LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

AUGUST 2017

THE CHALLENGE OF MEDIATION BETWEEN PARTIES WITH DIFFERENT WORLD VIEWS

Trust assets and accrual claims at divorce: The SCA opens the door

Are you pursuing a legitimate professional indemnity claim?

When good close corporations go bad

VAT and penalties: Is Sars playing according to the rules?

Action Group on Briefing Patterns delivers on procurement protocols

National Forum racing against time to submit recommendations to Minister

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18 The challenge of mediation between parties with different world views

In mediation, parties endeavour to reach some common ground to resolve their disputes or conflict. One assumes that by getting parties together around the same table, that the battle is already half won. Surely if they can share their observations, they can start exploring how their positions might overlap, or gain a greater understanding of the different positions that might enable some movement. In this article, **JP Venter** explores the challenge of mediating and finding agreement between parties when there is a big variance in world views and values.

22 Trust assets and accrual claims at divorce: The SCA opens the door

In the article 'Community of property and accrual sharing in terms of the Matrimonial Property Act, 1984 – Part 2' (1985 (Feb) *DR* 59) Professor Andreas van Wyk cautioned that the Matrimonial Property Act 88 of 1984, which introduced the accrual system into South African law. The spate of High Court judgments over the past decade that have dealt with the question as to whether the (value of) assets of a trust may be taken into account for the purposes of assessing the accrual of a spouse's estate. As of March of this year, by virtue of the Supreme Court of Appeal's judgment in *REM v VM* 2017 (3) SA 371 (SCA) there is a definitive answer. In this article, **Bradley Smith** sheds light on some aspects of this case and its vital importance for legal practitioners.

26 When good close corporations go bad

'Enjoy the little things, for one day you may look back and realise they were the big things' Robert Brault. This is both a valuable life lesson and an irrefutable truth when it comes to many legal matters where a small variation to the norm can have an exceptionally large effect from a legal perspective. This becomes even more relevant when two extraordinarily complicated legal fields, such as the laws surrounding close corporations (Close Corporations Act 69 of 1984) and the law of Trusts (Trust Property Control Act 57 of 1988) begin to intertwine, as laws generally do. This brief discussion, written by **Edrick Roux** and **Lucinda Horn** focusses on the rules surrounding CC and Trusts.

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Dialogue on the International Arbitration Bill

The Portfolio Committee on Justice and Correctional Services has invited interested persons and stakeholders to submit written submissions on the International Arbitration Bill B10 of 2017. Once enacted, the International Arbitration Bill will provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law into South African law.

Delivering the keynote address at the University of Witwatersrand's School of Law on 12 July, Deputy Minister of Justice and Constitutional Development, John Jeffery, asked:

- Is arbitration really the outsourcing of justice?
- Are we taking justice away from our courts?
- Does arbitration undermine national courts?
- And what role are courts to play in arbitrations?

Mr Jeffery noted that before the above questions can be answered, the benefits of arbitration should be considered. Mr Jeffrey added: 'Arbitration is typically faster, less formal and more tailored to the particular dispute than court proceedings while, at the same time, retaining the benefits of impartial expert adjudication. Possibly the biggest benefit of arbitration is that it is a method of dispute resolution that is chosen and controlled frequently by the parties themselves.'

During his keynote speech, Mr Jeffery noted that the new International Arbitration Bill emanates from an investigation of the South African Law Reform Commission. 'Concerns were raised that the Recognition and Enforcement of Foreign Arbitral Awards Act [40 of 1977] is not in alignment with international developments, that the Arbitration Act [42 of 1965] is inadequate for purposes of international arbitration and the South African arbitration law is outdated in many respects and thus needs revision and updating in order to reflect and serve modern commercial needs,' he added.

According to Mr Jeffery, 'the new Bill will assist businesses in resolving their international commercial disputes and will ensure that South Africa is an attractive venue for parties around the world to resolve their commercial disputes. It will also attract foreign direct investment. With this in mind, I have no doubt that we will see South Africa as a preferred arbitral seat in the very near future.'

The issue of international arbitration is an ongoing topic within the legal profession. In the next issue, *De Rebus* will cover the International Arbitration Conference of the Charted Institute of Arbitrators.

Mapula Sedutla – Editor

Would you like to write for *De Rebus*?

De Rebus **welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.**

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

- **Please note that the word limit is 2000 words.**
- **Upcoming deadlines for article submissions: 21 August and 18 September 2017.**

LETTERS
TO THE EDITOR

PO Box 36626, Menlo Park 0102 ● Docex 82, Pretoria ● E-mail: derebus@derebus.org.za ● Fax (012) 362 0969

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.

Complaint about an attorney

It is only natural for professionals to take pride in their professions and to not want the mere reference to their professions to invoke negative emotions in the minds of people. In this regard legal practitioners are no different. I invite you to read the following account of my experiences and decide for yourself whether or not the image of the profession is being adequately upheld.

On 30 October 2015 I lodged a complaint against an attorney based in the Cape. On 16 November 2015 the Cape Law Society (CLS) made it clear they have no intention of investigating my complaint and referred me to the National Consumer Commission (NCC). After a further representation by myself, the CLS referred me yet again to the NCC stating:

'Once the NCC has concluded their investigation, and should [the attorney] be found guilty of unprofessional conduct by the NCC, then you may provide our offices with that information where after we will determine whether we are able to investigate your complaint further.'

Further representations by myself followed, which were initially met with circumventing replies by the CLS. Eventually the CLS informed me my complaint would be referred to their Disciplinary Committee for consideration on 13 June 2016. On 22 June 2016 the CLS claimed 'The Committee directed that you be advised that as there was no *prima facie* complaint against [the attorney], which required a response, the Society was closing its file.'

I requested to be provided with the names and contact details of the members of the Disciplinary Committee, as well as a copy of the minutes of the relevant meeting whereupon the CLS advised me the names of the members of the Disciplinary Committee could be found on the their website and the minutes of the meeting comprised of the correspondence, which I forwarded to the CLS.

I informed the CLS that I was unable to find the names of the members of the Disciplinary Committee on their website and that the contact details of same had not been provided. I further pointed out the minutes of the meeting could not possibly comprised of only the correspondence which I forwarded to them. No response to the aforementioned was offered by the CLS.

I perused the website of the Law Society of South Africa (LSSA) and found the following encouraging words:

'The attorneys' profession is proud of its high professional standards and the low incidence of disciplinary action required by the provincial law societies. All attorneys are bound by a strict professional code.

It is part of the function of the councils of the law societies to act in the public interest. The law societies are committed to protecting the public against unprofessional and irresponsible conduct by attorneys and are prepared to investigate complaints which are submitted to them in good faith and which fall within their jurisdiction.'

I promptly forwarded all the correspondence between myself and the CLS to the LSSA, quoted the declaration on their website and closing my letter with: 'In the light of the aforementioned, I would like to know from you whether or not you believe the statement on your website alluded to above, is justified.'

The LSSA circumvented my question by replying: 'We cannot respond to you on whether the Cape Law Society dealt with your compliant adequately or not.' Further representations by myself were met with even more attempts by the LSSA to circumvent the issue, intermixed with bureaucracy and high handedness. The LSSA steadfastly neglected to comment on the declaration on their website.

My persistence to obtain a reply led to an employee of the LSSA claiming: 'I discussed the content of your correspondence with our co-chairs and have to advise again that we can not [sic] take the matter further.' I requested to be

provided with the contact details of the co-chairpersons. This information has, to date, not been provided.

As a last resort, I contacted the chairperson of the CLS. After numerous requests for an answer, I was eventually provided with a lengthy document purporting to be the reasons for the finding of the Disciplinary Committee. As the CLS had previously claimed the minutes of the meeting comprised of the correspondence that I forwarded to them. I find it inexplicable that the CLS now manages to provide two pages containing the background of my complaint, legal arguments and even quotes a judgment handed down by a court of law and once again claiming '… the reasons for the Disciplinary Committee's decision … the Disciplinary Committee considered the matter and directed … the minutes of the meeting comprised of [sic] the correspondence exchanged between yourself and the Society … the Disciplinary Committee was *functus officio* … the Society did not believe that it was appropriate to provide you with the contact details of the members of the Disciplinary Committee.' Several references were made to the 'decision of the Disciplinary Committee'.

Inexplicabilities:

- It was inferred that the NCC has jurisdiction to find an attorney guilty of unprofessional conduct.
- No reasons other than 'there was no *prima facie* complaint' appears anywhere in the correspondence. Despite the aforementioned, the CLS managed to compile two pages containing the reasons for the 'decision' of the Disciplinary Committee.
- Despite the absence of proper minutes of the meeting of the Disciplinary Committee, the CLS succeeded in compiling two pages of reasons for the 'decision' of the Disciplinary Committee.
- Initially, the minutes of the meeting of the Disciplinary Committee comprised the correspondence, which I forwarded to the CLS. It now comprises the correspondence exchanged between myself and the Society.
- Initially the CLS had no objection to me obtaining the names of the Disciplinary Committee on its website. It has since become inappropriate to provide same.
- In the final analyses, based on the above, combined with previous disappointing experiences with the Law Society of the Northern Provinces, which were very much in the same vein as the above, I have come to the conclusion the provincial law societies are failing in the obligations placed on them by s 58(*a*) to (*h*) of the Attorneys Act 53 of 1979. You decide for yourselves.

WJ Claase, Pretoria

Response to complaint

We refer to the letter from Mr WJ Claase to *De Rebus*.

It is correct that Mr Claase laid a complaint with the Cape Law Society (CLS) against a practitioner. The background is that Mr Claase laid a complaint with the National Consumer Commission (NCC) against a client of the practitioner. In representing the client, the practitioner made representations to the NCC. Mr Claase maintained these representations amounted to misrepresentations and that the practitioner was misleading the NCC and that the practitioner made no effort to correct these misrepresentations.

The CLS responded to Mr Claase saying that it appeared the matter was still under consideration by the NCC; there was no evidence that the practitioner acted unprofessionally towards him and that the documentation merely set out disputes of fact.

It is correct that the CLS said that once the NCC concluded its investigation, and if it was determined that the practitioner had misled the NCC, the CLS would determine whether further investigation was required. The issue did eventually serve before the Society's Disciplinary Committee, which found that there was no *prima facie* complaint against the practitioner, which required a response from the practitioner.

It is trite that a practitioner must act in the best interests of the client and present the client's case in the best possible manner. On the basis of the evidence available, there is no indication that this was not the case here and we were unable to conclude that there was unprofessional conduct.

The CLS's entire file consists of the correspondence with Mr Claase. Decisions are recorded, but detailed minutes of the discussions are not kept.

Mr Claase's further correspondence resulted in the Disciplinary Committee providing him with its written reasons for reaching the decision it did. We believe that we have acted to the best of our ability.

We take accusations against our members seriously and complaints are thoroughly investigated.

Frank Dorey, Director Cape Law Society, Cape Town

Discretion

A reminder of the meaning of 'discretion' in the context of the administration of justice: In *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Proper CC* 1997 (1) SA 1 (A) it was said at 32A: 'The use of the word "may" in the section appears to grant a discretion.'

In *Van der Walt v Metcash Trading Limited* 2002 (5) BCLR 454 (CC) Goldstone J said at 459 [13]: 'As O'Regan J pointed out in [*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC)]: "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."

It would seriously diminish the efficacy of this role of discretion if a decision made pursuant to its exercise bound other judicial officers in a court at the same level in the later exercise of their discretion in subsequent cases'.

JO Van Schalkwyk, attorney, Johannesburg

How old is too old?

I saw the article 'Never too old for school' on Graham Rhodenburg (2017 (May) *DR* 15) and I became curious because I am in a similar situation. I am in my mid-50s and studying towards an LLB degree. I am not aware of an age restriction from qualifying as a legal practitioner and I do not know what the new Legal Practice Act 28 of 2014 says about it, but I just wonder whether law firms would accept us as candidate attorneys.

I would be interested to hear what law firm partners have to say.

Anonymous, Port Elizabeth

According to the Legal Practice Age 28 of 2014, there is no age limit to becoming an attorney.

– Editor

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.

Send your letter to: derebus@derebus.org.za

A historic moment – Action Group on Briefing Patterns delivers on procurement protocols

Deputy Chief Justice, Raymond Zondo, congratulated the Action Group on Briefing Patterns in the Legal Profession (the Action Group) for the work they have done with the procurement protocol. Justice Zondo was the keynote speaker on the official signing of the procurement protocols for the legal profession in June in Johannesburg. He said that the event of signing of the procurement protocols was a historic event for the legal profession.

On 31 March 2016, the Action Group was established as a result of the Summit on Briefing Patterns held by the Law Society of South Africa (LSSA). The Action Group, which is a multi-stakeholder group, includes representatives of –

- the LSSA;
- the General Council of the Bar;
- Advocates for Transformation; and
- the Department of Justice and Constitutional Development.

The stakeholders drafted the procurement protocols, that have been adopted by the attorneys' and advocates' professions, to transform the legal profession – particularly with regard to briefing patterns – which has become a topical and contentious issue in South Africa (SA).

Justice Zondo said for the longest time there were talks of transformation, but not much action had been taken. He added that the need for a protocol arose because one of the realities that SA has been faced with, was that black lawyers and, particularly, women lawyers remain largely excluded from certain types of legal work, which white male lawyers are given in abundance. He pointed out that at times those who give work to white lawyers do not give work to black lawyers or women lawyers. Instead the work given to them has very little financial reward, because society lacked confidence in women's profession for no reason other than that they are women.

Justice Zondo noted that the exclusion black lawyers and women lawyers endured are there because of the legacy of Apartheid, colonialism and patriarchy. He pointed out that black lawyers and women lawyers are largely excluded in work in commercial law, mining law, trade mark law, competition law and many other fields. Justice Zondo said that the signing of the protocol represented an unequivocal rejection, unequal treatment of black lawyers and women lawyers and men and women in the legal profession in the provision of legal work.

Deputy Chief Justice, Raymond Zondo, signing the procurement protocol, in Johannesburg.

Justice Zondo added that the signing of the protocol acted as a very important building block in creating a society that is not based on exclusion, but a society that includes all the people of SA, black, white, men and women. He said it represented the desire and commitment to the society at large. He advised that the Action Group does not stop working, but rather monitor and implement various decisions to make sure the project does not fail.

Justice Zondo said that there should be a permanent structure of representatives from government, the private sector and the legal profession that will make sure that it monitors the pace of

Deputy Minister of Justice and Constitutional Development, John Jeffery, signing the procurement protocol in Johannesburg.

Deputy Chief Justice, Raymond Zondo, speaking at the signing of the procurement protocol in June. Justice Zondo described the event as a historic moment for the legal profession.

transformation and deals with challenges that will arise from time to time. He added that the structure had people from government, the private sector and the legal profession who are decentralised in all provinces to monitor that everybody was doing what they were supposed to do and report back to the larger structure so that the pace of transformation will not slow down. 'Let nobody be excluded from any legal plan, let all black, white, men and women share all the legal work,' Justice Zondo said.

The Deputy Minister of Justice and Constitutional Development, John Jeffery said that it is not an issue of race and gender, but an issue of values. However, he added that in terms of the current conjunction with the Legal Practice Act 28 of 2014, race and gender is key. 'We need a legal profession at all levels, from candidate attorneys, professional assistances, through to attorneys, senior partners and directors etcetera … that reflects the race and gender demographics of South Africa,' Mr Jeffery said.

Mr Jeffery pointed out that all sections of society should protect race, gender and the profile of the country. He said currently many law graduates are African women and that it was up to the provincial law societies to examine the figures on who is getting articles.

See also:

- 'LSSA hosts summit on briefing patterns' (2016 (May) *DR* 6).
- 'Action Group on Briefing Patterns in the Legal Profession reports on progress one year on' (2017 (May) *DR* 18).
- 'Procurement Protocols for the legal profession adopted' (2017 (June) *DR* 18).

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Refugee law guides launched for legal practitioners

Pro.Bono.Org in partnership with Cliffe Dekker Hofmeyr, Fasken Martineau and Norton Rose Fulbright South Africa, launched three refugee law guides for legal practitioners. The launch took place on World Refugee Day on 20 June in Johannesburg. ProBono.Org said in commemoration of World Refugee Day, it recognises the efforts of the private legal profession in ensuring that the world's most vulnerable group has access to justice and quality legal services.

The event was also a call for more legal practitioners to get involved in refugee law and the guides provide a resource for legal practitioners – who have limited knowledge of this area of law – so that they can assist refugees and asylum seekers. Keynote speaker, Judge Raylene Keightley, of the Gauteng Local Division of the High Court, said the initiative by ProBono.Org and the three law firms involved was an important one.

Judge Keightley said the Refugees Act 130 of 1998 is an important part of South Africa's (SA) arsenal of human rights. She said SA is proud of the protection it offers in terms of human rights legislation and the Constitution. However, she added that very often the protection of refugees is set aside, because there is an unfortunate tendency for people not to worry about things that do not directly affect them.

Judge Keightley pointed out that it was critically important to understand

that the Refugees Act is part of SA's human rights legislation. She said the Act puts SA's commitment to join the global action to protect refugees and commitment to share communal burden with other countries in practice. She added that one of the central features of the international protection of refugees and of the Act the principle of non-retoulement.

Judge Keightley said that refugee law is not an alternative to immigration but about protecting people who are desperate for a well-defined reason. 'It is a human rights issue and not about the back door system to immigration,' Judge Keightley added. She pointed out that the process of seeking asylum is a complicated and challenging process and it is in that regard that refugees get proper knowledgeable assistance.

Judge Keightley, however, pointed out that there has been an increase in the number of applications on the urgent court rolls for urgent release from Lindela Repatriation Centre on the basis that applicants wish to apply for asylum, or in some cases asylum seekers have not fully finished their review process. She said that these kinds of applications are brought to court without giving the State Prosecutors enough time to consider whether the applications are valid or not.

Gauteng Local Division High Court Judge Raylene Keightley, was the keynote speaker at the launch of the Refugee guidelines for legal practitioners. The launch took place on World Refugee Day on 20 June.

Judge Keightley added that this puts the court at a disadvantage, because the court is then unable to do its job and it is unable to properly balance the interest of the state by not allowing the refugee law to be used. 'There is a real need that the courts can have confidence that the cases they get are genuine and refugees get proper legal skills to build a case on review in appropriate circumstances,' Judge Keightley said.

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Legal Aid SA shares expertise and guidance with Sierra Leone on its legal aid system

Legal Aid South Africa (Legal Aid SA) provided expertise and guidance to Sierra Leone in setting up their legal aid system. In a press release, Legal Aid SA, said that as part of their strategic intervention to support developing countries in their efforts to establish their own legal aid system, KwaZulu-Natal's Regional Operations Executive, Vela Mdaka, visited Sierra Leone. Mr Mdaka's week-long visit that was facilitated by the Open Society Initiative for West Africa was intended to share information and expertise. 'This brings about meaningful support to the developing countries as we use our expertise and knowledge to provide guidance and advice as required by such countries. Sierra Leone is one of the countries that have been allocated such support. For the support to be effective, it was necessary to visit the country as well to observe … their operations on the delivery of legal aid services,' said Mr Mdaka.

Sierra Leone's Chief Justice, Justice Abdulai Charm (left) with KwaZulu-Natal's Regional Operations Executive, Vela Mdaka.

KwaZulu-Natal's Regional Operations Executive, Vela Mdaka, with Sierra Leone's Minister of Justice, Honourable Joseph Fitzgerald Kamara and Director of Sierra Leone Legal Aid Board, Claire Carlton.

The statement added that the strategic sites visitation was arranged in such a way that a full understanding of operations was achieved. Mr Mdaka's first stop was at the Sierra Leone Legal Aid Board offices, where he met with the Board's Director and staff members. His visit was followed by a meeting with Attorney General and Minister of Justice, Joseph Fitzgerald Kamara.

In the press release, Legal Aid SA pointed out how important it was for access to justice to be promoted so that human rights can be guaranteed. Legal Aid SA said it had the opportunity to observe court proceedings and also had a meeting with Sierra Leone's Chief Justice, Justice Abdulai Charm and the Chairperson of Sierra Leone Legal Aid Board, Justice Adeliza Showers. Among the places visited was the Community Bureau, an organisation made up of retired senior citizens, who held prominent positions in the community. This organisation provides expertise required in dispute resolution. 'Chiefs play an important role in the dispute resolution among the members of the community in Sierra Leone. The Paramount Chief Alimamy Dura III invited all the chiefs within his chiefdom to meet [with the] Legal Aid Board of Sierra Leone and Legal Aid South Africa,' Mr Mdaka said.

'The visit was definitely a success, getting first-hand information and understanding the operations and infrastructure. Of course we learnt a lot in terms of areas that will be new to us, which would help improve access to justice,' added Mr Mdaka.

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Minister gazettes threshold for major B-BBEE transactions

Trade and Industry Minister, Rob Davies, published a notice in the *Government Gazette* on the threshold for major Broad-Based Black Economic Empowerment (B-BBEE) transactions. The notice was published in June and stated that:

- All major B-BBEE transactions, as per code 100 of the Codes of Good Practice as amended, which transaction value equals or exceeds R 25 million, must be registered with the B-BBEE Commission, excluding Statement 103.
- Multiple parties/entities involved in the transaction need to register the transaction as a collective with the B-BBEE Commission.
- All major B-BBEE transactions concluded on or after the proclamation date of the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended, namely, 24 October, but before the final registered with the B-BBEE Commission within 60 calendar days of the final publication of the current notice.
- Any person may voluntarily register any major B-BBEE transaction consistent with the above threshold, concluded before 24 October 2014 with the B-BBEE Commission.
- Parties/entities involved in the transaction must submit documents for the registration of a major B-BBEE transaction according to the requirements prescribed by the B-BBEE Commission.

According to the notice, 'a major B-BBEE transaction' means any transaction between entities/parties that results in ownership recognition in terms of Statement 100. The threshold of registering the transaction with the B-BBEE Commission is based on the transaction value, excluding administration, professional and legal fees.

For Statement 102, transaction value means the value of the sale of assets, business and equity instrument.

The department said the threshold may be amended from time to time by a notice in the *Gazette* as determined by the minister.

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FISA submission to the Davis Tax Committee on possible forms of wealth tax

The Fiduciary Institute of Southern Africa (FISA), made a submission to the Davis Tax Committee (DTC), on the desirability and feasibility of possible forms of wealth tax, namely –

- a land tax;
- a national tax on the value of property (over and above municipal rates); and
- an annual wealth tax.

This was after the DTC released a media statement calling on stakeholders to send written submissions on possible wealth taxes for South Africa (SA). According to the statement, SA currently has three forms of wealth taxation, namely, estate duty, transfer duty and donation tax, which brings in an approximate 1% of tax revenue. The DTC states that Capital Gains Tax (CGT) is considered, by some, to be a form of wealth tax. 'The DTC has taken the view that CGT is a form of income tax and previously considered CGT in its estate duty reports so it will not be considered further during inquiry,' the statement said. The statement states that the DTC said it had adopted an approach that is participatory and consultative, which will provide for wide engagement with stakeholders. The DTC said that special dialogues would be arranged on an ongoing basis to take into account a diversity of interest and opinions.

FISA Chief Executive Officer, Louis van Vuren, submitted the following points on behalf of the FISA Council on 31 May. In its submission, FISA stated that, it cannot be assumed that all private owners of land are wealthy individuals. He

said land tax aimed at reducing inequality should take cognisance of this and a threshold value will have to be used, as ownership of land is not a very reliable proxy for wealth at a level that should be visited with a wealth tax.

FISA submitted that as a result of a need to discriminate between 'wealthy' and 'not-so-wealthy' land owners, a land tax will have to be so complex that it is doubtful whether it will be an efficient source of fiscal revenue. With regard to national tax on the value of property, over and above, municipal rates will suffer some of the same shortcomings as an annual land tax. The organisation pointed out that thresholds will have to be used again, with the result that ownership of residential property again will not be discreet enough as proxy for wealth. A very wealthy individual may own several pieces of property, which will all fall under the threshold.

On the third point of an annual wealth tax, FISA submitted that annual wealth tax will have to be extremely complex in order to target true wealth. The required level of complexity raises serious questions about the compliance and enforcement cost, as well as the ability to enforce. 'The existing taxes in South Africa are already highly progressive with 3,5% of taxpayers paying 38,5% of all personal income tax, while thresholds for estate duty, donations tax, transfer duty and CGT ensure that less affluent individuals are not affected by these taxes,' FISA said.

In the submission, FISA concluded that while it is understandable that a country such as SA cannot afford a perception that the tax system fails to tax the rich adequately on their wealth, great care should be taken to avoid hurting the middle class and future high nett worth individuals. 'It seems that, attractive as the idea may be to tax the wealthy on their wealth, any of the mentioned options are bound to be extremely complex taxes to introduce and administer,' FISA said in their submission.

FISA submitted that much research will have to be done to determine whether any tax such as one of those proposed will be efficient in terms of compliance and enforcement cost, compared to yield, and the existing taxes in SA are already highly progressive.

FISA stated that just in terms of income tax, those taxpayers with a taxable income in excess of R 1 million make up only 3,5% of the total number of taxpayers, while contributing 38,5% of the income tax revenue. 'The poor do not pay any estate duty, donations tax, transfer duty, capital gains tax or income tax, and in fact, it is submitted that the high level of inequality is not due to a lack of redistribution through the tax system, but more the result of lack of economic growth and the failure of the education system in South Africa to produce entrepreneurs and employable individuals,' FISA submitted.

• For the full submission visit www.fisa.net.za

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Proxi Smart matter rescheduled to be heard in February 2018

In last month's edition it was reported that the matter of *Proxi Smart Services Pty Ltd v Law Society of South Africa and Others* was on the High Court Gauteng roll (see 'LSSA takes on *Proxi Smart* Model in Gauteng High Court' (2017 (July) *DR* 14)) .

However, since the article was published, the matter was removed from the roll of 22 to 24 August by agreement between the parties. Deputy Judge President Aubrey Ledwaba has set the matter down for hearing in the Gauteng Division of the High Court: Pretoria as a special motion on 6 to 8 February 2018. The parties have requested that the matter should be heard by a full Court.

The notice of set down, as well as the Law Society of South Africa's (LSSA) papers and the papers of some of the other parties in the matter, can be viewed on the LSSA website at www.LSSA.org.za under the 'About us' and then 'Matters' tabs.

Barbara Whittle,
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National Forum racing against time to submit recommendations to Minister

The National Forum on the Legal Profession (NF) met on 30 June to finalise a number of matters in preparation for its recommendations to Justice Minister Michael Masutha on 1 August. This was the NF's ninth plenary meeting since it was established in March 2015.

In general the NF noted that, due to the looming deadline to make recommendations to the minister, time was running out to reach consensus on matters where there is no agreement among stakeholders. On such matters, the different views will be submitted to the minister for him to make a final decision. One such matter relates to the format and content of practical vocational training (PVT) for candidate legal practitioners. As no agreement has been reached between the attorneys' profession and some groups in the advocates' profession, different options will be submitted to the minister.

The NF has reached agreement on the following issues, which it was enjoined to make recommendations on in terms of s 97(1) read with s 109 of the Legal Practice Act 28 of 2014 (LPA):

• **An election procedure** to constitute the Legal Practice Council (LPC): The NF is recommending two separate voters' rolls for attorneys and advocates, with attorneys voting for their ten representatives and advocates for their six representatives on the LPC respectively. The attorneys' composition will be 70% black and 30% white attorneys; of which half must be women. The advocates' representation will be two black women, one white woman, two black men and one white man.

• **Provincial councils and their areas of jurisdiction:** The NF will recommend nine provincial councils; one in each province, with their areas of jurisdiction being within the official boundaries of the relevant province.

The LPC should be based in Midrand, with the provincial councils based as follows:

- Eastern Cape – East London
- Free State – Bloemfontein
- Gauteng – Pretoria
- KwaZulu-Natal – Durban
- Limpopo – Polokwane
- Mpumalanga – Nelspruit/Mbombela
- North West – Mahikeng
- Northern Cape – Kimberley
- Western Cape – Cape Town

The LPC should establish a committee comprising two advocates and two attorneys at each seat of the High Court, where there is no provincial council office.

• **The composition, powers and functions** of the provincial councils.

• **The manner in which the provincial councils must be elected:** The NF has drafted rules for the election of the provincial councils modelled on the election of practitioners to the LPC.

• **The right of appearance of candidate legal practitioners:** This is dealt with in s 25(5) of the LPA, but the NF plans to request an amendment to the LPA to afford pupil advocates the same rights as candidate attorneys. However, this is inextricably linked with the PVT aspects, which are yet to be finalised.

• The NF has conducted **a cost analysis** of the operation of the LPC and the provincial councils. Based on its analysis, and in an attempt to keep the levies affordable for legal practitioners, the NF foresees a shortfall in the LPC's budget for the first year of some R 28 million. The NF intended requesting the minister to consider recommending that the shortfall be subsidised by the Treasury via the Justice Department's budget. Some NF members expressed reservations that this could impact on the independence of the profession. However, generally the NF is concerned that, if this cannot be done, there will be no option but to increase the levies for practitioners. This, in turn, may have a detrimental effect on newly qualified practitioners entering the profession, as well as on other practitioners to remain in the profession.

If accepted, the recommendations will enable the minister to issue the required regulations, which need to be promulgated in time for the LPC to be established when ch 2 of the LPA comes into effect. This is envisaged to be on 1 February 2018.

The rules to be gazetted in terms of s 109(2) of the LPA have been completed save for those relating to PVT, where the minister must decide on the model. The completed rules relate to procedures to be followed by disciplinary bodies, as

well as the manner and form in which complaints of misconduct relating to legal practitioners, candidate legal practitioners or juristic entities must be lodged with the LPC. The NF must gazette the rules for comment. The Law Society of South Africa (LSSA) will inform practitioners immediately once these are gazetted to give you an opportunity to comment to the NF.

Fees and charges: The NF has also prepared the fees and charges payable by legal practitioners to the LPC for various applications, enrolment, certificates and conversion of enrolment, right of appearance, fees for Fidelity Fund Certificates, annual fees to be paid by practitioners etcetera. These too must be gazetted by the LPC.

Another aspect, which still requires finalisation, is the **agreement for the transfer of assets and staff** from the statutory provincial law societies to the LPC. Since the four provincial law societies do not have consensus currently on the terms of the agreement, the LSSA is to convene a meeting of the provincial law societies in an attempt to find a consensus and uniform position by mid-July. There is no provision in the LPA for the minister to make a decision regarding staff and assets, so this is an aspect, which must be agreed between the provincial law societies and the NF in order to move forward.

The timeframes for the implementation of the LPA are as follows:

- ***1 August***

The NF is to make recommendations to the minister (s 97(1)(*a*)).

Agreements between the NF and the provincial law societies with regard to transfers must be signed (s 97(2)(*a*)).

The NF is to issue rules on training and discipline through publication in the *Government Gazette* for comment (s 109(2)).

- ***1 February 2018: Implementation of ch 2 in terms of s 120(3)***

The minister's proclamation for the establishment of the LPC and provincial councils. (This is subject to the timeous amendment of the LPA in terms of the Legal Practice Amendment Bill B11 of 2017, currently before the Justice Portfolio Committee.) The LPC and provincial councils will exist without jurisdiction and the provincial law societies will continue to regulate the attorneys' profession for six months to ensure a smooth transfer.

The NF is to make all the rules in terms of s 95(1)).

The minister is to issue the regulations (s 109(1)).

- ***1 August 2018: Implementation of the rest of the LPA in terms of s 120(4)***

All rules and regulations need to be in place.

The provincial law societies will be abolished and the regulatory functions of advocates' structures will be transferred to the LPC.

The LPC and provincial councils will commence regulating the legal profession.

The NF will be wound up after a final meeting with the LPC in terms of s 105(3).

- The LSSA will continue to keep practitioners informed through its electronic advisories, particularly when various issues arising from the Act are gazetted for comment by practitioners. If you are not on the LSSA's e-mail database, please let us know by e-mailing LSSA@LSSA.org.za.
- More information on developments relating to the LPA, as well as links to the relevant legislation and documents as they become available, can be found under the 'Legal Practice Act' tab on the LSSA website at www.LSSA.org.za.

Legal Practice Act available in Afrikaans and Setswana

The Afrikaans and Setswana versions of the Legal Practice Act 28 of 2014 have been published. These can be accessed on the Justice Department website at www.justice.gov.za and also on the LSSA website under the 'Legal Practice Act' tab.

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

People and practices

Compiled by Shireen Mahomed

KISCH IP in Johannesburg has five promotions.

Vanessa Ferguson has been promoted to head of department in the trade mark and anti-counterfeiting department.

Vicky Stilwell has been promoted as a director.

Zama Buthelezi has been promoted as an associate.

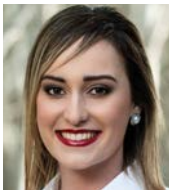
Robin Richardson has been promoted as an associate.

Natalia Androliakos has been promoted as an associate.

Abrahams & Gross in Cape Town has appointed Marita Swanepoel as a director in the trust and estates department.

Hill McHardy & Herbst Inc in Bloemfontein has three new appointments.

Dick Mabula has been appointed as an associate in the criminal and labour department.



Luzaan van Schalkwyk has been appointed as an associate in the general litigation department.

Aslin Saunderson has been appointed as an associate in the general litigation, criminal law and labour law department.

Clyde & Co in Johannesburg has five promotions.

Nicole Gabryk has been promoted as a partner in the insurance and construction department.

Thomas Lawrenson has been promoted as a partner in the speciality, international risk and reinsurance department.

Johann Spies has been promoted as a partner in the corporate insurance and commercial department.

Kate Swart has been promoted as a senior associate in the insurance and construction department.

Gregg Hammond has been promoted as a senior associate in the speciality, international risk and reinsurance department.

All People and practices submissions are converted to the *De Rebus* house style. Advertise for free in the People and practices column.

E-mail: shireen@derebus.org.za

❑

By
Thomas
Harban

Are you pursuing a legitimate professional indemnity claim?

The respective parties to a professional indemnity (PI) claim (the plaintiff's attorney, on the one hand, and the defendant (insured attorney), on the other) are opponents in the same manner as the opposing parties engaged in any other litigation. An in-depth examination of some of the claims notified to the Attorneys Insurance Indemnity Fund NPC (the AIIF) has revealed that this is not always the case. We have identified cases where the litigation is, unfortunately, brought by agreement between the supposed opponents. Furthermore, the litigation is not brought to pursue the interests of the plaintiff. In some instances, it is doubtful whether the plaintiff (as stated on the documents) is even aware of the litigation being pursued in his or her name.

The aim of the AIIF, in providing PI insurance to practitioners, is to provide such insurance in a sustainable manner and with due regard to the interests of the public by –

'(a) protecting the integrity, esteem, status and assets of the insured and the legal profession;

(b) protecting the public against indemnifiable and provable losses arising out of legal services provided by the insured attorney.'

What is stated above is set out in the preamble to the AIIF PI policy. It will be noted that the AIIF seeks, in a sustainable manner, to protect the interests of the profession and the public. The AIIF will, subject to the policy conditions, provide indemnity to insured attorneys for legitimate PI claims brought against them. Any agreement aimed at constructing PI claims threatens the sustainability of the AIIF.

In recent months, the assessment of claims has brought a number of undesirable practices to our attention. Where an insured attorney becomes aware of circumstances that may give rise to a PI claim, the client must be informed thereof and advised to consult with another attorney. It is not for the insured to instruct another attorney to pursue the claim against himself or herself, purportedly acting for the client. In these circumstances the insured attorney effectively elects an attorney who will litigate for him or her on behalf of the client, who has supposedly suffered a loss as a result of the breach of mandate/duty, and the aim is to obtain payment from the AIIF.

There have also been a number of instances where the plaintiff's claim is only pursued if/while the AIIF is providing indemnity to the insured. In some instances, either the AIIF will, without a legal basis, be cited as a defendant or the particulars are framed in a way that attributes liability to compensate to the AIIF. When questioned on the reasons for this, the response from the attorneys concerned has been that either –

- they saw this as a way to force the AIIF's involvement in the matter; or
- this was done in order to ensure that the AIIF 'would pay the claim'.

The following example illustrates this point:

Attorney A had been instructed by a client X to pursue a claim against the Road Accident Fund (RAF). The matter was not pursued timeously against the RAF and thus prescribed in A's hands. A then informed another attorney, B, of the prescription of the RAF claim and they (A and B) agreed that B would pursue a PI claim against A. The matter was reported to the AIIF by A who applied for indemnity. The AIIF was not aware of the agreement between A and B. When the AIIF either refused indemnity to A or, having initially granted indemnity, later withdrew such indemnity on the basis of the applicable policy conditions, B no longer pursued the claim against A. The reason for the failure to pursue the valid claim against A on behalf of X was that B did not want to obtain a judgment for which a colleague (A) would be liable. The fact that the AIIF, on the basis of the repudiation, would not indemnify A or pay the amount claimed (or any part thereof) was the reason for the claim against A no longer being pursued. By not pursuing the action against A, B was also exposed to a potential PI claim from X for failing to properly carry out the mandate.

Such claims are essentially constructed with the intention of pursuing a payment by the AIIF. This conduct is taken seriously and will, in appropriate circumstances be reported to the provincial law society and we will also pursue actions to recover any funds expended in such matters. Where collusion between the insured and the plaintiff's attorney is suspected, a full investigation will be undertaken. Fraudulent and/or dishonest applications for indemnity will be rejected.

The AIIF receives notification of an average of 600 PI claims per year. In order to assess the claims, the AIIF requires the assistance of the insured attorneys. The duty to provide assistance arises from the AIIF policy conditions. In many instances where the underlying circumstances of a PI claim are questioned, the insured attorney does not cooperate with the AIIF as required in the policy.

The AIIF policy

The duties of an insured, as listed in the AIIF policy (the policy), includes:

- ***Giving the AIIF and 'its appointed agents all information, documents, assistance and cooperation that may be reasonably required, at the insured's own expense.'***

In litigious matters, the AIIF may require that the insured attorney serve and file a notice of intention to defend while the matter is being assessed. The required information, documentation and assistance will enable the AIIF team to assess the claim. The most common instances where this duty is breached by insureds is where, for example, the AIIF team requires a copy of the attorneys file of papers but this is either provided at a very late stage in the proceedings or not provided at all. The AIIF's position is then compromised in that there is insufficient time to properly investigate a claim. There have been instances where a trial date had been set and a postponement had to be applied for as a result of the insured not having furnished the AIIF with the required information and documentation. It must be emphasised that, under no circumstances whatsoever, will the AIIF accept liability or agree to settle a claim without having had the opportunity to properly investigate all aspects of a matter.

• ***Giving immediate notice to the AIIF of any circumstance, act, error or omission that may give rise to a claim. The AIIF must be notified in writing as soon as practicable of a claim, but no later than one week after the insured receives a written demand, summons, counterclaim or application.***

In some instances, insured attorneys give late notification of the claim. The result is that the position of the AIIF as insurer may also be compromised in such circumstances. There have been many instances where the AIIF is only notified of a claim after a notice of Bar has been issued, a trial date is looming or even where judgment has already been taken against the insured. In some instances, the insured attorneys do not inform the AIIF that a notice of Bar has been issued. The AIIF reserves the right not to indemnify the insured for costs and ancillary charges incurred prior to or as a result of such late notification. Those firms, which have purchased top-up insurance in the commercial market, must have regard to the wording of their individual policies and note the time within which the top-up insurers are to be notified of an actual or potential claim. Some top-up insurers may reject a claim based on the late notification. In cases where the AIIF will not respond to the claim and the top-up insurer is then required to deal with the claim 'from the ground up', the top-up insurer will enquire why the AIIF policy has not responded and the insured will need to therefore, disclose the reasons. This then also puts the indemnification by the top-up insurer in jeopardy.

• ***The insured agrees not to admit or deny liability, settle a claim or incur any costs or expenses without the prior written consent of the AIIF.***

In violation of this obligation, some insured attorneys embark on the interactions with the plaintiff's attorney without the prior written consent of the AIIF. Unfortunately, some insureds even go the extent of admitting liability in respect of a claim on the mistaken impression that the AIIF will simply pay the amount sought. Similarly, an insured cannot, without the AIIF's prior consent, dispute a claim and litigate in respect thereof. All costs (including counsel's fees and correspondent's fees) incurred in such instances will be for the insureds own account.

• ***'The insured agrees to give the [AIIF] and any of its appointed agents all information, documents, assistance and cooperation … at the insured's own expense.'***

Any insured who refuses to provide cooperation to the AIIF or its agents (including the panel attorney) runs the risk of being refused indemnity. In assessing the claim and in pursuing the insured's defence, it is important that the AIIF team (and the panel attorneys appointed by the AIIF), are granted access to the insured and any member of staff who has dealt with the matter in question. Some insured attorneys do not make either themselves and/or their staff available for the required consultations. This places the AIIF in a compromised position.

Practitioners must be aware that in failing and/or refusing to comply with their duties in terms of the AIIF policy, they place themselves at risk in that, where the AIIF refuses to grant indemnity, the practitioner may then be in position where the PI claim is faced without the benefit of an insurer. In the case of the AIIF, this means that the practitioner would not have the benefit of an attorney conducting the defence (at the insurer's cost) and the AIIF limit of indemnity will also not be available to pay any damages (in the event that the practitioner is found to be liable to compensate the plaintiff).

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

By
Ian
Jacobsberg

Experiences as a mentor for the LEAD SA/Irish Rule of Law Mentorship Programme

I had the privilege of acting as mentor for the Commercial Law Programme run jointly by the Law Society of South Africa's (LSSA) Legal Education and Development (LEAD) division and Irish Rule of Law, an initiative of the Law Society of Ireland and the Irish Bar Council, for three consecutive years, from 2012 to 2015.

The programme originated from a recognition on the part of the participating practitioner bodies of the reality that the historical inequalities that the South African commercial world inherited from the days of the Apartheid government, pervaded the legal profession and just as much as, in business, could not be properly redressed by legislation alone. As the doors of commercial activities were opening to small and medium-sized, black-owned businesses, it was expected that there would be an increase in the demand for legal services tailored to their needs and financial resources more than the few large corporate firms in the major urban centres would be able to offer. At the same time, the majority of lawyers from historically disadvantaged backgrounds – who had not grown up as their white counterparts had – in an environment where discussion and understanding of business and commerce were common place, were often ill-equipped to offer growing businesses the advice they required. At the same time, while preferential procurement policies were opening up opportunities to historically disadvantaged lawyers to secure valuable commercial mandates from parastatals and other corporates, their lack of appropriate experience rendered them unable to provide the level of service such work demanded. These practitioners were unable to take advantage of the opportunities they were afforded.

As a result the mentorship programme was conceived, involving placement of a practitioner from a smaller firm in the corporate or commercial department of an established firm for a period of approximately three months. The practitioner was attached to a commercial partner in the host firm, in a manner similar to a candidate attorney, with a view to observing and learning about his or her matters, clients and practice and of the host firm in general.

Over the period that I participated in the programme, I acted as mentor to three different practitioners, all sole

practitioners in charge of small firms based in Pretoria, but all unique in terms of personalities and the types of practices they ran. Before starting the programme, they were asked to sign a contract, acknowledging, among other things, that, in return for being exposed to our practice and clients, they would observe the strict confidentiality of that information. During their time with us, they were exposed to all aspects of the practice, including meeting with clients and others, drafting of agreements, letters and other documents for clients and general practice administration. What was notable (but with hindsight probably to be expected) was that the areas where all the mentees had the most to learn was not so much theoretical knowledge of the law, or even how to apply it practically in given situations. Those skills are learned at law school, or relatively quickly in the course of articles and a year or two in practice. Also, being in charge of their own practices, all of them actually had a better handle on practice administration than many partners in large corporate firms, who all too quickly and too happily become reliant on an army of secretaries, bookkeepers and IT assistants. Where I found the mentees had the most to learn was usually in understanding the strategic significance of a specific transaction for a client's business, and, therefore, how the negotiation and drafting should be approached. Also, and probably most noticeably, all of the mentees, to a greater or lesser extent, were unaware of the importance of marketing their practices and how to go about it, especially on a limited budget. A lot of time was spent discussing this.

While I am certain all the mentees learnt much that they might not have had the opportunity to see and experience in their own practices, ultimately the benefit of the experience, like any opportunity, is what they made of it. I can only hope they found it invaluable, and I assume that they did, as at least two of them stayed in touch for some while afterwards, seeking guidance from time to time.

As a mentor, I experienced the truth of an old adage that the best way of learning is often to teach, because it forces you to make sure you know what you are talking about, and I certainly found myself thinking consciously about several things which, over years in practice, had become automatic. But most importantly, the feeling of assisting the success of others, and benefitting, in however small a way, the profession, the developing business community and the national economy was the most rewarding part of it all.

Why should experienced attorneys volunteer to mentor other attorneys?

According to Chief Executive Officer of the LSSA and Director of LEAD most

successful attorneys accept that a critical component to their success came from some form of mentorship. It may not have been a formal relationship, but there were people who impacted their professional lives by providing assistance and guidance. 'We need mentors in the profession more than ever due to the changing client needs, transformational requirements, evolving technologies and new competition. Today's attorneys need to seek out fresh areas of practice and mentors can play a role in helping mentees to identify new areas' said Mr Swart.

Mr Swart added that not all mentorship arrangements work out for a variety of reasons, however, those that do work, work very well. Mr Swart invited attorneys to become mentors. 'With your help, our mentorship programme will achieve greatness and sustainability for the profession. I invite experienced attorneys to become mentors by signing up on www.LSSALEAD.org.za and share their knowledge and experiences with attorneys from other firms,' he said.

• If you would like to be a part of the mentorship programme, please e-mail: mentorship@LSSALEAD.org.za for more information.

Ian Jacobsberg *BA LLB (Wits)* is an attorney at Hogan Lovells in Johannesburg. ❑

By Alan Lewis

VAT and penalties: Is Sars playing according to the rules?

This article will consider the provisions of the Tax Administration Act 28 of 2011 (the Act), regarding the levying of penalties, due to a vendor's failure to either submit a return, or to pay value-added tax (VAT), within the prescribed time period, and whether the South African Revenue Service (Sars) complies with those provisions.

Many vendors have learned – with some shock – that it is not a good idea to either fail to submit their VAT return, or fail to pay VAT, which is due to Sars, within the prescribed time period for doing so. These failures are immediately punished with a penalty, which is equal to 10% of the VAT liability.

In a recent matter, Sars had levied penalties in the vendors account for various tax periods.

The interesting aspect of this matter, is that none of the assessments, which had been issued on the vendor, made any reference to these penalties, nor had the vendor received any other correspondence, which explained the basis for these penalties.

The only reference to these penalties, was found in the vendor's account, as recorded in Sars accounting system, which was available on e-filing. While this account reflected the various penalties, it failed to offer any explanation for the basis on which Sars had levied them.

However, by examining the various entries for the relevant tax periods, in which the penalties had been levied, it became apparent that Sars had levied penalties, as a result of the vendor's failure to pay the VAT, which was due in terms of the relevant VAT returns, within the prescribed time period.

The vendor's explanation was that he accepted that he was entitled to set off those liabilities, against the various tax credits, which were reflected in his tax returns, for other tax periods.

The law

If Sars is satisfied that an amount of tax was not paid, as and when required under the Act, Sars must, in addition to any other 'penalty' or interest for which a person may be liable, impose a 'penalty' equal to the percentage of the amount of unpaid tax as prescribed in the Act (s 213 of the Act).

This penalty is imposed by way of a penalty assessment, which assessment must be delivered to the taxpayer and which notice must include the following information:

'(*a*) the non-compliance in respect of which the penalty is assessed and its duration;

(*b*) the amount of the "penalty" imposed;

(*c*) the date for paying the "penalty";

(*d*) the automatic increase of the "penalty"; and

(*e*) a summary of procedures for requesting remittance of the "penalty"' (s 214(1) of the Act).

'(2) A "penalty" is due upon assessment and must be paid –

(*a*) on or before the date for payment stated in the notice of the "penalty assessment"; or

(*b*) where the "penalty assessment" is made together with an assessment for tax, on or before the deadline for payment stated in the notice of the assessment for tax' (s 214(2) of the Act).

Sars is legally obliged to deliver an assessment to a vendor. In this regard, in handing down its decision in the matter of Singh *v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) at 527 para 17, the Supreme Court of Appeal (SCA) expressed itself as follows:

'The hypothetical (or assumed) knowledge by the taxpayer of the correct amount of his liability at the date for rendering his return is, no doubt, a convenient fiction for the determination of a date of liability and payment, but the reality is that no taxpayer (bona fide or dishonest) *who is kept in ignorance of the fact of an assessment and its content* can be expected to reconsider his liability and pay what he owes' (my italics).

Consequently, the SCA set aside the judgment, which Sars had taken against the appellant, on the basis of an assessment for VAT, which it had failed to deliver to the appellant, prior to taking that judgment.

Conclusion

I submit that the wording of s 213 is peremptory, and places a legal obligation on Sars, to deliver the necessary assessment to a vendor, where it seeks to levy, and recover a penalty as a result of the vendor's failure, to either submit a VAT return, or pay VAT, within the prescribed time period.

By failing to do so, Sars will fail to create the necessary debt, and consequently, it will have no right to demand payment of the penalty from the vendor. In the light of the definition of a penalty assessment, as set out in s 214(1) of the Act, Sars' account, concerning a particular vendor, or taxpayer, does not create such an assessment.

Consequently, Sars cannot simply rely on the details of such an account, which may reflect the above-mentioned penalty, to create an obligation on a vendor to pay that penalty.

Sars' apparent failure to comply with s 214 of the Act, could become a very costly mistake. The Act commenced on 1 October 2012, which is nearly five years ago. It is now high time that Sars take careful note of its provisions, and implement them.

Alan Lewis *BProc LLB (UFS) LLM Tax (UP)* is and advocate and tax practitioner in Johannesburg. ❑

The challenge of mediation between parties with different world views

Picture source: Gallo Images/iStock

By JP Venter

In mediation, parties endeavour to reach some common ground to resolve their disputes or conflict. One assumes that by getting parties together around the same table, that the battle is already half won. Surely if they can share their observations, they can start exploring how their positions might overlap, or gain a greater understanding of the different positions that might enable some movement. But, how would you feel if you were a party to a dispute and you knew that the worldview of the person sharing the table with you is so different from yours? You might as well have been sitting in two different rooms. That is the finding of the work of Dr Clare Graves, an American psychology professor. Is it still possible to find practical common ground under such circumstances?

In this article, I explore the challenge of mediating and finding agreement between parties when there is a big variance in world views and values.

Value systems: What are they and how do they develop?

According to the models developed by Dr Graves, people develop world views based on the problems of living they have experienced. For instance, if people have trouble surviving from day-to-day, they will tend to develop a world view that will enable them to cope and survive in a world that they experience as threatening to their existence. On the other hand, if a person experiences an environment where his or her needs are mostly met when he or she adheres to the rules and norms of society, he or she will tend to develop a world view that will allow him or her to cope with the demands of rules and norms. These world views are called value systems, or simply values, as they define what the person would see as important. According to these value systems, it is possible for people to have such contrasting world views, that they are practically living in two completely different worlds. That would mean that even though people are geographically in the same area, they might as well have lived in two different countries as they do not experience their worlds the same at all. For example, when South Africa (SA) went through its major political change in 1994, some people expected a war and were stocking up on supplies, while others could not imagine that and expected a mostly peaceful outcome.

Value systems

Dr Graves identified eight value systems. Each value system addresses a set of existence problems and the world view that would address these problems. Dr Graves called this model the Psychological Map – that is the map of the set of value systems. Only two of the value systems are discussed in this article. These value systems each have a certain colour identifying it on the map. For simplicity sake, we will use these colours as names for the values. Value system 1 is the red value system, and value system 2 is the blue value system.

• *Red value system*

The problems of living/existence challenges of this value system: A world filled with hostility, aggression and threats to existence.

The world view developed to deal with these problems: Seek to do what must be done for personal benefit and survival regardless of others and societal rules and norms.

• *Blue value system*

The problems of living/existence challenges of this value system: A world that requires order and stability and avoidance of chaos.

The world view developed to deal with these problems: Seek to live in ways prescribed by higher authorities, rules, regulations, standards and norms.

If views are as different as the definitions of these two values indicate, there is a lot of potential for conflict and misunderstanding. How should mediators act in order to prevent some pitfalls under these circumstances?

Mediation when value systems differ: A case study

In my own practice, I have found certain difficulties when having to mediate in commercial settings that comprise of various value systems. For instance, I was once confronted with conflict that arose due to a drop in performance of an employee in a construction-related company. He was seen as a high-potential person who could possibly move up to supervisory ranks, and then his performance dropped. As his work relationships deteriorated significantly, I was requested to mediate. Privately I wondered if management was not perhaps too controlling and demanding of a person who would be able to do better if allowed more independence. It later surfaced, however, that this was not the case at all. The relationship improved somewhat after the mediation as the animosity was aired, clear performance standards were set and objective control mechanisms were put in place. I was confident that the problem might have been solved. I patted myself on the back and watched the situation with interest. However, I was disappointed when the employee's performance did not improve sufficiently, despite all the efforts. I was also somewhat surprised that management did not fully use the levers that the mediation agreements had placed in their hands and that no formal warnings had been issued. Then one of the owners of the company discovered the reason for the poor performance by pure coincidence: Their employee was awarded a 'promising young entrepreneur' award. This became news on the Internet and the owner saw it per chance while browsing the Internet. So deviously, the employee was secretly building his own company, lying about his whereabouts and cheating with resources, while still maintaining his employment and riding on the back of his employers.

A review of the mediation process and the agreements made, revealed no fault in what had been done. No mediation guarantees that the reasons behind any behaviour will be revealed. In my mind, this is especially so if there is some unknown and devious misconduct behind the actions of a person – the person will try to keep it secret.

And management, acting out of the perception that the employee was trying to honour the agreements, made a mistake by not being sufficiently strict. They were actually trying to be less authoritarian. I later realised that they were endeavouring to follow their interpretation of the 'spirit' of the mediation.

All in all, the employee was operating from a red value system, while management made the mistake of thinking that everyone involved was operating from a blue value system.

Suggestions for catering for different value systems

Is it possible to cater for value systems that are so different? Fact of the matter is – we have no choice. The differences covered in this article are actually very common differences found in the South African labour market and probably in many other South African settings. I will separate the suggestions I have for the two discussed value systems, and then consider the problem of, at times having to do it simultaneously, such as during joint sessions. Ultimately, one must cater for both value systems in the process as a whole, up to the point where agreements have been implemented.

• *Catering for the blue value system*

This is not a problematic system, as the process of mediation and the set of rules and methods have, in my opinion, all been designed mostly from a blue world view. In general, do the following:

– Use tools that are printed and handed out.
– During individual sessions, stress your own adherence to principles and norms.
– Use words like what 'should' and 'ought' to be done.
– Cover all aspects in sufficient detail.
– Do not be inconsistent.

• *Catering for the red value system*

This value system is somewhat trickier as participants will break the rules if they can get away with it:

– Do not expect the printed word to be trusted or to be given much attention – repeat all important aspects verbally.
– Display body language that confirms a firm stance and an expectation that agreed behaviour will indeed be adhered to.
– Expect to be manipulated and taken advantage of – do not overreact and get into verbal altercations, but remain calm and firm.
– Do not expect to be trusted; explain why it is in your own interest to be even-handed and not to take sides (thus you provide the red value system with a believable self-interest reason why you would be even handed – that will be understood).
– Be careful not to be 'conned' into half-hearted agreements that leave loopholes for non-performance.

– Stress the benefit to them of doing the mediation, as well as of sticking to the agreements made.
– Explain the consequences of poor behaviour during mediation, as well as of disregarding agreements.

• *Catering for both red and blue value systems*

– Find a balance in the amount of paperwork and printed tools. Blue participants would prefer thorough printed details, while red participants would tend to want shorter and to-the-point versions of tools and agreements.
– While the suggestions above might seem to indicate that blue value system participants will be the easier participant and red the more difficult, in reality, this might not be so. People with a blue world view might be very pedantic and demand high attention to low-priority details, even when the issues have, in essence, already been settled. For instance, how payments will be made or which accounts will be used – which might be better handled by the legal representatives outside of the main mediation.
– It is also important to protect the red value system participant from agreeing to settlements without fully realising the consequences. The red value system participant might focus on only whether they have 'won' sufficient benefit, and once that is reached, settle quickly without giving enough attention to the full implications. For instance, the red participant might agree to pay a certain amount with interest – without giving enough attention to how much the interest will be in total.
– Encourage participants to follow through and implement every aspect and use every tool provided in the agreement (management in the case study could have solved the problem if they stuck to their guns).
– Overall, normal good mediation practice should be followed. If anything, the value system analysis showed how important it is to stick to good practice despite pressure to deviate from it. The exploitive value system discussed would mean that some participants would try to manipulate the process or push the mediator to take shortcuts.

Summary and conclusion

This article was written from a practitioner's perspective for other practitioners in the South African mediation field. The problem of finding agreement between parties who hold very different world views was explored. In the case discussed, management operated from a value system of rules and fairness, while an employee operated from an exploitative value system. Management misinterpreted the mediation process by assuming that their lenience was adhering to the spirit of the mediation. In the article, I made some suggestions on how to deal with and cater for the specific value systems discussed. Although these suggestions would improve the chances of successful mediation, in essence, nothing of the main process of mediation needed to change to accommodate the value systems. On the contrary, the case discussed illustrated that an unwavering and disciplined implementation of the agreements reached could have saved the day.

Suggested further reading:

• Clare Graves Website: Dedicated to the Work of Dr Clare W. Graves (www.clarewgraves.com, accessed 21-6-2017).
• Shalom H Schwartz 'An Overview of the Schwartz Theory of Basic Values' (www.scholarworks.gvsu.edu, accessed 21-6-2017).

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Trust assets and accrual claims at divorce: The SCA opens the door

By Bradley Smith

In the article 'Community of property and accrual sharing in terms of the Matrimonial Property Act, 1984 – Part 2' (1985 (Feb) *DR* 59) Professor Andreas van Wyk cautioned that the Matrimonial Property Act 88 of 1984 (the MPA), which introduced the accrual system into South African law only three months earlier, seemed 'deficient in protective measures against fraudulent alienations of assets aimed at defeating the other spouse's equalization [accrual] claim'. In this regard, Prof van Wyk specifically mentioned alienations of property to a discretionary trust as a manner to engage in 'preventative estate planning prior to divorce' (at p 60). The spate of High Court judgments over the past decade that have dealt with the question as to whether the (value of) assets of a trust may be taken into account for the purposes of assessing the accrual of a spouse's estate, testifies to the prescience of this statement. Finally, as of March of this year, we have a definitive answer to this question, by virtue of the Supreme Court of Appeal's (SCA) judgment in *REM v VM* 2017 (3) SA 371 (SCA). The purpose of this article is to shed light on

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some aspects of this case and its vital importance for legal practitioners.

The debate over the past decade

The 2006 SCA judgment of *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) provides a convenient point of departure. In this case, the SCA held that the value of the assets of a trust could be taken into account for the purposes of a redistribution of assets order (in terms of s 7(3) to (6) of the Divorce Act 70 of 1979). This was because 'the terms of the trust deed' and 'the evidence of how the affairs of the trust were conducted during the marriage' proved that the respondent had *de facto* 'controlled the trust and but for the trust would have acquired and owned the [trust's] assets in his own name' (at para 9, of the *Badenhorst* case) (the control test).

For present purposes two important principles may be distilled from the *Badenhorst* case:

- First, the rationale for taking the trust's asset values into account was that the respondent had had 'full control of the trust' and, in so doing, had 'paid scant regard to the difference between trust assets and his own assets' (at para 11). He had, therefore, violated the 'core idea' of the trust, which is to maintain a separation between the control (*qua* trustee) of trust property and the enjoyment of the benefits derived from such control (*Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paras 19 and 22). In short, the application of the 'control test' showed that the appellant had abused the trust by using it as his alter ego.
- Secondly, and closely linked hereto, there was an important reason why the court was constrained to taking *the value* of the trust assets into account (as opposed to ordering the redistribution of the trust assets themselves): This was because, in contrast to the situation where a 'trust' is held to be a sham (due to non- [or simulated] compliance with the essential elements for the creation of a trust), the trust property had been validly transferred to the trustees of a legally created trust. The result was that they had obtained the 'character' of trust assets (see *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC) at paras 16 – 23).

Bearing these principles in mind, the value of the trust assets could be taken into account to determine the extent of the redistribution order. In so doing, it is my view that the *Badenhorst* case entailed a piercing of the trust's 'veneer' (see BS Smith 'Statutory discretion or common law power? Some reflections on "veil piercing" and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – Part One' (2016) 2 *Journal for Juridical Science* 68 at 83 – 89 (Smith 2016), but compare to the *Kaye* case at paras 23 and 24).

In the wake of the *Badenhorst* case, two schools of thought developed regarding the possibility of taking the value of trust assets into account in the context of accrual claims. The first, as exemplified by case law such as *RP v DP and Others* 2014 (6) SA 243 (ECP), was that the *Badenhorst* case involved the exercising of a common law power that had been transplanted from company law (ie, the principles pertaining to 'piercing the corporate veil') into trust law. As such, Alkema J opined that it was 'fallacious' to argue that the court's discretion to take the value of the assets of an alter ego trust into account was derived from (and restricted to) marriages to which the discretionary powers conferred by s 7(3) to (6) of the Divorce Act applied (at para 56). In the result, the common law power could also be exercised in the accrual context.

The second school of thought is encapsulated in the approach adopted by Ploos van Amstel J in *MM and Others v JM* 2014 (4) SA 384 (KZP). In essence, the court held that there was 'a fundamental difference' between redistribution orders and accrual claims because in contrast to the former, ss 3, 4 and 5 of the MPA simply provided for a factual, mathematical calculation and did not permit a court 'to make an assessment of what it deems to be "just"' (at para 12 in the *MM* case). The MPA did, therefore, not permit any asset that did not form part of a spouse's estate to be taken into account in calculating the accrual claim (at para 19 in the *MM* case).

The next major development was occasioned by the SCA's judgment in *WT and Others v KT* 2015 (3) SA 574 (SCA). Although this matter dealt with a marriage in community of property, the court dealt two implicit, but decisive, blows to the possibility of trust assets being considered in the accrual context. The first, was the court's finding that a crucial distinguishing feature between a marriage in community of property and the *Badenhorst* case was the absence of a 'comparable discretion as envisaged in s 7(3) of the Divorce Act, to include the assets of a third party in the joint estate' (at para 35 of the *WT* matter). Academic commentators at the time correctly concluded that this finding by implication extended to accrual claims and thus endorsed the approach in the *MM* case (see F du Toit 'South Africa – Trusts and the patrimonial consequences of divorce: Recent developments in South Africa' (2015) *Journal of Civil Law Studies* 654 at 696 and 697).

Secondly, the court held that an aggrieved spouse would only have 'standing to challenge the management' of a trust (in an attempt to have its veneer pierced) if a fiduciary responsibility was owed to that spouse because he or she was a trust beneficiary or a third party who had transacted with the trust. It goes without saying that this decision placed aggrieved divorcing spouses whose marriages did not fall within the ambit of s 7(3) of the Divorce Act and/or who were neither trust beneficiaries nor third parties who had contracted with the trust, in an invidious position. In effect, the message conveyed was that trustee-spouses whose marriages were subject to the accrual system were free to engage in unscrupulous 'divorce plan-

ning' by utilising an alter ego trust to minimise their accrual liability at divorce (see Smith 2016 at 85 and BS Smith 'Statutory discretion or common law power? Some reflections on "veil piercing" and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – Part Two' (2017) 1 *Journal for Juridical Science* 1 at 7 – 14 (Smith 2017)).

The latest judgment of the SCA in *REM v VM* has, however, rectified this unsavoury state of affairs.

The *REM* case

In this case the parties had married and divorced one another on no less than three occasions. When the final divorce order was granted in 2011, the respondent's patrimonial claim was, by agreement that was made an order of court, postponed *sine die*. It will suffice for the purposes of this article to accept the SCA's finding that the exclusion clause contained in the parties' antenuptial contract did not exclude the assets of two trusts (the S Trust and the CPB Trust) for accrual purposes. As such, the major question to be answered was 'whether [these assets] legitimately form part of the assets of these trusts and do not form part of the appellant's estate, for purposes of the accrual system' (at para 10). This question, quite correctly, required the court to determine whether these trusts were merely the alter egos of the appellant. Although the SCA found that a conspectus of the evidence did not support the latter finding, two aspects of the case are of crucial importance for the purposes of this article.

First, the SCA confirmed the distinction between sham trusts and instances where a litigant sought to 'pierce the veneer' of a trust as the alter ego of a trust founder or trustee: While the former implied that a valid trust never existed, the latter entailed a remedy aimed at combating the abuse of an existing trust. This remedy could be styled as –

'an equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a flexible approach *to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances.* It is a remedy that will generally be given when the trust form *is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation*' (at para 17) (my italics).

Secondly, the SCA emphatically rejected the finding in the *WT* case that an aggrieved spouse, who was neither a beneficiary of the trust, nor a third party who had transacted with it, had no standing to impugn the management of a trust because no fiduciary duty was owed to such a spouse. In fact, as the SCA pointed out in the *REM* case, the fact that no fiduciary duty was owed to such a spouse was irrelevant. The critical issue instead was whether the spouse was seeking to advance a patrimonial claim that the other spouse had attempted to prejudice by administering a trust in such a manner as to amount to an unconscionable abuse of the trust form. Of crucial importance, the SCA correctly held that in marriages involving the accrual system, this would occur where a trustee-spouse transferred personal assets to a trust and dealt with them as if they were trust assets in a fraudulent or dishonest attempt to conceal them and thus prejudice the aggrieved spouse's accrual claim. In these circumstances, trust assets could 'be used to calculate the accrual' of the errant trustee-spouse's estate and to 'satisfy any personal liability of [that spouse] to make payment to the [aggrieved spouse]' (at paras 19 and 20).

The judgment in the REM case makes it clear that the asset values of an alter ego trust may now be taken into account in marriages that are subject to the accrual system.

Implications and practical relevance

The judgment in the *REM* case makes it clear that the asset values of an *alter ego* trust may now be taken into account in marriages that are subject to the accrual system. Although the court did not elaborate on the precise legal basis for doing so, it is my view that the judgment by implication endorses the sentiment expressed in the *RP* case to the effect that the power to pierce the veneer of an alter ego trust stems from the common law and exists independently of the Divorce Act or the MPA. As such, it may in principle be exercised in the context of all matrimonial property regimes. However, as I have pointed out in another publication (see Smith 2016 at 85 – 89) the fact that this power exists does not necessarily permit it to be exercised. Doing so depends on whether a *nexus* exists between the power and the applicable matrimonial property regime.

As far as future litigation is concerned, practitioners should note that two distinct processes are involved. The first step is to prove that one is dealing with a trust that is merely the alter ego of one of the spouses. This question may be answered with reference to the so-called 'control test' as enunciated in the *Badenhorst* case (*op cit*). Once this test has been complied with, the next step is to determine whether the applicable matrimonial property regime imposes an obligation on the divorcing spouses, which one of them has attempted to evade by means of the alter ego trust. It is the presence of this obligation that constitutes the *nexus* between the existence of the common law power and it actually being exercised. So, for example, the *REM* case shows that in the case of a marriage to which the accrual system applies, the obligation sought to be evaded is the obligation to provide a true and accurate reflection of the trustee-spouse's accrual. In the case of a marriage to which s 7(3) of the Divorce Act applies, the *nexus* is provided by the possibility of a redistribution order that, if granted, permits a (partial) transfer of assets to a spouse in circumstances in which he or she would otherwise not be entitled thereto because they are married out of community of property. (For suggestions regarding marriages that are in community of property – which is a particularly tricky scenario – or marriages entered into with complete separation of property after the enactment of the MPA, see Smith 2017 at 2 – 7 and 13 – 15).

In summary, the judgment in the *REM* case is to be lauded for creating certainty in respect of trust assets and marriages involving the accrual system and for correcting the erroneous approach to legal standing that was taken by the same court in the *WT* case. In addition, the principles enunciated in this judgment are in my view capable of being applied in other matrimonial property regimes in the manner alluded to above. The *REM* judgment has thus contributed to making piercing a more viable remedy for aggrieved spouses.

In conclusion, it should be noted that there are a number of contentious aspects of the *REM* judgment that considerations of space do not permit to be discussed here. The reader is referred to BS Smith 'Perspectives on the juridical basis for taking (the value of) trust assets of alter ego trusts into account for the purposes of accrual claims at divorce: *REM v VM*' 2017(4) *SALJ* forthcoming for an in-depth analysis.

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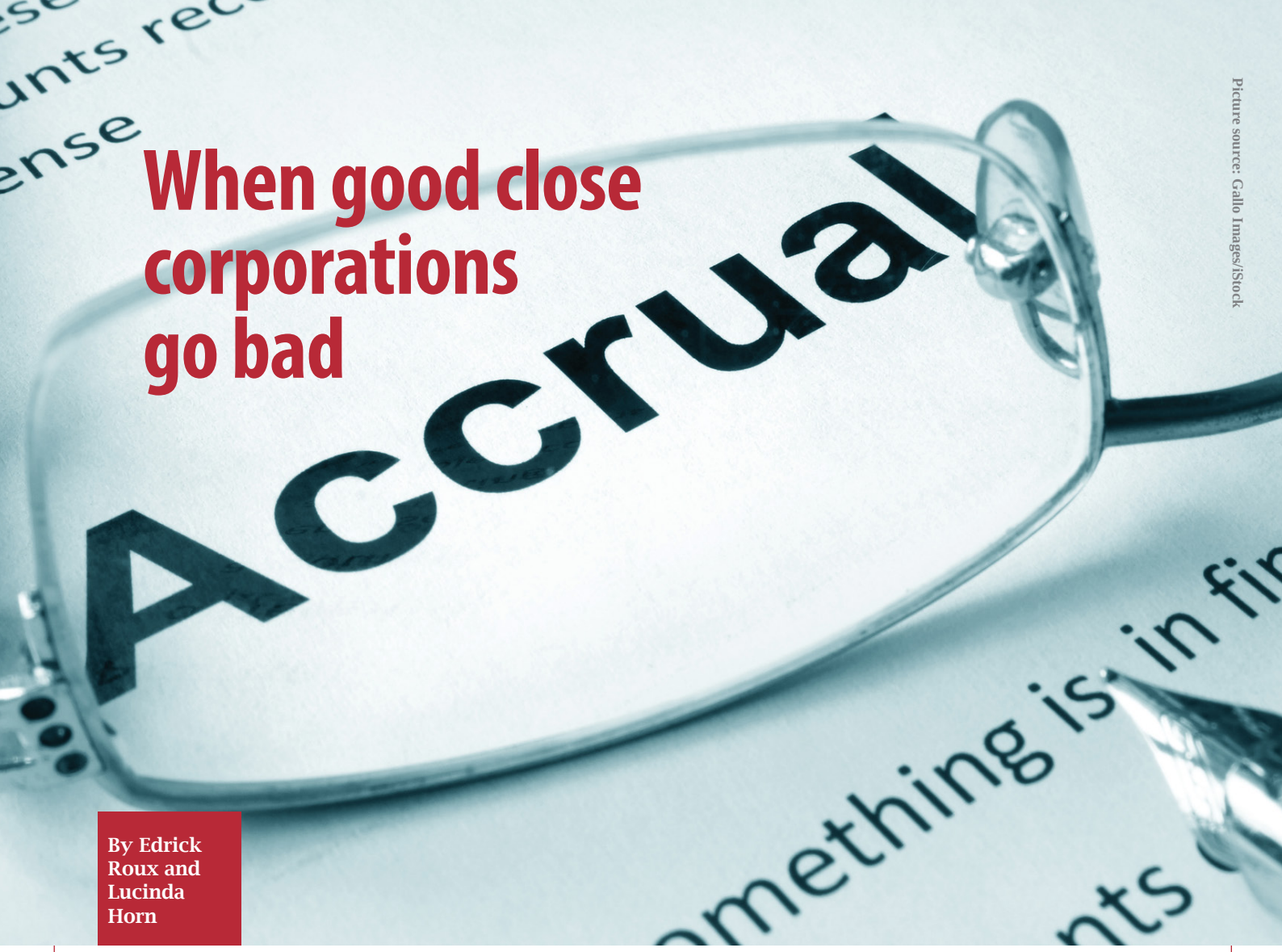

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By Edrick Roux and Lucinda Horn

'Enjoy the little things, for one day you may look back and realise they were the big things' Robert Brault. This is both a valuable life lesson and an irrefutable truth when it comes to many legal matters where a small variation to the norm can have an exceptionally large effect from a legal perspective. This becomes even more relevant when two extraordinarily complicated legal fields, such as the laws surrounding close corporations (Close Corporations Act 69 of 1984 (the CC Act)) and the law of Trusts (Trust Property Control Act 57 of 1988) begin to intertwine, as laws generally do.

Trusts, being extremely flexible *sui generis* entities, which provide various benefits from a risk protection and estate duty perspectives, often form the lynch pin of complicated estate plans. Practically this means that they often overlap with the business interests of estate planners, who by virtue of their success, and with expert assistance from attorneys and other skilled estate planning professionals, usually made comprehensive estate plans aimed at reducing estate duty and ensuring that family businesses would continue in operation long after they have passed away.

Quite often this includes the transferring of member's interest of a close corporation (CC) to a Trust, or by allowing a Trust to be the founding member of a CC from the get go.

What follows is a brief discussion on the rules surrounding CC and Trusts.

Can a Trust be the member of a CC?

In terms of the provisions contained in the CC Act (s 28) there must be at least one, and no more than ten, members of a CC, which originally were limited to only being allowed to be natural persons (s 29(1) of the CC Act).

However, this position was altered by s 1 of the Close Corporations Amendment Act 17 of 1990 by way of the insertion of s 29(1A) of the CC Act, which reads as follows:

'The provisions of subsection (1) shall not apply to the membership of a corporation of a *natural person who holds that membership for the benefit of a trust inter vivos* if immediately before 13 April 1987 a natural person held membership of the corporation for the benefit of the trust …' (our italics).

Accordingly, an *inter vivos* Trust, was now allowed to hold membership interest in a CC, subject, however, to the following prerequisites of s 29(1A)(*a*) – (*d*) of the CC Act –

'(*a*) *no juristic person shall directly or indirectly be a beneficiary* of that trust;

(*b*) the member concerned shall, as between himself or herself and the *corporation, personally have all the obligations and rights of a member*;

(*c*) the *corporation shall not be obliged to observe* or have any obligation in respect of *any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation*; and

(d) *if at any time* the *number of natural persons at that time entitled to receive any benefit* from the trust shall, *when added to the number of the members* of the corporation at that time, *exceed 10*, the provisions of, and exemption under, this *subsection shall cease to apply and shall not again become applicable* notwithstanding any diminution in number of members or beneficiaries' (our italics).

Therefore, there should all of the abovementioned requirements be met, there should be no prohibition to allow a Trust, via one of the trustees who will be required to attend to all of the necessary aspects, to hold the relevant member's interest.

Complications with regards to a Trust being a member of a CC

In light of the above it is clear that there is no prohibition on a Trust being a member of a CC, however, there are several complications that may arise, which would make it less desirable for a Trust to be such a member.

The first complication arises from the general wording, which is usually present in most Trust templates. Generally speaking juristic persons form part of the category of discretionary beneficiaries in terms of the Trust deeds. This clearly disqualifies the Trust, however, this can easily be remedied by way of attending to an amendment of the Trust deed to remove all juristic persons from the category of the beneficiaries.

The far more pressing concern arises from the provisions contained in s 29(1)(*d*) of the CC Act, which are often overlooked. In order to determine how many members are in office on a given Trust, one must take into account all of the natural persons who qualify as beneficiaries of the Trust.

In many cases this should not be a problem, since the number of members should effectively still be less than ten, at least at the date of the creation of the Trust. However, should the trustees ever become too lax in their administration of the Trust and this level exceeds ten, then the exemption that allows for the Trust to hold the member's interest will become inoperative and furthermore, in accordance with the provisions contained in s 29(1)(*d*) of the CC Act they can never become applicable again irrespective of whether the number of beneficiaries are subsequently reduced.

This seems to lead to two distinct scenarios –

- where the Trust was not the only effective member of the Trust, then the membership effectively falls away and the full membership should revert to the remaining member(s) as a deemed disposal by the Trust (this will likely occur in accordance with the provisions of s 33(1)(*a*) or alternatively s 37 of the CC Act); or
- the creation of a legal anomaly where there are no members left in the CC.

The second option is particularly problematic as it prohibits the capability of the CC to effectively function, including attending to the day to day management and operations of the CC, which could in extreme situations lead to the Registrar of CC (as defined in s 4 of the CC Act) deregistering the CC in terms of the provisions contained in s 26(1) of the CC Act.

For obvious reasons this is not a desirable result and could lead to severe detriment of the employees of the CC, as well as the potential beneficiaries of the Trust, which in turn could result in the trustees being held accountable for damages suffered due to their inability to foresee and attend to protecting against this eventuality.

Prevention is better than cure

In order to avoid any potential issue from impacting the ability of the Trust to hold the member's interest in a CC, the authors submit the following:

- Should the desired objectives of the Trust make it a necessity, or should it be desired to do so, the Trust deed must be scrutinised in order to make sure that powers and duties afforded to the trustees authorise them to hold member's interest of a CC.
- The Trust deed must be drafted in such a manner as to ensure that there is no chance that any juristic person may be benefitted, whether directly or indirectly.
- Provisions must be inserted into the Trust deed to create deeming provisions, which deems the member's interest held by a specific individual to be disposed of to another member, or potential member, immediately prior to the number of members exceeding ten (this aspect must be closely monitored by the trustees as s 29(1A)(*c*) of the CC Act specifically states that the CC is not obliged to observe any obligations or provisions of the trust).
- As the CC is not obliged to give effect to the provisions of the Trust deed it would also be prudent to incorporate provisions similar to those referred to in bullet three above in an association agreement signed by the members in order to ensure that it is given effect to. This would also be in accordance with the provisions of s 37(*a*) of the CC Act.
- An extreme alternative may also be to limit the number of beneficiaries in the Trust to ensure that they can never exceed the threshold set by the CC Act, however, this will limit the flexibility and usage of the Trust. As such this should only be considered as an extreme alternative.

The abovementioned will of course serve to prevent any unintended consequences, however, it must be noted that they could result in Capital Gains Tax (CGT) consequences arising from the disposal of the member's interest in order to avoid a legally untenable situation.

Where s 29(1A) of the CC Amendment Act has come into effect

Cases where the provisions of s 29(1A) of the CC Amendment Act has come into effect and there are other members, the effect would seem to be that the member's interest, which was held by the Trust was disposed *ipso iure* to the remaining member(s).

This may also result in CGT consequences arising, as the member's interest has been disposed of.

Where there are no other members, which is to the knowledge of the authors a legal anomaly and an issue, which has not yet been tested by court, it would seem that the only solution would be for the former member to approach the court for a declaratory order to have the member's interest disposed of to one of the beneficiaries of the Trust, or some other individual who qualifies for membership of a CC (as per the provisions of s 29(2) of the CC Act), in order to ensure that the normal business activities of the CC can continue.

Although generally speaking only the members of the CC would have the necessary *locus standi* to approach the court for relief in this regard, the unique nature of such an application should allow for the *locus standi* to extend to individuals who have a sufficient interest in the CC, similar to the position that would apply in the case of Trusts (see *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) and *Kidbrooke Place Management Association and Another V Walton and Others NNO* 2015 (4) SA 112 (WCC)).

Failing which, it is conceivable that the Registrar of CC will have the relevant corporation deregistered, which could have extremely wide reaching negative consequences for all of the relevant stakeholders. It must be noted that the CC will also be prohibited from initiating liquidation proceedings in accordance with s 67 or 68 of the CC Act, as there are no members to make the relevant resolution.

Conclusion

From the above it is clear that there are a wide range of negative consequences, which may arise should these circumstances occur, and although the authors have attempted to provide practical solutions it remains to be seen how these aspects will be dealt with in practice.

What is clear, however, is that either of these scenarios are best avoided in practice as prevention is better than cure.

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THE LAW REPORTS

June 2017 (3) South African Law Reports (pp 335 – 666); May [2017] 2 All South African Law Reports (pp 335 – 676); 2017 (3) Butterworths Constitutional Law Reports – March (pp 267 – 413); 2017 (5) Butterworths Constitutional Law Reports – May (pp 543 – 674)

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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
ECM: Eastern Cape Local Division, Mthatha
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LCC: Land Claims Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Child law

Where commissioning parent to a surrogate motherhood agreement is a single person her gamete must be used to fertilise surrogate mother: Section 294 of the Children's Act 38 of 2005 (the Act) provides that: 'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'

In *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC) the commissioning parent, AB, was a single person who had no gamete to use in the conception of the contemplated child. That was due to her infertility as she was not able to produce an ova or fall pregnant. As a result of lack of gametes her attorney advised her that the surrogate motherhood agreement was invalid for non-compliance with s 294 of the Act. For that reason the constitutionality of the section was challenged on a number of grounds, being that the section violated the rule of law, as well as the rights to equality, human dignity, reproductive autonomy, privacy and access to healthcare.

The GP, per Basson J, held that the section was unconstitutional and made a punitive costs order against the respondent minister for her dilatory conduct in the prosecution of her defence. The present application to the CC was for confirmation of the High Court order. The minister appealed against both orders. The court declined to confirm the High Court order relating to the invalidity of the section, this making the minister successful, but dismissed her appeal against the punitive costs order. The minister was ordered to pay the applicant's costs in the CC.

The majority judgment was read by Nkabinde J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ and Jafta, Mhlantla and Zondo JJ concurring) while the minority judgment was read by Khampepe J (Cameron, Froneman and Madlanga JJ concurring). The court held that the prerequisite for a valid surrogate motherhood agreement was that the conception of the child contemplated in the agreement had to be achieved by the use of the gametes of both commissioning parents or the gamete of one of the two parents if both parents could not donate gametes due to either biological, medical or other reasons. Where there was one commissioning parent, as was the case in the present matter, the section required the use of the gamete of that parent. The objective of the provision was evident from the plain language used in the heading to the section, which read 'Genetic origin of child', as well as the provisions of the section itself. Textually, if both commissioning parents were unable to contribute gametes for procreation they were disqualified. Single commissioning parents were likewise disqualified if they could not, in person, contribute gametes for that purpose.

The requirement of donor gametes within the context of surrogacy served a rational purpose of creating a bond between the child and the commissioning parent or parents. The creation of a bond was designed to protect the best interests of the child to be born so that the child had a genetic link with its parent or parents. The disqualification of the applicant, or of other people similarly placed, was rational in that it safeguarded the genetic origin of the child as contemplated in the surrogacy agreement for the child's best interests. Clarity regarding the origin of a child was important to the self-identity and self-respect of the child.

Although the applicant was disqualified from concluding the surrogate motherhood agreement by reason of biological, medical or other reasons she was not left without any legal option. She could in theory bring herself within the ambit of the section by entering into a partnership relationship with someone whose gamete could be used for the conception of the child as contemplated in the agreement.

• See law reports 'Child law' 2016 (May) *DR* 34 for the GP judgment.

Company law

Buying-out a shareholder to resolve deadlock: Section 163(1) of the Companies Act 71 of 2008 (the Companies Act) provides among others that: 'A shareholder or director of the company may apply to court for relief if –

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

On considering the application the court is granted power by subs (2) to make any interim or final order it considers fit, including an order directing an exchange of shares and an order to pay compensation to an aggrieved person, subject to any other

law entitling that person to compensation. Similar provisions, which apply to close corporations, are found in ss 36 and 49 of the Close Corporations Act 69 of 1984 (the CC Act).

In *De Klerk v Ferreira and Others* 2017 (3) SA 502 (GP) the plaintiff De Klerk (D) was initially the sole member of Plantsaam CC (the corporation), as well as the sole shareholder and director of Benjo (Pty) Ltd (the company). The company was the owner of land on which the corporation carried out its farming operations. As D was a medical practitioner practising his profession in Canada, he employed the first defendant Ferreira (F) as the farm manager. As an incentive to F he later admitted him as a member of the corporation and sold to him half of membership interest. He also admitted him as a shareholder and director of the company, selling to him half of the shares in the company. Because for a part of the year the plaintiff was out of the country, the day-to-day running of the farming business was left to F. However, F breached the trust by committing serious acts of financial irregularity when he misappropriated the funds of the corporation on several occasions and in a number of ways such as by depositing the corporation's funds in his private banking account for personal needs. He also carried out farming operations for his own benefit on the company's land, alleging that there was a lease but never paid rental or accounted for income received.

On finding out what F was doing D approached the court for an order authorising him to acquire F's membership interest in the corporation, his shareholding in the company, both with full compensation, and cessation of F's directorship of the company. F opposed the application and counterclaimed for winding-up of both the company and corporation. In the alternative he sought an order directing that he, in turn, should buy-out D. Because of the obvious dispute of fact that arose, motion proceedings were changed to trial action.

Murphy J granted with costs the order sought by D and dismissed F's counterclaim. D was ordered to pay a specified amount to F, which represented the value of his membership interest in the corporation and shareholding in the company. The court held that if it appeared that particular acts or omissions by F in relation to the corporation were unfairly prejudicial, unjust or inequitable, or that the corporation's affairs had been conducted prejudicially, unjustly or inequitably, the court could make such order as it thought fit, including compelling the sale of his membership interest, provided the court considered it just and equitable to do so. The common thread running through all the provisions of s 163 of the Companies Act and ss 36 and 49 of the CC Act was that they conferred on the court a wide discretion to compel a transfer of shares or member's interest in order to deal with prejudicial, oppressive, unjust and inequitable conduct by a company, director, shareholder or member against other members.

The actions of F in relation to the corporation were unfairly prejudicial. Furthermore, F had conducted the affairs of the corporation in a manner unfairly prejudicial to D as contemplated in s 49 of the CC Act and thus permitting the court to make an order as it saw fit, which was considered just and equitable. It was thus appropriate to make an order in terms of s 36 of the CC Act that F should cease to be a member of the corporation and a further order for the acquisition of his interest in terms of ss 36(2)(*a*) or 49(2).

What was good for the corporation was equally good for the company as they were related entities and were both under the *de facto* control of F. Over the years F had exclusive control of the financial affairs, management and day-to-day running of the two entities. D had minimal access to the financial records, source documents and correspondence of both entities and played a limited role in their functioning, as well as performance. The corporation was, therefore, a 'related person' as contemplated in s 163(1) of the Companies Act with the result that D was entitled to relief in terms of s 163(2)(*e*) in relation to the company.

Protection of security or title interest of a third party when business rescue practitioner disposes of property belonging to the company: Section 134(3) of the Companies Act 71 of 2008 (the Act) provides among others that if during business rescue proceedings the company wishes to dispose of any property over which another person has any security or title interest, the company must –

'(*a*) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(*b*) promptly –

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

(ii) provide security for the amount of those proceeds to the reasonable satisfaction of that other person.'

In *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others* 2017 (3) SA 539 (GJ) the applicant, Energydrive, was the owner of certain equipment, which it leased to the second respondent, Winplas, subject to a reservation-of-ownership clause. When the latter went into business rescue proceedings, the fourth respondent, Knoop, was appointed its business rescue practitioner. The fourth respondent sold and delivered the equipment to the first respondent, Tin Can Man, without obtaining the prior consent of the applicant, paying to discharge the company's indebtedness to it regarding its security or title interest in the equipment or providing security to its reasonable satisfaction.

When the applicant sought to recover the equipment from the first respondent, it was contended that as the proceeds of the sale were sufficient to satisfy the title interest of the applicant, the first respondent was protected by s 134(3) and could retain the equipment. The application was granted with costs and the first respondent ordered to deliver the equipment to the applicant. Coetzee AJ held that s 134(3) allowed a company under business rescue to dispose of property, which was subject to security or a reservation of ownership clause without the consent of the creditor con-

cerned, only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security. If that were so, s 134(3)(*a*) authorised a business rescue practitioner to dispose of the property. In such event s 134(3)(*b*) required the practitioner to promptly pay the debt due to the secured creditor or owner or provide security, therefore, to the reasonable satisfaction of the applicant.

The obligation to pay or secure the debt was not a mere personal right against the practitioner as interpreting it that way would destroy the agreed security or ownership and replace it with a personal right against the practitioner. The obligation to promptly pay or secure the debt was a requirement for a valid transfer of ownership by the practitioner by way of a sale and delivery in terms of the section if there was no consent on the part of the creditor. The rights of the creditor would only be terminated on payment or the provision of other security. In the present case the practitioner did not pay or secure the debt due to the applicant. It followed, therefore, that the practitioner did not validly destroy the right of ownership of the applicant who still remained the owner of the equipment.

Custom and excise

South African Revenue Service (Sars) does not have embargo for payment of customs duty over imported goods when company is wound up: In *Commissioner, South African Revenue Service v Van der Merwe NO and Others* [2017] 2 All SA 335 (SCA) the sixth respondent, Pela Plant (the company) had a major civil engineering project in the Democratic Republic of Congo in respect of which it purchased certain items of heavy duty equipment. After completion of the project it brought the equipment back to South Africa. For importing (bringing back) same into the country the appellant Commissioner for Sars imposed customs duty in terms of the Customs and Excise Act 91 of 1964 (the Customs Act), as well as value-added tax (VAT) in terms of the Value Added Tax Act 89 of 1991 (VAT Act). The equipment was stored in a customs and excise warehouse pending payment of customs duty and VAT. In the meantime the company was wound up for inability to pay debts as a result of which the first to fifth respondents were appointed its liquidators. The liquidators requested the appellant to release the equipment for realisation in the insolvent estate of the company and distribution of proceeds among creditors. The appellant rejected the request, alleging that there was an embargo in his favour over the equipment, which precluded him from releasing it until customs duty and VAT were paid in full. The KZD, per Annandale AJ, held that the Customs Act did not preclude the appellant from releasing the equipment to the liquidators and thereafter, like any other creditor, prove a claim in the insolvent estate of the company. An appeal against that order was dismissed with costs by the SCA.

Theron JA (Lewis, Wallis, Petse and Dambuza JJA concurring) held that the answer to the question – whether there was an embargo in favour of the appellant – which prevented the liquidators from taking possession of the equipment in order to deal with it according to the laws of insolvency without first having to pay customs duty and VAT thereon was to be found in ss 20(4)(*a*), 38, 39 and 114 of the Customs Act. The important aspect of the sections was that they were all addressed to the ordinary situation where goods were brought into the country and attracted liability to pay customs duty. The sections were directed at the obligation of the importer and others liable to pay customs duty, but did not address the special situation of insolvency. When one looked at liability to pay customs duty in the ordinary course, one only had to look to the provisions of the Customs Act alone. When insolvency intervened one turned to the Insolvency Act 24 of 1936 (the Insolvency Act). In the event of insolvency the common law provided that a trustee had to realise all the assets of the insolvent including those subject to a *lien* and as such the trustee was entitled to demand delivery thereof. If it were otherwise the *lien*-holder would be able to frustrate the winding-up of the estate. The common law was somewhat altered by s 83 of the Insolvency Act, which permitted a creditor, who held as security for his claim any movable property, to realise that security under certain prescribed conditions prior to the second meeting of creditors. Section 83 was, however, not applicable to the present case. In brief, there was nothing in either the Customs Act or the Insolvency Act, which expressly, or by necessary implication, providing that goods subject to a *lien* in favour of the appellant did not fall to be dealt with under the laws of insolvency.

Environmental law

Environmental authorisation of coal-fired power station needs climate change impact assessment: Section 24(1) of the National Environmental Management Act 107 of 1998 (NEMA) requires among others that environmental impact of a listed activity such as construction of a coal-fired power station must be considered, investigated, assessed and reported on, to the competent authority tasked with making a decision on environmental authorisation. Therefore, once an application for environmental authorisation has been made, an environmental assessment process has to be undertaken. According to s 24O(1) the purpose of the climate change impact assessment is to help the authorities in taking measures to protect the environment from harm likely to arise from the activity which is the subject of the application.

In *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) the second respondent, Chief Director of the Department of Environmental Affairs, granted environmental authorisation for the construction of a coal-fired power station by the fifth respondent, Thabametsi, in Lephalale (Ellisras) in Limpopo Province. The applicant Earthlife, a civil society organisation pursuing environmental issues, objected to the authorisation as it had been granted without undertaking climate change impact assessment. The applicant's appeal against the authorisation was rejected by the first respondent, the Minister of Environmental Affairs who, realising that there was no climate change impact assessment, upheld the authorisation on condition that such assessment was done. As a result the applicant approached the High Court for an order reviewing and setting aside the decisions of both the Chief Director and the Minister.

Murphy J held that in terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000 the court had a discretion to grant relief that was just, equitable and proportional. Accordingly, it was not necessary to review and set aside the decision of the Chief Director but that of the minister only. For that reason the matter was remitted to the minister for a reconsideration of the appeal of the applicant in the light of a climate change impact assessment which had in the meantime been finalised. The respondents were ordered to pay costs.

The court held that a climate impact assessment was required before authorising new coal-fired power stations. That assessment was necessary and relevant to ensuring that the proposed coal-fired power station fitted the country's peak, plateau and decline trajectory as outlined in the Nationally Determined Contributions, being factors to be pursued regarding climate change mitigation measures, and its commitment to build clearer and more efficient power stations than existing ones. The legislative and policy scheme and framework overwhelmingly supported the conclusion that an assessment of climate change impacts and mitigating measures were relevant factors in the environmental authorisation process, and that con-

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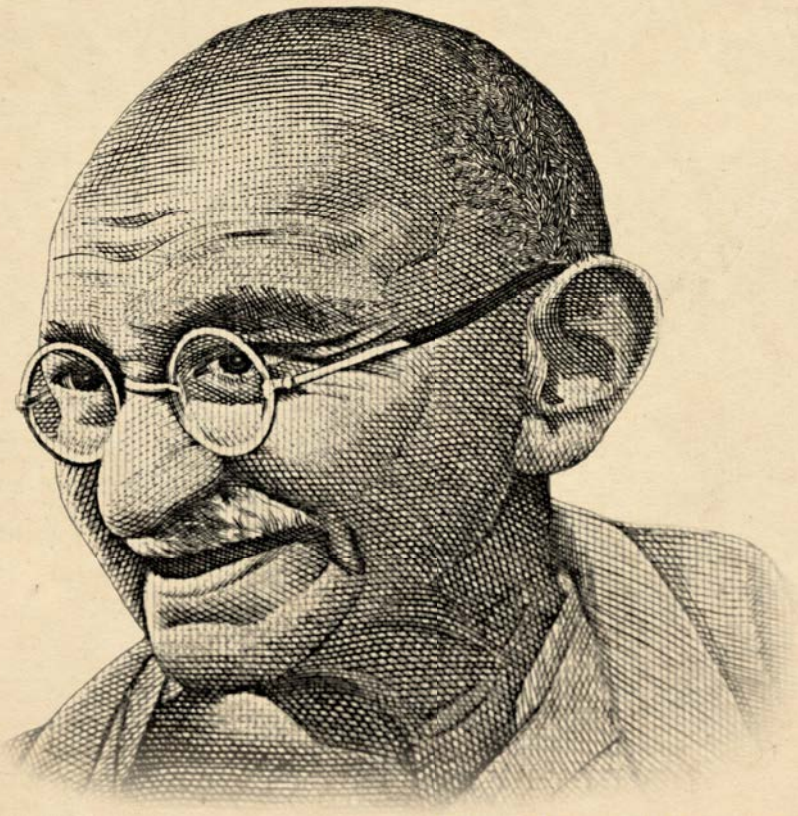

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sideration of such would best be accomplished by means of a professionally researched climate change report. A plain reading of s 24O(1) of NEMA confirmed that climate change impacts were indeed relevant factors that had to be considered.

No prospecting for minerals in a nature reserve or protected conservation area: Section 48(1)(*c*) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) provides among others that 'no reconnaissance permission, prospecting right, mining right or mining permit may be granted or mining permit be issued in respect of –

…

(*c*) any land being used for public or government purposes or reserved in terms of any other law'.

Section 7(1)(*a*) provides: 'In the event of conflict between a section of this Act and (a) other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of protected areas.'

In *Mpumalanga Tourism and Parks Agency and Another v Barberton Mines (Pty) Ltd and Others* [2017] 2 All SA 376 (SCA) the first respondent, Barberton Mines, was granted prospecting rights on certain properties in the District of Barberton in Mpumalanga Province. When it wanted to commence prospecting it encountered resistance on the part of the appellants, Mpumalanga Tourism and Parks Agency (MTPA) and Mountainlands Owners Association (MOA), who were later joined by three other appellants. The position of the appellants was that as part of the prospecting area included areas that had been declared a nature reserve, protected area or protected environment by the provincial government in terms of the Proclamation 12 of 1996, prospecting for minerals was not allowed. The GP, per Baqwa J, granted the first respondent an order declaring that it was free to commence prospecting and further interdicted the appellants from interfering with its prospecting activities. The SCA upheld with costs an appeal against the decision of the High Court.

Ponnan JA (Tshiqi, Majiedt, Dambuza and Van der Merwe JJA concurring) held that the granting of prospecting rights under the MPRDA was made subject to environmental protections and constraints. Section 48(1)(*c*) of the MPRDA, which should be read subject to s 48 of the National Environmental Management: Protected Areas Act 57 of 2003 (the NEMPAA) prohibited the granting of a prospecting right in respect of any land which was being used for public or government purposes or was reserved in terms of any other law. NEMPAA bound all organs of state and trumped other legislation in the event of a conflict concerning management or development of protected areas. According to s 9(*a*) of NEMPAA the system of protected areas in the country included 'special nature reserves, national parks, nature reserves (including wilderness areas) and protected environments'. In terms of s 12 of NEMPAA, a protected area that was reserved or protected in terms of provincial legislation was entitled to be regarded as a nature reserve or protected environment for the purposes of NEMPAA. The effect of that provision was to extend the protection afforded to a nature reserve by NEMPAA to a protected area reserved in terms of provincial legislation as well. NEMPAA contemplated the protection of areas that had been either declared or designated in terms of provincial legislation, while the definition of a nature reserve in NEMPAA included areas designated in terms of provincial legislation.

The effect of the Mpumalanga Proclamation of 1996 was that the designated area was reserved or protected in terms of provincial legislation for a purpose for which it could be declared as a nature reserve or protected environment under s 12 of NEMPAA. As the Proclamation met the requirements of s 12, it followed that the prospecting area fell to be protected against prospecting under s 48(1) of NEMPAA.

Land restitution

Exclusive jurisdiction of the LCC in land restitution claims and agreements: The facts in *Bangani v Minister of Rural Development and Land Reform and Another* [2017] 2 All SA 453 (ECM) were that: Prior to the year 1935 members of a certain community in the Eastern Cape enjoyed grazing rights over a certain piece of land. However, due to past racially discriminatory laws usage of that land for grazing purposes was outlawed with the result that the right was lost. In April 2009 the community, the local municipality, being Nyandeni Local Municipality (located some 30 km to the south of Mthatha) and the respondents, Minister of Rural Development and Land Reform (first respondent) together with the Regional Land Claims Commissioner (the second respondent), entered into a settlement agreement in terms of which households in that community were to receive some R 88 million as restitution. Thereafter the appellant, Bangani, instituted proceedings in the High Court, instead of the LCC, for recovery of her share of the restitution amount, which was some R 94 000. The respondents raised a special plea that the appellant did not have *locus standi* as she was not a direct descendant of the original claimant but a spouse of that descendant. The merits of the claim were also contested. At the trial the respondents raised another objection, namely that the High Court did not have jurisdiction over the claim as it belonged to the exclusive jurisdiction of the LCC.

The ECM held that it did not have jurisdiction over the matter and dismissed the claim. An appeal to the full court of the same division was dismissed with costs. Van Zyl DJP (Dawood and Brooks JJ concurring) held that in s 22 of the Restitution of Land Rights Act 22 of 1994 (the RLRA) the legislature created a court known as the LCC. Although the LCC had all the powers of a High Court having jurisdiction in civil proceedings at the place where the land in question was situated, it did not possess general or inherent jurisdiction. Unlike the High Court that derived its judicial authority from the Constitution, the LCC derived its authority from a statute and its powers were circumscribed. The powers, which it did possess were, however, to the exclusion of the High Court. Section 22 provided that the LCC had power to the exclusion of any court contemplated in s 166(*c*), (*d*) or (*e*) of the Constitution to determine any

number of matters listed in paras (*a*) to (*d*) thereof.

The court *a quo* correctly found that it lacked material jurisdiction in respect of those matters, which the legislature in s 22(1) of the RLRA assigned to the exclusive jurisdiction of the LCC, which was created as a specialist court charged with the task of administering and interpreting the RLRA. The effect of s 22 was that the High Court did not have the power or authority to determine any of the listed matters. A judgment given by the High Court contrary to s 22(1) was void *ab initio* and of no force and effect. The power of the LCC in s 22(1) of the RLRA at para (cE) was 'to determine any matter including the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provided otherwise'. As the appellant's claim was one for specific performance of the terms of a written contract, the matter fell squarely within what was contemplated by the legislature in para (cE).

Status of new land rights restitution claims: The Restitution of Land Rights Act 22 of 1994 (the RA) set the cut-off date by which land rights restitution claims had to be lodged as 31 December 1998. That date was extended to 30 June 2019 by the Restitution of Land Rights Amendment Act 15 of 2014 (the AA), which came into effect on 1 July 2014. However, the AA was declared invalid by the CC in the case of *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others* 2016 (5) SA 635 (CC), (the *Lamosa* case) as the National Council of Provinces and provincial legislatures were found not to have followed the required consultative process in which interested parties and the public at large were given afforded adequate participation. In declaring the AA invalid the CC nevertheless held that while the Chief Land Claims Commissioner (the commission) could not process new claims lodged on the basis of the AA, claims that had been lodged in the meantime would be noted as received and acknowledged, with the result that after Parliament had passed a new amendment within a period of two years, failing which the CC could be approached for directives within two months after expiration of the period of suspension of the order of invalidity, such claims could then be processed.

The issue in the present case of *In re Amaqamu Community Claim (Land Access Movement South Africa and Others as* amici curiae) 2017 (3) SA 409 (LCC) was whether since in the *Lamosa* case the CC expressly prohibited the commission, and not the Land Claims Court (the LCC), from processing new land claims, the LCC was also prohibited from doing so. The court per Bertelsmann J (Meer AJP, Gildenhuys J and Sardiwalla AJ concurring) held that the LCC too was prohibited from processing new land restitution claims. That was so as it would be impossible for the LCC to deal with new claims in any fashion without the assistance of the commission. Even if the new claimants could be joined to old claim proceedings, or were able to intervene in them as plaintiff or defendant, they could not participate meaningfully in the trial without the assistance of the commission. Their claim would still need to be investigated, reported on, possibly gazetted or made subject to an order in terms of s 12 of the RA, all of which were the functions that needed to be performed by the commission but which it was precluded from doing by the *Lamosa* case.

The commission was also involved in the finalisation of matters that came before the LCC as a result of an application for direct access to it. After all, new claimants would in all probability need to be funded through the offices of the commission, which funding could possibly be regarded as assisting in processing claims. The route of direct access to the LCC was also blocked in that s 38B of the RA, which enabled a party to approach the LCC directly, was premised on the existence of a claim lodged and accepted by the commission. Such a claim would need to have been lodged before 31 December 1998, which date was still the operative date as the AA had been declared invalid.

The court made no order as to costs, as there were no winners or losers in the case, the parties only having been interested in finding out the way forward.

• See law reports 'Constitutional law' 2016 (Dec) *DR* 40 for the *Lamosa* case.

Roads

Constitutional and statutory duty of provincial government to repair and maintain provincial roads, including farm roads: Section 3(1) of the Eastern Cape Roads Act 3 of 2003 (the Roads Act) provides among others that the Member of the Executive Committee (the MEC) or his or her delegate 'may' protect and rehabilitate a provincial road, as well as provide and maintain road infrastructure. In *Agri Eastern Cape and Others v MEC, Department of Roads and Public Works and Others* 2017 (3) SA 383 (ECG), [2017] 2 All SA 406 (ECG) the applicant, Agri Eastern Cape, a voluntary association representing the interests of the farming community in the Eastern Cape Province, together with some of its members, approached the High Court for a structural interdict in terms of which the Eastern Cape Department of Roads and Public Works (the Department), represented by the MEC and the Director-General, were required to come up with a plan of action for the repair and maintenance of provincial roads, including access farm roads. The draft order proposed to that effect also made provision for refunding farmers who spent money on repairing and maintaining access roads leading to farms. The interdict was sought after many meetings with the Department yielded no results, while neglect of provincial roads repair and maintenance extended over a period of more than 20 years in some instances. The Department pleaded lack of funds for failure to maintain and repair the roads but also argued that as in terms of the section the word used was 'may', the provisions of the Roads Act were permissive. That meant, so it was argued, that the duty to repair and maintain provincial roads arose only if funds were available.

The structural interdict was granted with costs, a fairly lengthy draft order providing for various reports that had to be filed with the registrar of the court relating to steps to be taken, progress made and difficulties encountered, if any.

Roberson J held that there was a constitutional and statutory basis for seeking the structural interdict. Part A of sch 5 of the Constitution provided for the functional areas of exclusive provincial legislative competence, one of which was provincial roads and traffic. In terms of s 125(2)(*a*) of the Constitution, the premier, together with the other members of the executive council, exercised executive authority by implementing provincial legislation in the province. When one considered some of the consequences of failure to repair and maintain roads, fundamental rights such as basic education and access to healthcare were indirectly affected.

Roads and road traffic fell within the exclusive legislative competence of provinces. No person or authority other than the MEC had the power to repair and maintain roads, unless the MEC or his or her delegate concluded an agreement with that person or authority to take over responsibility for a provincial road. The various consequences of a failure to maintain and repair farm roads illustrated the importance of road maintenance and repair in many respects, which were in the public interest such as rural development, employment opportunities, education of children, agricultural commerce, communication, access by and to emergency services and physical safety. The submission that the section imposed no duty on the MEC was not sustainable. It was, therefore, clear what the constitutional and statutory obligations of the respondents

were and that their performance of same was deficient.

Social welfare

Payment of social grants after expiration of contract with a service provider: The facts in the case of *Black Sash Trust v Minister of Social Development and Others* (*Freedom Under Law intervening*) 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC), were that in 2012 the South African Social Security Agency (Sassa) concluded a five-year contract with Cash Paymaster Services (CPS) in terms of which, the latter, would administer the system of payment of social grants to beneficiaries. The contract was to expire on 31 March 2017. In 2013 the CC declared the contract invalid for failure to follow a proper bidding process. However, the declaration of invalidity was suspended until such time as Sassa would find another service provider or be in a position to render the service itself. That meant that CPS would continue rendering the service under the contract until its expiry date. The CC played a supervisory role as Sassa was required to file reports relating to performance in terms of the contract and any issues arising. The court's supervisory role came to an end in 2015 when Sassa advised that it would not invite tenders for a new contract as it would administer the system of payment itself. By April 2016 it became clear that Sassa would not be able to run the payment system but nothing was done about it. In early 2017 it sought to enter into a contract with CPS for rendering that service without following any bidding process at all. Because of uncertainty that prevailed regarding provision of the service of administering social grants after expiry of the contract on 31 March 2017 the applicant, Black Sash Trust, a civil society organisation, approached the CC directly on an urgent basis for an order declaring that both Sassa and CPS, as organs of state, had a constitutional obligation to ensure payment of social grants to beneficiaries after 31 March 2017 and that this obligation should be performed on the same terms and conditions as those of the existing contract that was about to expire. Moreover, Black Sash Trust wanted to ensure that CPS's pricing system was not inflated as it had a monopoly in rendering the service, there being no competitors at all.

Reading the main judgment Froneman J (Madlanga J filing a separate concurring judgment) granted the applicant direct access and held that Sassa and CPS were under constitutional obligation to ensure payment of social grant benefits to beneficiaries from 1 April 2017 until an entity, other that CPS, was able to do so. It was also held that failure to do so would infringe beneficiaries' right of access to social assistance under s 27(1)(*c*) of the Constitution. The declaration of invalidity of the previous contract was further suspended for 12 more months beginning 1 April 2017, it being ordered that the contract would continue running on the same terms and conditions as the old one. Sassa and the minister were required to file reports on affidavit every three months setting out how they planned to ensure payment of grants after expiry of the 12-month period, as well as further steps they would take to ensure that payments did not cease after that period. Costs were reserved until conclusion of the proceedings.

Traditional leadership

Application of the principle of judicial immunity to members of the judiciary presiding in traditional courts: The facts in *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* [2017] 2 All SA 463 (WCC) were that in 2009 King Dalindyebo of AbaThembu nation (the King) was convicted of culpable homicide, arson, assault with intent to do grievous bodily harm, defeating the ends of justice and kidnapping for which he was sentenced by the ECM per Alkema J to 15 years of imprisonment. On appeal to the SCA some of the convictions were set aside and the sentenced was reduced to 12 years. A further appeal to the CC was dismissed.

In the present case the applicant, Congress of Traditional Leaders of South Africa, a voluntary organisation looking after the interests of traditional leaders, sought to have the conviction and sentence of the King reviewed and set aside. The applicant approached the WCC for a number of orders including one reviewing and setting aside the decision of the second respondent, the National Director of Public Prosecutions, to charge and prosecute the King for the offences. If the order were granted, that would have the effect of nullifying the King's prosecution, conviction and sentence. The other major remedy sought was an order directing Parliament to pass a law that would grant traditional leaders judicial immunity when presiding over civil and criminal matters in traditional courts, such as applies to magistrates and judges in their respective courts. It was alleged that by failing to pass such legislation Parliament was in breach of its obligation imposed by s 212(1) of the Constitution, which provides that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. The application was dismissed with costs.

Mantame J (Davis J concurring in a separate judgment and Hlophe JP dissenting) held that the doctrine of judicial immunity found no application in the instant case as at the time of the commission of the offences the King was not acting as a king, his brother Patrick was. Furthermore, when the offences were committed he was not acting as a judicial officer. His testimony was that it was the community that was carrying out 'people's justice' or 'jungle justice'. The King did not act as a Tribal or Regional Authority at the time of the commission of the offences. In order for judicial immunity discussion to be alive, the King would need to have acted as a King and/or judicial officer when the offences were committed. There would be no fear if traditional leaders applied punishment and sanction in terms of customary law guiding principles and within the confines of the Constitution. The actions of traditional leaders had to keep up with the rule of law and the Constitution. If traditional courts performed their judicial functions according to applicable customary legislation and more importantly in line with the Constitution, there would be no need for presiding officers to be anxious and fear prosecution. Judicial immunity would flow to them automatically the way it was applicable to magistrates and judges.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Appeal against Land Claims Court order confirming eviction lying to the SCA, application for search warrant in terms of the Criminal Procedure Act 51 of 1977, defamation, disqualification from inheritance of a person who attests and signs a will as a witness, effect of dispute of fact on motion proceedings, enforceability of obligation to negotiate in good faith, exclusion of trust assets from accrual system, expungement of trade mark for non-use, invalidity of contractual provision inconsistent with unalterable provisions of the Companies Act 71 of 2008, liability of the Minister for attack caused by person released on parole, liability of municipality for attack which took place at holiday resort owned by it, notice to debtor in terms of s 129 of the National Credit Act 34 of 2005, option to renew a lease and piercing veneer of trust form and rejection of representations made to representations officer in terms of Administrative Adjudication of Road Traffic Offences Act 46 of 1998.

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New legislation

Legislation published from 2 – 28 June 2017

Philip Stoop *BCom LLM (UP) LLD (Unisa)* is an associate professor in the department of mercantile law at Unisa.

Bills

Judicial Matters Amendment Bill B14B of 2016.
Road Accident Benefit Scheme Bill B17 of 2017.

Commencement of Acts

Financial Intelligence Centre Amendment Act 1 of 2017. Commencement: 13 June 2017 and 2 October 2017 (see the notice for more detail). GN563 *GG*40916/13-6-2017 and GN601 *GG*40939/28-6-2017.

Promulgation of Acts

Legal Practice Act 28 of 2014 (Afrikaans and Setswana translations). GenN480 *GG*40937/23-6-2017.
Criminal Procedure Amendment Act 4 of 2017. *Commencement:* 29 June 2017. GN619 *GG*40946/29-6-2017 (also available in Afrikaans).

Selected list of delegated legislation

Allied Health Professions Act 63 of 1982
Professional Board for Ayurveda, Chinese Medicine, Acupuncture, and Unani Tibb: Use of certain needles classified as unprofessional conduct. BN98 *GG*40883/2-6-2017.
Auditing Profession Act 26 of 2005
Rule on mandatory audit firm rotation for auditors for all public interests entities. BN100 *GG*40888/5-6-2017.
Inspection fees payable to IRBA. BN101 *GG*40898/9-6-2017.
Amendments to the code of professional conduct for registered auditors relating to custody of a client's assets. BN115 *GG*40930/23-6-2017.
Broad-Based Black Economic Empowerment Act 53 of 2003
Amended Property Sector Code. GN560 *GG*40910/9-6-2017, GenN464 *GG*40926/21-6-2017 and GenN481 *GG*40941/28-6-2017.
Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016. GN581 *GG*40923/15-6-2017.
Threshold for major B-BBEE transactions. GN551 *GG*40898/9-6-2017.
Civil Aviation Act 13 of 2009
Fifteenth Amendment of the Civil Aviation Regulations, 2017. GN R586 *GG*40929/23-6-2017 (Afrikaans regulations).
Defence Act 42 of 2002
Regulations for the reserve force. GN527 *GG*40886/2-6-2017.
Financial Services Board Act 97 of 1990
Levies on financial institutions. GenN458 *GG*40912/12-6-2017.
Income Tax Act 58 of 1962
Agreement between South Africa and Costa Rica for exchange of information relating to tax matters. GN592 *GG*40930/23-6-2017 (also available in Afrikaans).
Agreement between South Africa and Monaco for exchange of information relating to tax matters. GN593 *GG*40930/23-6-2017 (also available in Afrikaans).
Legal Aid South Africa Act 39 of 2014
Legal Aid Manual tabled in Parliament. GenN477 *GG*40932/23-6-2017.
Mental Health Care Act 17 of 2002
Annexures to the guidelines for licensing of residential and day care facilities for people with mental and/or intellectual disabilities. GN567 *GG*40919/15-6-2017.
Merchant Shipping Act 57 of 1951
Regulations in terms of the Act. GN R534 *GG*40893/6-6-2017.
National Credit Act 34 of 2005
Guideline for the submission of credit information in terms of reg 19(13). GenN476 *GG*40930/23-6-2017.
National Environmental Management: Biodiversity Act 10 of 2004
Biodiversity management plan for Pickersgill's reed frog (hyperolius pickergilli). GenN423 *GG*40883/2-6-2017.
Amendment to appendices I and II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Regulations, 2010. GN529 *GG*40889/5-6-2017.
National Health Act 62 of 2003
Regulations relating to emergency care at mass gathering events. GN566 *GG*40919/15-6-2017 (also available in isiZulu and Tshivenda).
Nursing Act 33 of 2005
Fees and fines payable to the Council. GN R599 *GG*40933/23-6-2017.
Occupational Health and Safety Act 85 of 1993
Construction Regulations, 2014. GN489 *GG*40883/2-6-2017.
Petroleum Products Act 120 of 1977
Amendment of regulations regarding petroleum products specifications and standards. GN R582 *GG*40929/23-6-2017.
Pharmacy Act 53 of 1974
Fees payable to council. GenN433 *GG*40892/6-6-2017.
Rules relating to services for which pharmacists may levy fees and guidelines for levying such fees. GenN432 *GG*40892/6-6-2017.
Amendment of the rules relating to good pharmacy practice: Minimum standards specifically relating to the collection and the delivery of medicines to patients from a community of institutional pharmacy. GenN431 *GG*40892/6-6-2017.
Preferential Procurement Policy Framework Act 5 of 2000
Recognition of categories of institutions to which the Act applies. GN571 *GG*40919/15-6-2017.
Public Finance Management Act 1 of 1999
Different categories of debt for interest rate applicable to debts owing to the state. GenN469 *GG*40930/23-6-2017.
Recognition of Customary Marriages Act 120 of 1998
Extended period for the registration of customary marriages: 30 April 2019. GenN483 and GenN484 *GG*40883/2-6-2017.
South African Civil Aviation Authority Levies Act 41 of 1998
Levy on the sale of aviation fuel. GN R585 *GG*40929/23-6-2017.
South African Maritime Safety Authority Act 5 of 1998
Comprehensive maritime transport policy, 2017. GenN457 *GG*40904/12-6-2017.
South African Reserve Bank Act 90 of 1989
Directive for conduct within the National Payment System in respect of the collection of payment instructions for authenticated collections. GenN475 *GG*40930/23-6-2017.
Spatial Data Infrastructure Act 54 of 2003
Regulations in terms of the Act. GN R579 *GG*40920/15-6-2017 and GenN472 *GG*40930/23-6-2017.

The National Land Cover Classes and Definitions 2016 Standard. GN573 *GG*40919/15-6-2017.

Tax Administration Act 28 of 2011

Persons to submit returns for the 2017 year of assessment. GN547 *GG*40898/9-6-2017 (also available in Afrikaans, Sesotho and isiZulu).

Draft Bills

Draft Older Persons Amendment Bill. GenN426 *GG*40883/2-6-2017.

Draft Repeal of the Overvaal Resorts Limited Bill. GN580 *GG*40921/15-6-2017.

Draft delegated legislation

Proposed regulations to exclude waste streams from definition of waste in terms of the National Environmental Management: Waste Act 59 of 2008 for comments. GN528 *GG*40887/2-6-2017.

Rules relating to good pharmacy practice in terms of the Pharmacy Act 53 of 1974: Minimum standards for the selling of HIV screening test kits for comments. GenN434 *GG*40892/6-6-2017.

Proposed fees payable in respect of applications and issuing of rights, permits and licenses in small-scale fishery sector in terms of the Marine Living Resources Act 18 of 1998. GN558 *GG*40906/9-6-2017.

Amendment to reg 10(5) (fees for filing a merger notice) of the rules for the conduct of proceedings in the Competition Commission in terms of the Competition Act 89 of 1998 for comments. GN555 *GG*40902/9-6-2017.

Amendment of merger thresholds in terms of the Competition Act 89 of 1998 for comments. GN554 *GG*40902/9-6-2017.

Regulations relating to human gamete banks in terms of the National Health Act 61 of 2003 for comments. GN556 *GG*40903/9-6-2017.

Declaration of certain practices by medical schemes in selecting designated health care providers and imposing excessive co-payments on members as irregular or undesirable practices in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001 and the Medical Schemes Act 131 of 1998 for comments. GenN435 *GG*40898/9-6-2017.

Draft National Policy on student support services for community education and training colleges in terms of the Continuing Education and Training Act 16 of 2006. GN543 *GG*40898/9-6-2017.

Proposed amendments to the Code of professional conduct for registered auditors: New guidance for professional scepticism and professional judgment in terms of the Auditing Profession Act 26 of 2005. BN107 *GG*40898/9-6-2017.

Proposed regulations regarding assignees: Inspections and fees in terms of the Agricultural Product Standards Act 119 of 1990. GN R552 *GG*40899/9-6-2017.

Draft withdrawal notice of exemptions and draft amendment regulations in terms of the Financial Intelligence Centre Act 38 of 2001 for comments. GN562 *GG*40916/13-6-2017.

Proposal for the amendment of the Mortgaging of Aircraft Regulations, 2017 in terms of the Convention on the International Recognition of Rights in Aircraft Act 59 of 1993 for comments. GN R587 *GG*40929/23-6-2017.

Proposed list of particular trees and particular groups of trees as 'champion trees' in terms of the National Forests Act 84 of 1998. GenN482 *GG*40945/30-6-2017.

Draft regulations regarding infrastructure or activity affecting safe railway operations, 2017 in terms of the National Railway Safety Regulator Act 16 of 2002. GN618 *GG*40945/30-6-2017.

Draft security matters regulations, 2017 in terms of the National Railway Safety Regulator Act 16 of 2002. GN617 *GG*40945/30-6-2017.

Regulations relating to the surveillance and control of notifiable medical conditions in terms of the National Health Act 61 of 2003 for comments. GN604 *GG*40945/30-6-2017.

Employment law update

Nadine Mather *BA LLB (cum laude) (Rhodes)* is an attorney at Bowmans in Johannesburg.

Employers thwarting dismissed employees' attempts for reinstatement by filling their positions

In *Mashaba v South African Football Association ("SAFA")* [2017] 6 BLLR 621 (LC), the applicant, Mr Mashaba, was dismissed from his position as head coach of the South African National Football team (*Bafana Bafana*) and referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Before the matter was set down at the CCMA, the applicant became increasingly concerned that, if his dismissal was found to be substantively unfair, the CCMA Commissioner may be reluctant to reinstate him if a new head coach had been appointed by the South African Football Association (SAFA). Consequently, the applicant instituted urgent proceedings in the Labour Court for an order restraining SAFA from appointing a new head coach before the CCMA proceedings were concluded.

The applicant contended that his application was for interim relief only and was accordingly required to demonstrate, among other things, a *prima facie* right to the relief sought and a well-grounded apprehension of irreparable harm if the relief was not granted.

The court noted that s 193(2) of the Labour Relations Act 66 of 1995 (the LRA) requires an employee whose dismissal is found to be substantively unfair to be reinstated unless –

- the employee did not wish to be reinstated;
- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; or
- it is not reasonably practicable for the employer to reinstate the employee.

In this regard, the court found that the appointment of a new head coach would have no bearing on whether the restoration of the employment relationship would be tolerable, nor would the appointment of a new head coach make the applicant's reinstatement reasonably 'impracticable'.

The court held that an employer may not prevent a dismissed employee's request for reinstatement by replacing him and then arguing that it cannot reinstate the dismissed employee because there is someone occupying his former position. The right, which the LRA provides by virtue of s 193(2), is the right of an employee to be reinstated if their dismissal is found to be substantively unfair and provided none of the exceptions listed above are applicable.

The court held further that 'an order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement.' That is an eventuality an employer must take into account when it replaces a former employee who is challenging their dismissal. If an employer does not take appropriate steps in its contract with the replacement employee, it runs the risk that it may be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement's contract if the former employee is reinstated. It followed that the appointment of a new head coach would not cause the applicant irreparable harm.

The court found that the applicant had failed to prove a *prima facie* right to the relief sought because SAFA's contract with a new head coach had nothing to do with his unfair dismissal dispute. The court could not dictate how employers should conduct themselves in contracting with third parties, unless the contract was unlawful. Moreover, the applicant's right to be reinstated did not translate to a right to have his position kept vacant on the assumption that the unfair dismissal claim might succeed. If the relief were to be granted, the court would have to take an interim view that the dismissal was substantively unfair. The court held that it could not 'second-guess' the outcome of the CCMA proceedings in this way.

In the circumstances, the court was not satisfied that the applicant had demonstrated the existence of a right to restrain SAFA from employing a replacement head coach pending the outcome of the CCMA proceedings, even if the applicant would be entitled to reinstatement at the conclusion of those proceedings. The application was dismissed accordingly.

Employees precluded by statute from resigning without notice to avoid disciplinary action

In *Nogoduka v Minister of the Department of Higher Education & Training and Others* [2017] 6 BLLR 634 (ECG), the applicant, Mr Nogoduka, was employed by Ikhala Tvet College (the College) as a lecturer. The applicant was placed on suspension pending an investigation into various allegations of misconduct, including allegations of gross dishonesty and insubordination. The applicant was later served with a charge sheet calling on him to attend a disciplinary hearing.

Following the issuance of the charge sheet but prior to the disciplinary hearing, the applicant resigned with immediate effect. The applicant claimed that his employment situation had become increasingly intolerable, because he had refused to be involved in the 'political machinations' of senior officials of the College and as a result become marginalised and unhappy. The College, however, declined to accept the applicant's resignation and proceeded with the disciplinary hearing in his absence. The applicant was found guilty of the charges of misconduct and the chairperson handed down a sanction of dismissal.

The applicant instituted proceedings against the minister and the Director General of the Department of Higher Education and Training and the College (collectively the respondents), in terms of which he sought an order setting aside the disciplinary proceedings held against him, and for the respondents to take such steps as may be necessary to correct his employment records so as to reflect the applicant's resignation as an employee. The applicant also sought an order directing that the respondents procure and facilitate the payment of his pension money following his resignation.

In support of the relief sought, the applicant contended that the chairperson committed a gross irregularity by proceeding with the hearing as it was clear from the circumstances that the College had accepted his resignation and, at the

time of the hearing, he was no longer an employee of the College. The College contended, however, that the applicant resigned in order to avoid the disciplinary proceedings despite the fact that his contract of employment provided for a one-month notice period.

Having found that it had jurisdiction to entertain the matter under s 77(3) of the Basic Conditions of Employment Act 75 of 1997 because the dispute concerned a contract of employment, the court considered s 16B(6) of the Public Service Act 103 of 1994 (the Act), which provides as follows: 'If notice of a disciplinary hearing was given to an employee, the relevant executive authority shall not agree to a period of notice of resignation which is shorter than the prescribed period of notice of the resignation applicable to that employee'. In this regard, the applicant was subject to a one-month notice period.

The court held that s 16B(6) was inserted into the Act to cater for precisely the circumstances that arose in this matter, namely, where an employee 'resigns' in order to avoid an adverse disciplinary finding and thereby to leave her or his employment with a seemingly clean record. Accordingly, in these circumstances where the disciplinary proceedings had been instituted against the applicant before his ostensible resignation, the College was precluded in terms of s 16B(6) of the Act from accepting his resignation and the applicant was obliged to serve his one-month notice period.

In light of the above, the court found that the applicant was still an employee at the time of the disciplinary hearing and remained so at the conclusion of the hearing as well as when the sanction of dismissal was handed down. The applicant therefore chose not to attend the disciplinary hearing at his own risk.

As regards the applicant's claim in relation to his pension money, the court held that his claim had to fail because he had not yet submitted the required forms for the withdrawal of his pension money. The application in its entirety was dismissed with costs.

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

The dangers of not complying with the Practice Manual

Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others (LC) (unreported case no PR 192/15, 13-6-2017) (Prinsloo J)

With the intention of edifying practitioners of the consequence of failing to file a transcribed record within the prescribed time frame in a review application, the court in this matter gave a detailed interpretation of clause 11.2 of the Labour Court's Practice Manual, which reads:

'11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.

11.2.4 If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.'

Factual background

In brief, the applicant employer filed an application to review and set aside an award, which directed the employee be reinstated. On 18 December 2015, the Registrar issued a r 7A(5) Notice informing the applicant that the digital recordings have been filed at court. In response to the applicant's failure to file the transcribed record by 18 March 2016, that being 60 days from when the r 7A(5) Notice was issued, the employee's attorney wrote to the applicant's attorney on 22 March 2016 informing them that their review application was deemed to have been withdrawn.

On 5 May 2016 the transcribed record was served on the employee's attorney who, on 17 May 2016 informed the applicant's attorney that the record was incomplete. Having informed the bargaining council of the missing portion of the record, the council advised the applicant's attorney on 14 June 2016 that it could not locate the full record but that the arbitrator had offered to assist the parties by scheduling a meeting to try and reconstruct the relevant portion of the record.

The applicant filed an application to –

- condone the late filling of the complete record; and
- an order directing the parties meet in an attempt to reconstruct the record alternatively that the matter be remitted to the bargaining council to be heard *de novo*.

The court began by reaffirming the point that the provisions in the Practice Manual are binding on litigants and must be adhered to at all times.

On an interpretation of clause 11.2 of the Manual, the court held that an applicant has 60 days from when the r 7A(5) Notice was issued to file the transcribed record. Once an applicant is unable to meet this deadline, it must approach the respondent seeking its consent to extend the period in which to file the record. Should the respondent refuse this request, the applicant may then apply to the Judge President, by way of a notice of motion and supporting affidavit, for an extension of time.

On the facts of the matter, it was common cause that the applicant had not filed the record within the stipulated time period nor had it sought the employee's consent for an extension of time and thus, on a reading of clause 11.2.3, the court found that the applicant was deemed to have withdrawn its review application.

Pursuant to this finding, the court held that it could no longer grant the alternate order remitting the matter to the bargaining council, nor could it condone the late filing of the record, as per the first prayer sought.

This, however, was not the end of the road for the applicant – the court found

there was nothing in law preventing the applicant from applying for its review application to be reinstated together with an application to condone the late filing of the record.

In addressing the second prayer, the court noted that parties often abuse clause 11.2.4 of the Manual by seeking the court's direction under circumstances where the record is missing, incomplete or inaudible, before first fully exploring all options. In doing so, practitioners unnecessarily and unduly increase the workload of the court.

In setting out the steps a party should embark on before approaching the court for direction, Prinsloo J held an applicant party must first determine whether the missing portion of the record is relevant for purposes of its review application; bearing in mind the Labour Court Rules require an applicant only serve the relevant portion of the record in its review application.

If the entire record is lost or the missing portion is relevant then it is the applicant's duty to drive the reconstruction process to its finality.

If the reconstruction process proves unsuccessful, the applicant must then seek the respondent's consent to have the matter remitted to the bargaining council or Commission for Conciliation, Mediation and Arbitration to be hard *de novo*. If consent is given the applicant can approach the Registrar for an order to be made by a judge in chambers in terms of r 17(3).

It is only when the respondent does not consent to the matter being heard afresh, should an applicant approach the Judge President in terms of clause 11.2.4 of the Practice Manual.

In this case, the bargaining council, in 2016, indicated its willingness to assist the parties to reconstruct the record, yet instead of following through on that process, the applicant brought an application seeking the court to direct the parties to meet in an attempt to reconstruct the record. This, according to the court was an abuse of clause 11.2.4.

The application was dismissed with costs.

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By Meryl Federl

Recent articles and research

Please note that the below abbreviations are to be found in italics at the end of the title of articles and are there to give reference to the title of the journal the article is published in. To access the article, please contact the publisher directly. Where articles are available on an open access platform, articles will be hyperlinked on the *De Rebus* website at www.derebus.org.za

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Abbreviation	Title	Publisher	Volume/issue
JJS	Journal for Juridicial Science	Free State University	(2017) 42.1
PER	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2017) May (2017) June
SALJ	South African Law Journal	Juta	(2017) 134.2
SLR	Stellenbosch Law Review	Juta	(2017) 28.1

Child law

Pienaar, L and Karels, MG 'Compulsory HIV testing of child sex offenders in the South African criminal justice system' (2017) 42.1 *JJS* 41.

Company law

Du Plessis, J and Delport, P '"Delinquent directors" and "directors under probation": A unique South African approach regarding disqualification of company directors' (2017) 134.2 *SALJ* 274.

Madlela, V and Cassim, R 'Disclosure of directors' remuneration under South African company law: Is it adequate?' (2017) 134.2 *SALJ* 383.

Mupangavanhu, BM 'Fiduciary duty and duty of care under Companies Act 2008: Does South African law insist on the two duties being kept separate?' (2017) 28.1 *SLR* 148.

Computer law

Cassim, F 'The use of electronic discovery and cloudcomputing technology by lawyers in practice: Lessons from abroad' (2017) 42.1 *JJS* 19.

Constitutional law

Bronstein, V 'What is a "provincial act" for purposes of the Constitution? Determining the boundaries of the Constitutional Court's confirmation jurisdiction' (2017) 134.2 *SALJ* 235.

Contract

Hutchison, A 'Relational theory, context and commercial common sense: Views on contract interpretation and adjudication' (2017) 134.2 *SALJ* 296.

Construction law

Boxall, T, Hutchison, A and Wright, M 'NEC3ECC clause 10.1: An enforceable contractual duty of trust and co-operation in the construction industry?' (2017) 28.1 *SLR* 97.

Copyright law

Alberts, W and van Dyk, D '"Taxi! Taxi!" The protection of car shapes in intellectual property law' (2017) 134.2 *SALJ* 219.

Karjiker, S 'Copyright infringement and game theory: The law and its limits' (2017) 28.1 *SLR* 164.

Rogowski, A 'Can a song be copied with impunity? A legal perspective on copyright infringement cases in respect of musical works' (2017) 28.1 *SLR* 213.

Credit law

Van Deventer, S 'The enforcement of credit agreements through set-off: Evaluating the impact of the National Credit Act 34 of 2005' (2017) 134.2 *SALJ* 415.

Criminal law

Magobotiti, CD 'An assessment of life sentence without parole for people convicted of killing police officers on duty in South Africa' (2017) 42.1 *JJS* 62.

Whitear, N 'The admissibility of extracurial admissions by a co-accused: A discussion in the light of the *Ndhlovu*, *Litako* and *Mhlongo/Nkosi* cases, and international law' (2017) 134.2 *SALJ* 244.

Family law

Bonthuys, E 'Proving express and tacit universal partnership agreements in unmarried intimate relationships' (2017) 134.2 *SALJ* 263.

Smith, BS 'Statutory discretion or common law power? Some reflections on "veil piercing" and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – part two' (2017) 42.1 *JJS* 1.

Human rights

Chitimira, H and Mokone, P 'A general legislative analysis of "torture" as a human rights violation in Zimbabwe' (2017) June *PER*.

Madlingozi, T 'Social justice in a time of neo-Apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28.1 *SLR* 123.

Insolvency law

Stander, AL and Kloppers, H 'Het 'n eerste verbandhouer werklik 'n "vry hand"-voorkeur ten opsigte van sy sekuriteit as vervreembare goed kragtens artikel 8(*b*) van die Insolvensiewet? *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC)' (2017) 42.1 *JJS* 100.

Labour law

Basson, Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) May *PER*.

Mupangavanhu, Y 'The relationship between restraints of trade and garden leave' (2017) June *PER*.

Tshoose, C 'Constructive dismissal arising from work-related stress: *National Health Laboratory Service v Yona & Others'* (2017) 42.1 *JJS* 121.

Law of succession

Schoeman-Malan, L 'Condonation confusion' (2017) 42.1 *JJS* 77.

Legal profession

Bauling, A 'Towards a sound pedagogy in law: A constitutionally informed dissertation as capstone course in the LLB degree programme' (2017) May *PER*.

Mining law

Badenhorst, PJ 'The nature of new order prospecting rights and mining rights: A can of worms?' (2017) 134.2 *SALJ* 361.

Municipal law

Brits, R 'Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title – a follow-up occasioned by the SCA's *Mitchell* judgment' (2017) 28.1 *SLR* 47.

Public procurement law

Sewpersadh, P and Mubangizi, J 'Using the law to combat public procurement corruption in South Africa: Lessons from Hong Kong' (2017) May *PER*.

Property law

Badenhorst, PJ and Young, C 'The notion of constitutional property in South Africa: An analysis of the Constitutional Court's approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC)' (2017) 28.1 *SLR* 26.

Braude, NL 'A "uniform procedure" for all expropriations? Customary property rights and the 2015 Expropriation Bill' (2017) 28.1 *SLR* 68.

Tchawouo Mbiada, CJ 'The Public Protector as a mechanism of political accountability: The extent of its contribution to the realisation of the right to access adequate housing in South Africa' (2017) May *PER*.

Van der Walt, AJ 'Property law in the constitutional democracy' (2017) 28.1 *SLR* 8.

Vols, M and Fick, S 'Using eviction to combat housing-related crime and anti-social behaviour in South Africa and the Netherlands' (2017) 134.2 *SALJ* 327.

Tax law

De Matos Ala, C 'Taxing the president: The income tax implications of the security improvements made to the private residence of President Jacob Zuma' (2017) 28.1 *SLR* 187.

Meryl Federl *BA HDip Lib (Wits)* is an archivist at the Johannesburg Society of Advocates Library. E-mail: merylfederl@yahoo.co.uk

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- *African Public Procurement Law Journal*
- *Comparative and International Law Journal of Southern Africa*
- *De Jure*
- *Journal for Juridical Science*
- *Law, Democracy & Development*
- *LitNet Akademies (Regte)*
- *Potchefstroom Electronic Law Journal*
- *Speculum Juris*
- www.lawsofsouthafrica.up.ac.za
- www.saflii.org

Contract: General Principles

Louis van Huyssteen, Gerhard Lubbe and Machiel Reinecke
Cape Town: Juta
(2016) 5th edition
Price: R 695 (incl VAT)
697 pages (soft cover)

Having particular regard to the developments in consumer protection law and constitutional jurisprudence, the fifth edition of *Contract: General Principles* provides a comprehensive guide to understanding the general principles of the law of contract in South Africa (SA).

The publication comprises 13 different chapters, which include –

- an introduction to the concepts of obligation and contract;
- the basis for contractual liability;
- offer and acceptance;
- consensus obtained by improper means;
- formalities;
- possibility of performance;
- legality;
- certainty;
- contents and operation of a contract;
- breach of contract;
- remedies for breach of contract and cession; and
- termination of obligations.

Each chapter contains its own detailed index to enable quick navigation to the specific issues on which a reader seeks clarity.

The chapters are structured to clearly and logically set out the essential elements and principles of contract – beginning with a detailed but not protracted account of the theoretical and historical foundations of contract law in SA – ideal for students.

The formulation of the chapters also highlights the concepts, which have been topical in recent, local and foreign jurisprudence. One such example of this is the chapter on improperly obtained consensus. This chapter follows the progress of our courts' reasoning, moving away from delictual constructions to a reasonable and rational approach apt for a democracy predicated on equality, fairness and a growing protection of the ill-informed consumer.

There are various instances in other chapters where the implications of the Consumer Protection Act 68 of 2008 are set-apart and specifically addressed in relation to the topic at hand.

The new edition covers developments in contractual law up to the end of February 2016. These include more substantial changes, for example, the evolution of good faith as a more discernible principle of law, discussed in particular in relation to pre-contractual conduct and issues of breach. Further, though to a lesser degree, the commentary on advancements in relation to technological innovations (such as electronic signature), cession and the legal nature of debts and methods of payments make this a most relevant and current resource.

While the publication does not stress the significant shift in the approach to the interpretation of contracts, it does note the latest case law on the topic. The divergence from the strict application of the parol evidence rule towards a more liberal and practical approach to interpretation, which includes surrounding and background circumstances, as well as the conduct of the parties in implementing agreements could have been expanded on.

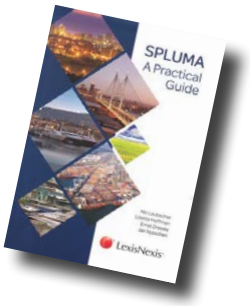
On a stylistic front, cross-referencing is now simplified by numbered paragraphs. The subject matter is streamlined through the extensive use of headings and subheadings. This guides the reader through what could otherwise seem a complex convolution of principles and their requirements, relevant legislation and interrelated areas of law. The detailed footnotes provide the reader with context and expand on the rich and varied case law discussed in the text.

In the fast paced milieu of legal practice, there are arguably other resources, which delve less into the origins of the principles and set out more clearly and at a glance the key issues, current status and latest case law that is often the superseding reason for which a more experienced practising attorney consults a reference work.

Nevertheless, students and young professionals would do well to have this publication at hand. This is undeniably an all-encompassing account of contract law in SA as it stands.

Shelley Efthymiades is a candidate attorney at Webber Wentzel in Johannesburg. ❑

Book announcements



SPLUMA – A Practical Guide

By Nic Laubscher, Lizette Hoffman, Ernst Drewes and Jan Nysschen
Durban: LexisNexis
(2016) 1st edition
Price R 456 (incl VAT)
438 pages (soft cover) ❑

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South African Banking Legislation

FR Malan, AN Oelofse, JT Pretorius

South African Banking Legislation collects the most important legislation pertaining to banking, and relevant regulations. Available in loose-leaf format and online, this subscription work is kept up-to-date by means of regular revision services. Unique to the online version is the inclusion of updated Exchange Control Manuals.

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T Humby, L Kotzé, O Rumble, A Gilder (Editors)

Updated annually, and available in loose-leaf and online format, *Climate Change: Law and Governance in South Africa* provides a comprehensive analysis of climate change, the relevant laws and policies and their intersection with international governance structures.

Soft cover | 484 pages | ZAR Print: R750

A Practical Approach to Criminal Law in Botswana 2e

WM Modise

A Practical Approach to Criminal Procedure in Botswana explains the basic principles of the law of criminal procedure in Botswana in plain and concise language. Aspects of the law of criminal procedure are analysed with an emphasis on their practical application, and with reference to recent case law and legislation. The author also discusses the rights of the accused at each stage of the criminal justice process.

Prices include 14% VAT, exclude courier delivery, if applicable, and are valid until 31December 2017.
Loose-leaf price excludes the cost of future updates. *Online multiple-user pricing is available on request.

Soft cover | 404 pages | ZAR Print: R585

Pregnancy Law in South Africa: Between Reproductive Autonomy and Foetal Interests

C Pickles

Pregnancy Law in South Africa focuses on the issues of prenatal substance abuse, termination of pregnancy, violence that terminates a pregnancy, and the extension of legal personhood to the unborn. The book explores the question of whether it is possible to regard pregnancy in law as embodying both women and the unborn, and whether the pregnancy can be construed as a non-adversarial relationship. The author argues that a relational approach to pregnancy, centred on fostering relationships, encourages imaginative and constructive possibilities for law reform efforts without sacrificing women's reproductive autonomy and rights or the recognition of the unborn.

Soft cover - annual periodical | 272 pages | ZAR Print: R325

South African Journal of Environmental Law

MA Kidd (Managing Editor), WF Couzens, JI Glazewski, JA Ridl, AR Paterson

The South African Journal of Environmental Law and Policy is a peer reviewed journal which publishes contributions related to environmental law and policy. It provides a forum for scholars and practitioners from South Africa and abroad to reflect on environmental issues in South Africa and internationally.

Soft cover | 316 pages | ZAR Print: R475

Vulnerable Employees (LegalEase - Essence series)

D Smit (Editor), D Viviers

Vulnerable Employees guides the reader through the basic principles of law pertaining to the different categories of workers and offers guidance and insight in relation to the management of these individuals. The book sheds light on the most significant case law and applicable legislation, as well as to propose draft policies, where applicable. Complex concepts, the key objectives and basic legal and other relevant principles are explained simply and clearly, without using unnecessary and complex legal jargon.

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RISKALERT

AUGUST 2017 NO 4/2017

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RISK MANAGEMENT COLUMN

A NOTE FROM THE EDITOR

Thomas Harban, Editor

This edition of the *Bulletin* will be published one month into the 2017/2018 AIIF insurance scheme year. The professional indemnity Master Policy and the Executor Bond policy for this scheme year were published in the July 2017 edition (3/2017) of the *Bulletin*. We trust that practitioners have taken time to carefully read both policies in order to understand the respective conditions. The AIIF team will gladly answer any queries regarding the policies.

The inception of the new policy year is an opportune time for practitioners to conduct a risk assessment and also complete the risk management self-assessment questionnaire. It will be noted that some of the questions in the risk management questionnaire are similar to those included in the proposal forms of most top-up insurers. The completion of the risk management should not be seen as a 'tick box' exercise but rather as an opportunity for the practitioners (and their staff) to focus their minds on the risks associated with their respective firms.

Since the cybercrime exclusion (clause 16(o)) was introduced on 1 July 2016, we have been notified of more than 50 claims cybercrime related claims with a total value exceeding R25 million. As these claims fall within the exclusion and have been rejected, the firms concerned will have to bear these losses themselves, should they not have appropriate cybercrime cover under another policy. We note with concern that despite the warnings in respect of cybercrime risks published by the AIIF and other bodies, many firms are still falling victim to the various scams. All staff must be alerted to the risks associated with cybercrime and appropriate measures must be put in place to avoid and/or mitigate the dangers of this risk materialising. On the AIIF website (www.aiif.co.za) a useful document compiled by Shadrack Maile on the interest risks for legal practices can be accessed.

Cover for the risks associated with cybercrime can be purchased in the commercial insurance market. There are a number of insurers who offer this type of

RISK MANAGEMENT COLUMN continued...

cover and practitioners should enquire with their respective brokers and insurance underwriters in this regard.

The high number of claims arising out of circumstances where practitioners and their staff have failed to apply basic procedures remains a serious cause for concern. We have received a number of requests to publish practical risk management tools and, in response thereto, we publish a precedent for file audits. This file audit precedent was previously published by the AIIF. The precedent can be adapted by practitioners for their particular needs.

Suggestions from the profession for topics to be covered in the Bulletin are always welcome (as are contributions in the form of articles).

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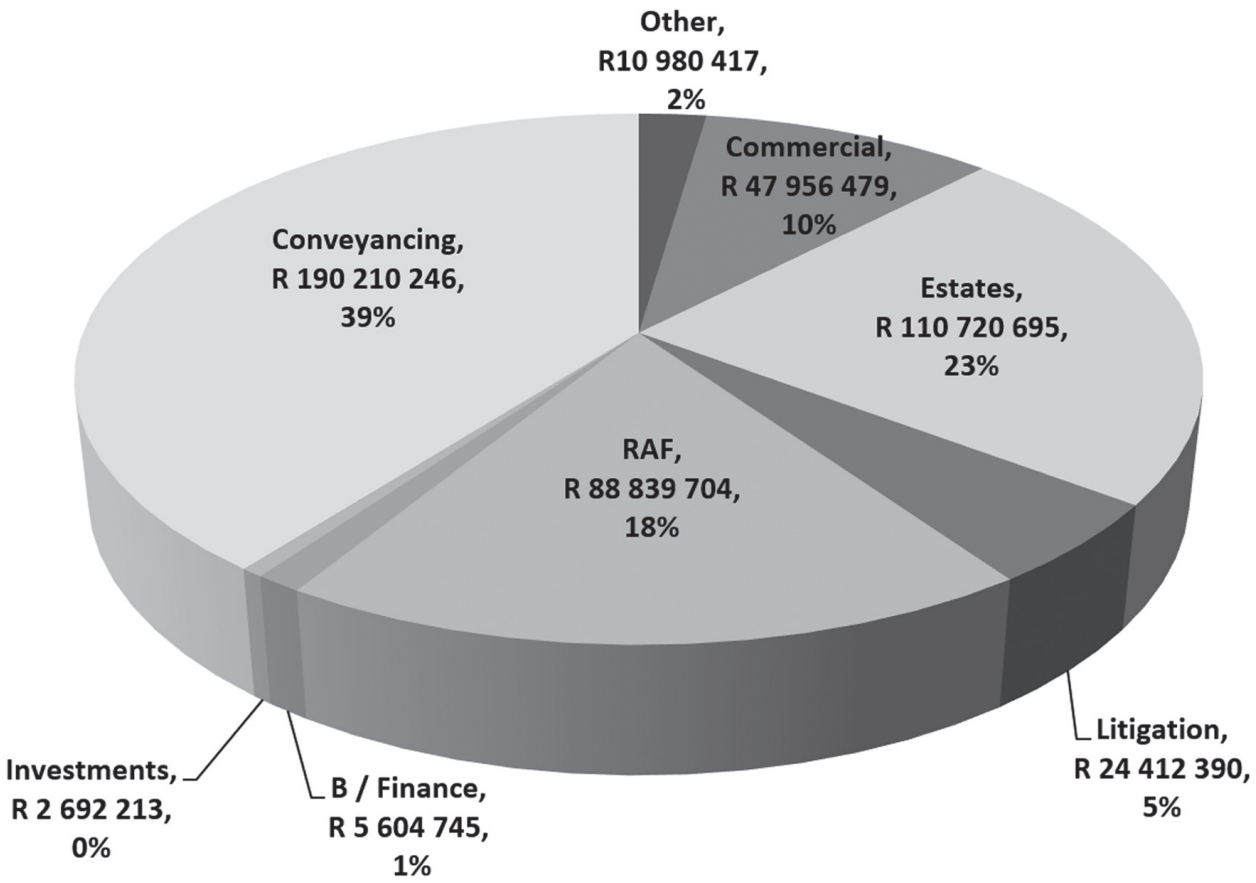
LATEST CLAIM STATISTICS



RISK MANAGEMENT COLUMN continued...

The pie chart on page 2 gives a classification of contingent claims against the Attorneys Fidelity Fund (AFF).

(The segment labelled "other" is made up of administrations, collections, criminal, matrimonial and insolvency related claims.)

The Claims Executive at the AFF, Jerome Losper, reports that as at 31 May 2017 the AFF had 1189 claims on record with a combined value of R481, 416, 889.

There are some similarities in the AFF statistics with the claims notified to the AIIF. As at 31 March 2017, the value of outstanding claims against the AIIF was actuarially assessed at a value in excess of R475 million. The AIIF team is currently dealing with over 2022 active claims. Prescribed RAF claims, under settled RAF claims, conveyancing and general litigation claims make up the largest categories of claims notified to the AIIF.

It will be noted that 23% of the AFF claims relate to misappropriation of deceased estate related funds. The claims notified to the AIIF in respect of the bonds of security issued to executors of deceased estates also mainly arise out of the misappropriation of estate related funds. Practitioners practising in this area should thus take extra caution in the management of estate related funds.

In so far as conveyancing transactions are concerned, practitioners must take precaution in the handling of the funds not only during the course of the transaction but also post the finalisation thereof. It will be noted that bridging finance related claims as well as cybercrime related claims mainly arise out of conveyancing related transactions. Inadequate supervision of staff and a failure to develop and apply minimum operating standards are some of the underlying causes of the increase in conveyancing related claims. Conveyancers must also take particular care in defining the scope of their mandates- it has been found that many claims arise from an act or omission which takes place in the firm after the conveyancing transaction (the transfer of the legal title or the registration of the real right in immovable property) has taken place. Practitioners who hold funds post the conclusion of the conveyancing transaction, without any current underlying instruction to carry out any legal services, may then be holding for pure investment purposes. Investment related claims are excluded from the AIIF policy (clause 16 (e)) and also fall within the limitation of the AFF's liability (section 47 of the Attorneys Act 53 of 1979).

GENERAL PRACTICE

PRESCRIPTION

As noted above, prescription related claims are a continued cause of concern for the AIIF. Over the last few years, we have published a number of articles giving suggestions of measures that practitioners could implement in order to mitigate the risk of claims prescribing in their hands. The AIIF has also made the Prescription Alert system available to practitioners for the registration of time-barred matters. Please send an email to alert@aiif.co.za or to lunga.mtiti@aiif.co.za in order to register with the Prescription Alert unit. A system of supervision and regular file audits will also mitigate the risk of prescription.

It must never be assumed that the prescription period is three years in all cases.

In a recent judgement (**Kruger v Minister of Health and others** [2017] JOL 38009 (FB)), the Free State Division of the High court considered an application for condonation of a failure to comply with sections 3(2) and 4 of the Legal Proceedings Against

GENERAL PRACTICE continued...

Certain Organs of State Act 40 of 2002 (the Legal Proceedings Act). The plaintiff in that case had undergone a medical procedure at a state hospital in the Free State on 22 February 2008. Summons was only issued (in the North Gauteng High Court) three years later in which damages were claimed on the grounds of alleged professional negligence by the medical professionals. The action was defended and the a special plea filed to the effect that the court lacked jurisdiction as there had been a failure to give notice of the claim as prescribed by section 3(2) of the Legal Proceedings Act. The matter was transferred from the North Gauteng High Court to the Free State Division on 17 September 2013. On 8 May 2014 the plaintiff gave the notice as required by the Legal Proceedings Act to the defendants of his intention to institute the action for damages and the basis of such action. A day later a letter was sent to the defendants requesting condonation of the non-compliance with section 3 of the Legal Proceedings Act. The defendants did not agree to the condonation and six months later the plaintiff brought an application for condonation.

Some of the points arising out of this case (of which practitioners should take note) are that:

- There was no explanation of the time lapse between the dates of issue of the summons (17 June 2011), the issue of the section 3 notice (8 May 2014) and the launching of the condonation application (November 2014);
- The court found that there was a need to explain the delay taking steps to proceed with the claim after the plaintiff ascertained in March 2011 that his paralysis was permanent;
- The applicant had to apply for condonation as soon as it became necessary to do so (in this case the condonation application was only filed almost three and a half years after the institution of the action and three years after the plaintiff became aware of the need to apply for condonation). The court found the delays to be unreasonable;
- In the condonation application, the plaintiff had failed to sufficiently deal with his prospects of success in the case;
- The service of the summons in the North Gauteng High Court would not have enabled the plaintiff to prosecute his case to finality due to a lack of jurisdiction and thus would not have interrupted prescription.

GENERAL PRACTICE continued...

FILE AUDIT PRECEDENT

The file audit precedent below can be adapted by practitioners for their particular needs.

File Ref:		File Handler:	
Client name:		Date reviewed:	
Type of matter:		Reviewer :	

1. FILE OPENING

Yes, No or N/A		Remedial action needed?	Comments
	1.1 File opening procedures correctly followed?		
	1.2 Evidence of conflict check?		
	1.3 FICA documents complete?		
	1.4 Risk assessment? - Referred matter?		
	1.5 Full client particulars and alternative contacts?		
	1.6 Signed and complete letter of engagement / mandate? -Fees/costs/deposit discussed? -Scope of work? -client's objectives? -preferred method of correspondence? -strategy? -Name & status of contact person in the practice?- Instructions, action and advice confirmed to client?		
	1.7 Comprehensive written record of first consultation		
	1.8 Appropriate deposit taken?		

GENERAL PRACTICE continued...

	1.9 Key dates calculated & recorded accurately? - prominently placed?		
	1.10 Related files identified - cross referenced?		
	1.11 Referred matter? -obligations complied with?		
	1.12 Case strategy and working plan apparent?		

2. CONDUCT OF MATTER

Yes, No or N/A		Remedial action needed	Comments
	2.1 File organised & maintained according to MOS?		
	2.2 Matter been progressed with minimal delays?		
	2.3 Client regularly kept up to date on progress?		
	2.4 Work carried out in accordance with mandate & working plan?		
	2.5 Legal advice correct in terms of the facts and law?		
	2.6 Any ethical problems?		
	2.7 Letter of engagement updated for changes in mandate?		
	2.8 All discussions, instructions & advice recorded in writing?		
	2.9 Timeous responses to client's calls and correspondence?		
	2.10 Any client complaints? -Any complaints dealt with satisfactorily?		

GENERAL PRACTICE continued...

	2.11 Time recorded accurately?		
	2.12 Billing complies with MOS? -regular, accurate accounting to client? - Timeous payments from client?		
	2.13 Counsel/experts instructed appropriately?		
	2.14 Evidence that file diarised for appropriate periods?		
	2.15 Financial aspects in order? -trust money dealt with i.t.o internal and external rules? -money invested i.t.o the rules? - written instructions from depositor for investment and disbursement? -payment out of trust i.t.o internal and external rules? -anti fraud and anti money- laundering rules complied with?		
	2.16 Correct file closing & archiving procedures followed? -Appropriate file closing letter to client? -Original documents returned to client?		

3. [Department] – specific matters

Yes, No or N/A	Checklist for specific matters eg RAF, conveyancing etc.	Remedial action needed?	Comment

4. Reviewer Comments

5. Remedial actions

Action required	Due Date
1.	
2.	
3.	
4.	

The remedial actions were completed on …….and the review is now complete.

Signed : ……
(Reviewer)

Signed : …….
(File Handler)

Date: ……

Place one copy of this form on the file and forward a copy to the Risk Manager/Senior Practitioner