

*Furthermore, the plaintiff is cited in the particulars as an unemployed adult female. It is clear that she will not be in a position to pay the defendant's costs which could have been avoided had her attorney exercised the professionalism and expertise expected from an attorney.*

The Court therefore upheld the special plea of prescription and ordered the plaintiff's attorney to pay the costs *de bonis propriis*.

In pursuing PI claims, attorneys acting for plaintiffs must thus conduct detailed investigations in order to ascertain whether or not the PI claim has prescribed. Orders against attorneys to pay costs *de bonis propriis*, are excluded from the AIIF policy (see clause 16 (g)).

**Jonathan Kaiser**  
Legal Advisor AIIF

**Editor's note:** The AIIF was recently notified of another matter where the court ordered a practitioner to pay costs *de bonis propriis* in circumstances where the practitioner acted on a *pro bono* basis for a client. That claim was rejected on the basis of clause 16(g) of the policy. Practitioners must thus guard against conducting themselves in a manner that would warrant the court sanctioning their behaviour with a punitive costs order.

## SOME TAKE OUTS FROM A RECENT MEDICAL MALPRACTICE WORKSHOP

There has been a significant amount of coverage in the commercial media regarding medical malpractice claims.

On 3 March 2017 I participated in a medical malpractice workshop hosted by Hogan Lovells in Sandton. The workshop was an initiative of the Department of Health and was sponsored by Constantia Insurance Company Limited. The Minister of Health, Dr Aaron Motsoaledi, and the Minister of Science and Technology, Ms Naledi Pandor, were in attendance and

not only addressed the workshop but also engaged in the discussions around the various topics on the day. Delegates and representatives at the workshop included parties from the judiciary, the medical profession, the insurance industry, the RAF and the legal fraternity. The debate on many of the subjects was robust.

The topics discussed on the day included:

(i) Whether parties to medical malpractice litigation should litigate or mediate;

- (ii) Reconciling the Prescription Act relating to minors and the medical practitioner's duty to keep records;
- (iii) The pros and cons of contingency fee agreements;
- (iv) The capping of claims and payment of future damages by way of annuities; and
- (v) Compulsory professional indemnity insurance for the medical profession.

Much of the debates on the day centred around the frequency and quantum of

## GENERAL PRACTICE continued...

medical malpractice claims. Some of the areas of concern raised were those around touting and allegations of theft of medical records from health care facilities in certain cases. The allegations were that the stolen records are then sometimes used in the institution of medical malpractice claims.

Areas raised in respect of the alleged abuse of contingency fee agreements included:

- Vexatious litigation
- Victims not being awarded the damages to which they were entitled
- Successful defendants not being able to recover costs orders from impecu-

nious plaintiffs

- Whether, as currently applied, contingency fee agreements are fair, just and equitable
- Whether an abolition of contingency fee agreements would be a violation of section 34 of the constitution
- Should the Contingency Fees Act allow for plaintiff's attorneys to be held liable in the event of unsuccessful claims and costs orders being awarded against the unsuccessful plaintiff?
- Whether a requirement should be introduced for a certificate of merit to be produced?
- Could the existing principles of

awarding *de bonis propriis* costs be utilised to achieve this purpose?

The discussions around capping of claims and the payment of future damages by way of annuities included a discussion around future loss of income and future medical expenses.

Practitioners conducting medical malpractice claims are urged to keep up to date with the various discussions and developments in this area. The Law Reform Commission reportedly has been requested to look into this area of law.

## RAF CLAIMS: MORE ALLEGATIONS OF FRAUDULENT PRACTICES

In considering recent claims against the AFF (in respect of two separate practitioners who have been struck off the roll), it has emerged from two former practitioners that some of the claims lodged with the Fund by the claimants arose out of fraudulent claims brought against the RAF in the first instance. In the first matter, the former practitioner alleged that the plaintiff's claim against the RAF had initially been rejected as it had prescribed. Her allegations are further that, in order to 'revive' her client's claim, an agreement was entered into between herself and certain parties purportedly employed by the RAF in terms of which the plaintiff's claim was accepted by the RAF and later settled against the payment of an amount of money to the said parties purporting to be RAF employees. The plaintiff, in turn, has now pursued a claim against the Fund alleging that the RAF pay-out has been misappropriated by the former practitioner. All the allegations in this matter are being investigated by the Fund's Forensic Investigation team and

have also been reported to the RAF for investigation on its side.

In the second matter, the former practitioner alleges the plaintiff instructed him to pursue a claim against the RAF. The plaintiff had allegedly consulted with two other attorneys previously, both of whom reportedly advised him that he did not have a sustainable claim against the RAF. The former practitioner alleges that in this case, similarly to that above, an arrangement was allegedly made with certain staff at the RAF in terms of which the claim was admitted and paid against payment of part of the proceeds to the alleged RAF staff members. This claim is also being investigated by the Forensic Unit of the Fund.

Practitioners engaging in fraudulent or other dishonest conduct in relation to RAF claims (or any other matter) are engaging in unprofessional conduct and run the risk of disciplinary action being taken against them by the law society (many are subsequently struck off the roll of practitioners) and criminal

charges being brought against them. Claims arising out of such conduct will also not be entertained by the AIF. In our engagement with the RAF and various other stakeholders, allegations are constantly raised with regards to certain underlying fraudulent activity in which a host of participants from various sectors are allegedly a part of.

Practitioners should also be wary of touts and other syndicates operating in RAF matters. Every aspect of an alleged claim needs to be investigated and, in the language used by auditors, 'a degree of professional scepticism applied' to the version given. A proper investigation of an alleged claim at the outset will also assist the plaintiff in arguing the matter later if there is indeed a valid claim and aspects of the matter are contested later by the RAF.

**DO NOT PARTICIPATE IN OR FALL VICTIM TO SCAMS OR OTHER DISHONEST CONDUCT!**

## SETTLEMENT NEGOTIATIONS: HAS AN APPROPRIATE MANDATE BEEN OBTAINED FROM YOUR CLIENT?

In the often quoted judgment of *Goldschmidt and Another v Folb and Another* 1974 (3) SA 778 (T), one of the principles enunciated by Botha J was that:

*An attorney would fail in his duty to his client on a proposal for a settlement coming from the other side before answering such proposal. His answer to the proposal is a reasonably necessary and proper step in connection with the conduct of*

*the action and the preceding consultation with his client stands on the same footing.*

It is thus important that every offer of settlement received from the other side is put to the client, even if the recommendation and advice to client is/will be that the settlement offer should be rejected. Often, particularly in personal injury matters, we deal with allegations by a plaintiff that, to their



## GENERAL PRACTICE continued...

detriment, a settlement offer made to their attorney had not been communicated to them and that, had the offer been communicated, they would have accepted it. All communication and consultations with clients on any settlement offer must be properly recorded in writing- this will assist in your defence in the event of a PI claim.

Practitioners should not rely solely on a widely worded power of attorney which purports to give them authority to carry out a host of activities in respect of the matter, including the settlement thereof without first consulting with the client on the settlement terms. In many under-settled RAF matters,

the allegations against the attorney are that, in breach of the mandate, the matter was settled for an amount less than the damages suffered and that the plaintiff had no knowledge of such settlement.

Practitioners should ensure that proper instructions are obtained from their clients in the 'block-settlements' in RAF matters as well as those matters settled on the day of trial (so called 'settlements at the doors of court'). If the client agrees to a 'commercial settlement' of a matter rather than running the risk (or cost) of litigation, the instructions in this regard should, likewise, be properly documented.

## PONZI SCHEMES: PRACTITIONERS BEWARE!

Claims arising out of the provision of investment advice, without any underlying existing instruction to provide legal advice, are excluded from the AIIF policy and the Fund will also not respond to such claims.

Some practitioners, unfortunately, fall victim to Ponzi or other similar schemes. Participating in or promoting a Ponzi scheme is unlawful

(see our Practice Management article in the May 2017 edition of *De Rebus*). Beware of schemes purporting to give high returns.

In certain instances, practitioners have placed their clients' funds in such schemes (with or without the client's knowledge) and have had to refund the affected parties when either the scheme collapses or the promised returns do not materialise. The South

African Reserve Bank (SARB) and the Financial Services Board (FSB) often engage in campaigns aimed at educating consumers of the dangers associated with participating in such schemes. Sections 42 and 43 of the Consumer Protection Act 68 of 2008 also outlaw the promotion and participation in pyramid or related schemes.

## LEGISLATIVE UPDATE continued...

As the countdown to the full implementation of the Legal Practice Act continues, we continue bringing selected aspects of that important piece of legislation to the attention of practitioners. The preamble of the Act lists, as one of its objects, to "ensure the accountability of the legal profession to the public".

Chapter 5 of the Legal Practice Act contains the provisions relating to the establishment of the Office of the Legal Services Ombud. This is a new office whose objects include (section 46):

- (a) Protection and promotion of the public interest in relation to the rendering of legal services as contemplated in the Act;
- (b) Ensuring the fair, efficient and ef-

## A NOTE OF THE LEGAL PRACTICE ACT

fective investigation of complaints of alleged misconduct against legal practitioners;

- (c) Promoting high standards of integrity in the legal profession; and
- (d) Promoting the independence of the legal profession.

The powers and functions of the Ombud (section 48) include the competency to investigate, on his or her own initiative or on receipt of a complaint, an alleged-

- (i) Maladministration in the application of the Act;
- (ii) Abuse or unjustifiable exercise of power or unfair or improper conduct or undue delay in performing a function in terms of the Act;

- (iii) Act or omission which results in unlawful or improper prejudice to any person,

which the Ombud considers may affect the integrity and independence of the legal profession and the public perceptions in respect thereof.

Some of the underlying conduct by certain practitioners which gives rise to the claims notified to the Fund and the AIIF may fall within the ambit of the Ombud's powers. Practitioners are advised to read the Act and the proposed rules for practice in order to ensure that they will be compliant when the Act is fully implemented.



CENTRE FOR CONVEYANCING PRACTICE

2017



## Courses in conveyancing and notarial practice to prepare for these examinations

### Trusted courses

The conveyancing course has been used with great success for more than twenty three years and the notarial course for more than ten years by legal practitioners throughout the country and in Namibia to prepare for the conveyancing and notarial exams.

### Characteristics of the courses

- The study notes are available in either English or Afrikaans and the courses can be done through home study or by the attendance of formal lectures.
- Logical exposition and explanation of concepts.
- They were written for learners who have had no exposure to a conveyancing or notarial practice.
- The prescribed syllabuses for the examinations are covered.
- The study notes are made up of explanatory notes and a set of practical examples.
- The notes are marketed in loose-leaf format and supplements are available so that the notes can be updated with the latest amendments.

### Registration form

- 1) Indicate your preferences, as well as your language preference for the notes, in the option boxes.
- 2) Complete all your details below.
- 3) Indicate your nearest Postnet branch as our 1st choice for mailing.
- 4) Send this page with proof of payment to us (use your name and surname as reference for the payment).

Name and surname: \_\_\_\_\_  
 ID number: \_\_\_\_\_  
 Firm: \_\_\_\_\_  
 VAT number: \_\_\_\_\_  
 E-mail: \_\_\_\_\_

### Course fees (VAT incl.)

#### Course in Conveyancing Practice

- ☐ **Attendance - R6,500 or R5,900 for early registration\***  
 Payment to Centre for Conveyancing Practice, ABSA, 917-264-9440
- ☐ **Self-study - R4,700**  
 Payment to Self-study Deeds Course, ABSA, 2330-141-371

#### Closing date for conveyancing attendance

Registrations close one week before commencement of a course. An additional **R350** is payable for late registrations at CPT, DBN, BFN & PE.

#### Course in Notarial Practice

- ☐ **Attendance - R4,300 or R3,900 for early registration\***  
 Payment to Notarial Practice, ABSA, 927-657-2365
- ☐ **Self-study - R3,400**  
 Payment to Notarial Practice, ABSA, 927-657-2365

#### Closing date for notarial attendance

Registrations close one week before commencement of a course. An additional **R250** is payable for late registrations at CPT, DBN, BFN & PE.

### www.aktepraktik.co.za

Visit our website for more information and online registration.

Tel: (012)361-1715 | Fax: 086-660-0463

E-mail: annemarie@aktepraktik.co.za

Telephone: \_\_\_\_\_  
 Cell phone: \_\_\_\_\_  
 Nearest Postnet branch: \_\_\_\_\_  
 Postal address (compulsory): \_\_\_\_\_  
 Postal code (compulsory): \_\_\_\_\_

#### Course in Conveyancing Practice (\*Closing dates for early registration)

First Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (Afrikaans)	7 – 10 Feb	17 Jan
		Cape Town (English)	7 – 10 Feb	17 Jan
		Bloemfontein (Afrikaans)	7 – 10 Feb	17 Jan
		Johannesburg (English)	14 – 17 Feb	24 Jan
		Pretoria (English)	14 – 17 Feb	24 Jan
		Durban (English)	21 – 24 Feb	31 Jan
		Port Elizabeth (English)	21 – 24 Feb	31 Jan

#### Language preference for conveyancing notes

Afrikaans ☐ English ☐

Second Semester	✓	Venue and Language	Dates	*Early reg.
		Cape Town (English)	18 – 21 July	27 June
		Bloemfontein (Afrikaans)	18 – 21 July	27 June
		Pretoria (Afrikaans)	18 – 21 July	27 June
		Johannesburg (English)	25 – 28 July	4 July
		Port Elizabeth (English)	25 – 28 July	4 July
		Pretoria (English)	25 – 28 July	4 July
		Durban (English)	1 – 4 Aug	11 July

#### Course in Notarial Practice (\*Closing dates for early registration)

First Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (English)	2 – 3 March	9 Feb
		Durban (English)	6 – 7 March	13 Feb
		Cape Town (English)	9 – 10 March	16 Feb
		Johannesburg (English)	13 – 14 March	20 Feb
		Pretoria (Afrikaans)	16 – 17 March	23 Feb

#### Language preference for notarial notes

Afrikaans ☐ English ☐

Second Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (Afrikaans)	14 – 15 Aug	24 July
		Johannesburg (English)	17 – 18 Aug	27 July
		Durban (English)	21 – 22 Aug	31 July
		Cape Town (English)	24 – 25 Aug	3 Aug
		Pretoria (English)	28 – 29 Aug	7 Aug

