

CHANGES IN THE NCA AND THE INTERPRETATION OF THE REINSTATEMENT MECHANISM

The **voetstoots** clause – should latent defects be disclosed in property sales?

A cautionary tale about the purchase of trust property by trustees

Practice note:
Purchasing a franchise

Unravelling s 103 of the Firearms Control Act

Justice Raymond Zondo appointed as Deputy Chief Justice

Holding delinquent directors personally liable

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Liability of directors of an incorporated law practice

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FEATURES

26 Changes in the NCA and the interpretation of the reinstatement mechanism

The judgment of the Constitutional Court (CC) in *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) resulted in a paradigm shift within the legal fraternity and in the manner in which credit providers approach collections. In this article, **Arno Duvenhage**, focuses on ss 129(3) and 129(4) of the National Credit Act 34 of 2005, as amended by ss 32(a) and 32(b) of the National Credit Amendment Act 19 of 2014. It will specifically consider and comment on the principle that a consumer may reinstate a credit agreement as an operation of law, as enunciated by the CC in *Nkata*.

29 Holding delinquent directors personally liable

One of the fears expressed on Companies Act 71 of 2008 (the new Act) was about the increased responsibilities and liabilities for directors. It was thought that the new Act would stifle entrepreneurship because fewer business people would be willing to subject themselves to these new risks. Section 424 of the Companies Act 61 of 1973 balanced the need to protect directors and creditors perfectly well, so why start from scratch with something new and unknown? In this article, **Emile Myburgh**, looks at how a creditor can hold a director personally liable for unpaid debts owed to them by a company in the light of the small but growing body of jurisprudence dealing with directors' liability under the new Act.

32 A cautionary tale about the purchase of trust property by trustees

Due to the *sui generis* nature of a trust, buying property from a trust at the very best of times can be a harrowing process for the uninitiated. **Edrick Roux** and **Lucinda Horn** say it is not simply a process of entering into an agreement for the purchase and sale of a specific property, but rather a tactical decision of the trustees, which requires the necessary logistical support as envisioned in the trust deed and what often complicates the purchase even further is the fact that the purchase from the trust will usually be to the advantage of the trustees, which can be seen as a potential conflict of interest.

34 An unspooled tape - copyright law in need of fixing

Copyright law in many countries has been used to limit parallel importation of goods into a country without the express permission of the copyright owner. These imports are not illegal, immoral or unlawful and are not fundamentally different to ordinary imports and the limitations on the importation of these goods depends on the copyright law of that particular country and the policy considerations that inform the interpretation of that law. **Jenalee Harrison** advocates for South Africa to either incorporate the doctrine of exhaustion into our law, as done in the United States, or at least for the doctrine to be a relevant consideration in determining whether the parallel imports should be prohibited, as done in Singapore.

36 The *voetstoots* clause - should latent defects be disclosed in property sales?

Many disputes have arisen from the fact that purchasers and sellers of property do not understand what the *voetstoots* clause means. Even though some purchasers may not be aware of this, when you buy a property, there is an implied warranty that the property is sold free from any defects. It is, however, possible for the seller to contract out of this implied warranty by inserting a clause into the sale agreement that provides for the sale to be *voetstoots*. This simply means that what you see is what you get, and that no warranties exist. **Madeleine Truter** discusses the effect of the Consumer Protection Act on the *voetstoots* clause and what is classified as a latent defect.

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Financial Intelligence Centre Amendment Act gazetted

A number of sections of the Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act) were gazetted recently. The Amendment Act was signed into law by President Jacob Zuma on 26 April and gazetted on 2 May (GN396 GG40821/2-5-2017), but the determination of the commencement date was left to the Minister of Finance.

According to the Financial Intelligence Centre (FIC), the key objective of the Amendment Act is to improve the protection of the integrity of South Africa's financial system and strengthen its ability to prevent and punish financial crimes such as money laundering, illicit capital flows, tax evasion, corruption, bribery and financing of terrorism.

The Amendment Act also introduces the following new concepts and approaches to the implementation of the Financial Intelligence Centre Act 38 of 2001 (FIC Act):

- Full range of customer due diligence requirements, which are focused on understanding customers better rather than simply identifying and verifying their identities.
- Customer-friendly approach based on a risk-based customer due diligence, which enables efficient utilisation of resources and should make compliance easier for low risk clients.
- Beneficial ownership, which requires institutions to know and understand the natural persons who ultimately own or exercise control over legal entities or structures.
- Prominent (influential) persons and 'politically exposed persons', which requires institutions to better manage risks relating to relationships with prominent persons.
- Freezing of assets, in terms of targeted financial sanctions against persons identified by United Nations Security Council in terms of various sanctions regimes.

The implementation of various provisions of the Amendment Act will

start on different dates, namely, 13 June, 2 October and dates to be determined after 2 October – but expected to be no later than the end of 2018.

The first set of implemented provisions do not require changes to existing regulations, exemptions or internal systems of institutions to enable compliance with the FIC Act. The provisions deal mainly with information sharing, consultation arrangements, constitutional concerns relating to inspection powers, and improved functioning of the FIC Act Appeal Board.

The second set of provisions will commence on 2 October. These provisions, which give effect to the above-mentioned new concepts and approaches, will require changes to existing regulations and exemptions under the FIC Act.

The FIC stated that the commencement and operationalisation dates of the two remaining set of provisions in the Amendment Act, namely ss 26A to 26C dealing with the freezing of assets in terms of the United Nations Security Council Resolutions on targeted financial sanctions, and sch 3A dealing with the setting of a monetary value threshold for companies doing business with the state, will be determined after October. One of the new features that will be introduced by the Amendment Act is a requirement for institutions to determine whether there are specific money laundering or terrorist financing risks associated with relationships with prominent persons in companies doing business of a certain value with the State. This provision, which relates to sch 3A, will commence on 2 October, but will require operationalising later by notice, once a monetary value threshold has been finalised and the state is able to generate such a database or capability.

Those who wish to comment on the Amendment Act are requested to make submissions by 12 July electronically by using the online response at www.fic.gov.za.



Mapula Sedutla – Editor

Would you like to write for *De Rebus*?

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Withdrawal of accreditation – response from universities

In the May issue of *De Rebus*, the editor's note 'Legal education in crisis' 2017 (May) DR 3 focussed on the quality of the LLB qualification. This was after the Council of Higher Education (CHE) released its outcomes in the National Review of the LLB qualification in April. In the June issue editor's note, 'CHE release full LLB review' 2017 (June) DR 3, *De Rebus* reported that the CHE released the full report on the Na-

tional Review of the LLB. The report detailed the mechanism used to review the 17 institutions that offer the LLB degree. The report also provides reasoning behind the CHE's decision to furnish four universities with a notice of withdrawal of accreditation if the quality of their LLB programme does not improve. *De Rebus* spoke to the four universities about their LLB qualification.

University of South Africa (Unisa)

Kgomotso Ramotsho (KR): Why was Unisa issued with a withdrawal of accreditation notice?

Unisa's Executive Dean for Law Faculty, Professor Rushiella Songca (RS): The CHE placed Unisa's LLB on notice of withdrawal of accreditation, which requires the college to put measures in place to address the reasons, concerns and recommendations set out in the review report. It does not mean that Unisa's qualification accreditation has been withdrawn or that our LLB programme has been de-accredited.

It is important to note that shortly before the national review of the LLB, a group of experts developed the LLB Qualification Standard against which the LLB qualifications would be measured. The CHE resolved that because the standard had been developed long after LLB programmes had been in existence, it would not be used as the sole, or primary, benchmark for programme re-accreditation (ie, national review). Institutions were requested, as part of the national review, to identify any areas in their programmes, which currently do not meet the standard, and to indicate plans for improvement together with proposed timelines for implementation. The issues flagged by the CHE with regard to Unisa's LLB were indeed those that the College of Law has identified in its self-evaluation report, notably:

- Curriculum design: The CHE recommended that the College

of Law revise the LLB curriculum to include non-law modules. In addition, it recommended that from second year onwards, pre- and co-requisites are to be instituted for some of the modules in order to prepare students adequately for the progression and increasing complexity of modules from the first to the fourth year of study. This will be implemented from January 2018.

- Alignment of Unisa Teaching and Learning policies with practice within the College of Law: The CHE recommended that the college develop a manual for academics containing all the relevant policies and processes, so that teaching and learning practices are clearer as far as their operationalisation are concerned. This manual is already being developed, for implementation in 2018.

- Early identification of students who may need additional support: The CHE recommended that the college develop systems and processes that will assist in tracking students who may require additional student support (eg, those who fail certain modules repeatedly or may be at risk of doing so). The college already has a system in place to track students at risk of failing LLB modules.

KR: What measures or steps has the university taken to ensure that it remains accredited to provide the LLB degree?

RS: The University of South Africa and specifically the College



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of Law is taking every possible step to ensure that the LLB's accreditation remains intact.

The institution has also engaged the CHE on the findings of the report and has since the release of the report, committed a lot of effort to the rolling out of the LLB Improvement Plan, which is addressing the identified challenges. The plan contains clear targets, resource allocations and progress made so far.

The College of Law has also communicated widely (on its website and other social media platforms) with all LLB students to explain to students the current position and to alleviate anxiety regarding the qualification's status. In addition, the deanery has commenced with visits to the different regions to give effect to this.

KR: What message would you give to prospective students and current students to alleviate fears that the LLB degree may be seen as inferior?

RS: Unisa's LLB qualification is generally well-recognised and respected and its legal history is widely acknowledged. The LLB qualification has its roots in the very distant past when, in 1873, the Board of Public Examiners was replaced by the University of the Cape of Good Hope (UCGH), Unisa's forerunner, and the Certificates in Law and Jurisprudence offered by the board were replaced by the UCGH's Certificate of Proficiency in Law and Jurisprudence and the LLB degree (Bachelor of Laws). Unisa's first LLB degrees, under the deanship of advocate William Pittman, were awarded on 2 April 1919.

To date, Unisa takes pride in the fact that it has graduated the largest cohort of LLB students of all law faculties in the country, some of which became Constitutional Court and Supreme Court judges, not to mention Unisa's long tradition of having produced highly successful members of the legal pro-

fession and corporate leaders. The late Mr Nelson Mandela also obtained his LLB degree through Unisa.

We would like to point out that there was no negative finding with regard to the academic content of our LLB qualification. In fact, the CHE report commended Unisa's LLB degree on a number of issues, which include, among others -

- the approach to globalisation in selected modules;
- evolving information technology issues;
- the alignment of the College of Law's enrolment plan with the national development agenda, which facilitates access to education, commitment to curriculum transformation and the dynamic nature of law and its relationship with relevant contexts;
- that the majority of modules require students to engage in genuine problem solving;
- the College of Law's diverse and highly qualified academics; and
- assessment practices ranging from good to excellent and commendable moderation practices.

KR: What message would you give to the legal profession and other prospective employers of students who have graduated from the institution?

RS: This question is partly addressed above. One out of two LLB students in South Africa study at Unisa, which situates Unisa and the College of Law as one of the biggest educational role players in the context of the fields of law and criminal justice. The quality of our qualification and the calibre of our dedicated academics have always been widely acknowledged. We welcome the opportunity to improve our qualification to continue to make it relevant, current, sought after and appropriate and to deliver law graduates who will continue to excel in the world at large.

Walter Sisulu University (WSU)

Kgomotso Ramotsho: Why was WSU issued with a withdrawal of accreditation notice?

WSU's Senior Director, Marketing, Communication and Advancement, Yonela Tukwayo (YT): It is standard practice that academic programmes be reviewed periodically to ensure that each tertiary institution continues to provide an acceptable level of teaching and learning to ensure that it produces graduates of a calibre required by various industries. The reviewing panel found some shortcomings, namely, that WSU needed more qualified academic staff (Doctors of law and Professors). Secondly the infrastructure was not at an acceptable level.

KR: What measures or steps has the university taken to ensure that it remains accredited to provide the LLB degree?

YT: Part of the feedback WSU received from the CHE highlighted timelines to improve the stated deficiencies. As a first step, WSU must submit a plan on how it will improve on areas that it fell short on. WSU are working on the improvement plan, which will be submitted.

As an institution, WSU already identified the areas for improvement in 2016 and applied for grant funding from the Department of Higher Education and Training (DHET) to im-

prove the facilities. We received confirmation from DHET that it will grant WSU R 90 million to address the infrastructure needs and this was confirmed prior to the release of the CHE report. Secondly, WSU had initially tried to recruit more suitably qualified academic staff in 2016, but there were no suitable candidates and it will re-start the recruitment process.

KR: What message would you give to prospective students and current students to alleviate their fears that their LLB degree would be seen as inferior?

YT: WSU remains accredited and it is at least two years away from being discredited. Once the improvement plan has been submitted by WSU, it will be given time to implement it. There are no issues highlighted with regard to the curriculum and in fact it received praise for other elements of its LLB programme.

KR: What message would you give to the legal profession and other prospective employers of students who have received a degree from your institution?

YT: WSU continues to produce highly qualified legal professionals and our alumni can be found in the private and public sector, which includes judges at the Constitutional Court.



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North West University (NWU)

Kgomotso Ramotsho (KR): Why was NWU issued with a withdrawal of accreditation notice?

NWU's Vice-Chancellor, Professor Dan Kgwadi (DK): The Higher Quality Education Committee (HQEC) report makes three general findings that exist, namely –

- inequity between the two sites of delivery in Potchefstroom and Mafikeng (eg, provision of curriculum delivery, teaching, learning and assessment; the profiles of staff in respect of seniority, qualifications and scholarly reputation; the quality assurance of the programme and infrastructure);
- inadequate racial integration in the programme overall, but particularly at Potchefstroom where a group of mainly black students receiving tuition through the medium of interpreting from Afrikaans to English, felt accommodated rather than fully accepted and integrated in the academic space; and
- relatively low admission requirements without sufficient additional student support throughout the programme.

KR: What measures or steps has the university taken to ensure that it remains accredited to provide the LLB degree?

DK: The Council of NWU approved a new structure for NWU, which led to the amendment of the NWU statute, which is currently being implemented. A main feature of this new structure is that a single executive dean will be responsible for a faculty (eight faculties rather than the current 15), which spans all three campuses of NWU.

From 1 July there will, therefore, be only one Faculty of Law with one executive dean and one faculty board. This new governance structure together with the improvement plans' implementation will ensure that programmes are fully aligned, managed and quality assured across all campuses.

The admission score for the LLB programme has been raised for 2018 and additional student support will also be introduced. In addition the language policy of NWU is currently under revision and the Faculty of Law is investigating ways to address the concerns raised by students (from a wider transformation and institutional culture perspective).

KR: What message would you give to prospective students and current students to alleviate their fears that their LLB degree would be seen as inferior?

DK: NWU has a long and proud tradition of legal education and its graduates are well-known for their qualities (knowledge, skills, problem solving and values). NWU believes that our alumni are our best ambassadors for our programme as they excel in the admissions examinations, in all areas of the legal profession, the business world, as well as the public sector.

Our students know that fellow and previous students perform very well in national and international moot court competitions and, successfully complete postgraduate studies at national and international faculties of law and finish final year international exchange programmes with distinction. The HQEC report did not fault the programme design or standard of the NWU LLB as such and in fact commended several aspects of the NWU programme. The matters of concern raised in the report are currently being addressed by means of the institutional restructuring and the LLB improvement plan, which will be submitted by 6 October 2017.

NWU's management and staff are constructively (and earnestly) engaging with students to keep them up to date with developments and are committed to address identified issues.

KR: What message would you give to the legal profession and other prospective employers of students who have received a degree from your institution?

DK: We take pride in the graduates we deliver, both at Potchefstroom and Mafikeng. The academic quality of NWU's LLB programme is borne out by the HQEC report. In particular, it was found that the programme appropriately imparts a comprehensive and sound knowledge and understanding of South African law and its associated values and historical background to students.

It was also found that sufficient attention is paid to teaching, learning, assessment and the inculcation of critical thinking skills in the various modules. Lastly, the report states that the programme sufficiently addresses all the areas of applied competence listed in the LLB Qualification Standard.

It must be remembered that the NWU's merger was unique in South Africa and its geographically dispersed multi-campus institution faced challenges to become a truly unitary multi-campus institution. However, the matters raised by the HQEC report are aspects that NWU had already started to address prior to the findings of April this year, and it is well on track to address said matters.

NWU also believes that the standing that our degree currently enjoys in the marketplace will ensure that potential employers will continue to hold the NWU degree in high regard and that they will appreciate that NWU is dealing with institutional matters and that current and past NWU law graduates (as confirmed in the HQEC report) are appropriately prepared to enter the legal profession or any related career requiring the application of law.

University of the Free State (UFS)

Kgomotso Ramotsho (KR): Why was the UFS issued with a withdrawal of accreditation notice?

UFS's Executive Dean for Law Faculty, Professor Caroline Nicholson (CN): Although the review report raises a number of issues, the two primary reasons that the LLB was placed on notice of withdrawal of accreditation were:

- The faculty decided in April 2015 that it would like to do a thorough re-curriculum of the LLB programme to ensure that it was aligned with the newly adopted LLB national qualification standards, which were only finalised at the end of 2015 and that it meets the needs of the current legal context. This context has changed significantly over the period since the existing curriculum was introduced and, while the new curriculum may not differ substantially from the old, it is vital

that institutions review and improve on their offerings on a regular basis. As part of this process, the faculty placed the qualification in category C, meaning that we would replace the existing curriculum with a new curriculum date to be determined. Thus, the curriculum that was subject to the review was already a curriculum that UFS had, ourselves, decided to review. The CHE accepted that the faculty had made the correct decision to embark on process and, as this is not a process that will be completed overnight, this determined that this was a ground to place the current LLB curriculum on notice of withdrawal of accreditation.

- The second primary concern relates to the credit loading in the qualification. The UFS LLB degree was designed with the minimum of 480 credits in mind. At that time there was no

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maximum load specified. The CHE have since indicated that a four year Bachelor's programme should not exceed a maximum of 540 credits. The UFS qualification comprises 768 credits and is thus, on paper at least, overloaded. In our self-evaluation report, UFS indicated that the credits are overstated and that the credits do not accurately reflect the actual workload in the programme. The CHE is, however, concerned that if UFS simply remove credits it could undermine the educational foundation of the programme. For this reason, it is necessary for UFS to supply the CHE with a plan in which it details how this issue will be dealt with without undermining the content of the qualification.

KR: What measures or steps has the university taken to ensure that it remains accredited to provide the LLB degree?

CN: The faculty had a very productive and collegial meeting with representatives for the CHE who visited the campus on 12 May. This meeting was used to establish exactly what the faculty needs to do to satisfy the CHE concerns.

The faculty has been actively engaged in the re-circulation project and had strategic sessions during the week of 22 to 25 May at which the new programme was discussed and what of the new ideas can be implemented in the existing programme to benefit its current students and those who will enrol before the new programme is implemented. 2020 is the planned date for implementation. This strategic session will be followed by an engagement with the various stakeholders, who will assist the faculty in ensuring that the new curriculum will be exciting, innovative and tailored to the legal profession in the 2020s. This will be an ongoing process with a view to having a programme to submit to internal structures before the end of 2017.

The faculty will also use these engagements and discussions in formulating a detailed implementation plan for the CHE, which will explain what we plan to do, how we plan to do it and the timelines associated with the plan.

The faculty has an excellent LLB degree and we are confident that, with the above interventions we will be able to address the concerns and improve our product simultaneously.

KR: What message would you give to prospective students and current students to alleviate their fears that their LLB degree would be seen as inferior?

CN: Prospective and current students can be assured that the quality of the offering in the LLB that the UFS presents is of an exceptionally high quality. The faculty covers the full spectrum of the law and its graduates are highly regarded in the sector. Our graduates statistically, perform well in the professional examinations and our alumni hold some of the most important legal and judicial positions in the country. There is no question that the qualification is of an extremely high quality and that the faculty will take all steps possible to ensure that it maintains these standards. The panel members on the review panels, both a recent external review initiated by ourselves, and the CHE peer review panel, were very positive about the programme content as a whole, although they did make some suggestions for improvement. The CHE did not regard the content of our qualification as inferior or deficient.

KR: What message would you give to the legal profession and other prospective employers of students who have received a degree from your institution?

CN: The profession and prospective employers have always had the utmost confidence in the quality of the UFS programme and the graduates we produce. The manner in which the recommendations were conveyed was unfortunate and did irreparable reputational damage to the UFS, and other institutions. We trust that the quality of our academics, graduates and alumni speak for themselves and that the profession and prospective employers will continue to trust a brand that has always met their needs in the past. We hope that they will engage in our stakeholder discussions and that they will endorse the faculty's view that the current situation creates a wonderful opportunity for the UFS Faculty of Law to revitalise its programme and produce an exciting LLB that centres human rights and social justice at its core.

Kgomotso Ramotsho, Kgomotso@derebus.org.za

Office of the Chief Justice receives an unqualified audit outcome

Justice Minister, Michael Masutha, commended the Office of the Chief Justice (OCJ) for the unqualified audit outcome. Minister Masutha was addressing the National Assembly, in Cape Town at the occasion of the budget debate on 17 May. In a press release, Mr Masutha said that there was no overspending from the OCJ.

Mr Masutha pointed out that the expenditure of the OCJ for the 2016/17 budget at the end of the financial year stood at 98%. He said that it was commendable to note that the department had an unqualified audit outcome on financial statements in the maiden year of operating the budget vote. Mr Masutha added that over the three year Medium Term Expenditure Framework period, the OCJ had been allocated a total budget of R 6,32 billion.

Mr Masutha noted that for the 2017/

2018 financial year the allocated budget amounted to R 1,984 billion. He added that of the amount allocated to the OCJ R 966,06 million is allocated to judges' remuneration and benefits. 'This means that the OCJ will have an operating budget of R 1,018 billion,' Mr Masutha said. He pointed out that of the total budget, of R 737,47 million, which represents 77,3% of the budget, is allocated to judicial support and court administration.

Mr Masutha said the bulk of the budget is allocated to judicial support and court administration as it forms part of the key mandate of the OCJ. He noted that the funds will be utilised to improve the court system through an effective and efficient case-flow management system of the OCJ Provincial Centres, which will provide administrative support to the superior courts. He added that the funds allocated for the judicial training

of judicial officials has increased from R 30,2 million to R 49 million in the 2017/18 period.

Mr Masutha said the Justice Department recognised that education and training of judicial officers is necessary to promote and uphold the independence, impartiality, accessibility and effectiveness of the courts. 'In this regard, the South African Judicial Education Institute located under the OCJ, continues to offer training courses to judicial officers,' Mr Masutha said.

Mr Masutha noted that a total amount of R 154,94 million has been allocated to conduct about 246 judicial education courses over the Medium Term Expenditure Framework period. The budget for administration of the entire OCJ amounts to R 98,99 million, which constitutes 19,5% of the budget. He added that during the 2016/17 financial year,

90 judicial education courses, which include basic and advanced courses for newly appointed magistrates and aspiring judges, were offered to serving and aspiring judicial officers, which exceeded the set target of 70.

Mr Masutha said he acknowledged the

tight fiscal environment within which the country currently operates and the difficult decisions that the National Treasury needs to make to divide the limited resources against competing priorities of the government. Mr Masutha pointed out that the OCJ is committed to ensure that

the funds allocated in the budget will be utilised in an efficient and effective manner.

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Future of the legal profession discussed at BLA NGM

In May, the Black Lawyers Association (BLA) held its national general meeting (NGM) in East London under the theme 'Determination of the future of the legal profession post the Legal Practice Act – our responsibility and priority'. The NGM was preceded by the Third Godfrey Pitje Annual Memorial Lecture, which was delivered by advocate Dumisa Ntsebeza SC.

President of the BLA, Lutendo Sigogo, began the proceedings of the memorial lecture by saying that Godfrey Pitje, the founding father of the BLA, is a true example of what being a black lawyer means. Mr Sigogo went on further to inform the attendees that the BLA will be celebrating 40 years of its existence in October, therefore, it will be launching the first official history book of the BLA.

Speaking about the effects of Apartheid, Mr Ntsebeza said the fact that Mr Pitje was convicted and sentenced for refusing to sit, as a candidate attorney, in a place in court that was decreed for black practitioners, is testimony to the moral bankruptcy of a period South Africa should never return to. Mr Ntsebeza added: 'The indignity of the racism of the past and the way that racism was felt by those who were subjected negatively to it, could not have been expressed better than by Rolihlahla Mandela, who at one stage was, with OR Tambo, Pitje's boss. He once said the following about justice in those dark days of Apartheid: "Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?" It is, therefore, not amazing that Mandela, Tambo and Pitje, among others, became involved in revolutionary politics as a matter of course.'

History of the formation of NADEL

Mr Ntsebeza found it necessary to spend a bit of time on the history of the forma-



*Black Lawyers Association
President, Lutendo Sigogo,
speaking at the Third Godfrey
Pitje Annual Memorial Lecture.*

tion of the National Democratic Lawyers Association (NADEL) during the memorial lecture. He said:

'I can testify that I, in 1986, with Ms Linda Zama, Selby Baqwa (now Judge) and Bernard Ngoepe (now retired Judge President) were flown to Geneva, ostensibly to meet with the World Council of Churches (WCC) representatives, and report to them on the situation at home, and indicate in what way the WCC could assist, especially in the raising of funds, for the representation of those who were increasingly swelling the Apartheid jails as detainees. ...

During this visit, there were hints that it was important to have lawyers or a body of lawyers who would be the leaders of a new outlook, lawyers who would begin to articulate and brainstorm the kinds of values that would inform a post-Apartheid society and its constitutional architecture. ...

At that time, I was not even in the BLA. I was in a structure called the Eastern Cape Democratic Lawyers Association (ECDLA), to which the Umtata Democratic Lawyers Association had affiliated. What we had discussed in Geneva and London was obviously something that

had been communicated to others in the country, though this was not known to me. Organisations like the Democratic Lawyers Organisation from the Western Cape, the Democratic Lawyers Association from the then Natal, the [Mathole] Motshekga-led Democratic Lawyers Congress, from the then Transvaal, emerged throughout the country.

The BLA leadership must have heard that the ECDLA, which was led by the late stalwart, attorney Templeton Mdalana, was fairly active in advancing the idea of the formation of a brand new organisation that would commit itself to a transformation agenda. The BLA sent a delegation that included Keith Kunene and retired Deputy Chief Justice [Dikgang] Moseneke, and from that moment the BLA, for its part, articulated the basis on which it would be part of the proposed new body.

I was in the Constitution Drafting Committee. [In] the Constitution Conference of the new body in Durban on the 1 - 3 May 1987, the ECDLA - led Drafting Committee took a reasonably well drafted Constitution that proposed the name: South African Association of Democratic Lawyers (SAADEL).

At the very beginning of conference, the recently departed advocate, Comrade Imran Moosa, strongly objected to the use of the name "South African", and proposed that the name "Azanian" be substituted for "South African" in the title of what the organisation should be called.

I was in the Chair. I realised that there was an ideological conflict emerging. To avoid a protraction of debate on that issue, I quickly proposed that the meeting should accept neither "South African" nor "Azanian" but settle for "National", a proposal that was accepted, happily ever after, by everybody, hence the National Association of Democratic Lawyers.

The late Chief Justice Pius Langa was one of the candidates for Presidency. He was not successful. The BLA overwhelmingly supported its own candidate, [myself], who became the first President of



Advocate Dumisa Ntsebeza SC delivered the Third Godfrey Pitje Annual Memorial Lecture.

NADEL, elected by popular vote on the 3rd of May 1987.’

Remembering Mr Pitje

In conclusion, Mr Ntsebeza, remembering Mr Pitje, said: ‘As we remember him today, and as we remember what he stood for we must also begin to reflect [on] the sickness of our own society today. I have no doubt that if he was alive today, he would be dead against the present day scourges that will destroy our democracy, eventually. If we as legal practitioners, like Madiba and GM [Pitje], want to be leaders in the campaign against corruption, we need to remember to write history as it happened and not as we would have wished it should have happened. It is important that we become truly introspective, and think seriously what our role is in society.’

The now and tomorrow of lawyers

On the second day of the proceedings, the keynote address was delivered by the Chief Executive Officer (CEO) of the Attorneys Fidelity Fund (AFF), Motlatsi Molefe. Mr Molefe began his address by thanking the BLA for the support and succour he has always received since his incumbency of the office of the CEO of the AFF.

Mr Molefe noted that the theme of the NGM was about the now and the tomorrow. He added: ‘The now and tomorrow of lawyers – individually and collectively – and one might add that for black lawyers who have always been at the periphery of the real economics that drive wealth and power within the profession, [is] so much more important and pertinent. This theme is about setting objectives for tomorrow but thereof germination lies in the seeds that we plant today. William Jennings Bryan, a populist American Democrat who lived in the latter part of the 1800’s could

not have put it any better when he said, and I quote, “Destiny is not a matter of chance, it is a matter of choice, it is not a thing to be waited for, it is a thing to be achieved”. The Legal Practice Act 28 of 2014 (LPA) actually sets the basis for the journey that all lawyers have to undergo but within that journey are the objectives that will inform what our priorities and responsibilities will be in the future. Interestingly, I believe that the objectives that one alluded to are clearly spelt out in the preamble to this Act. ...’

Mr Molefe went on further to state that lawyers need to action the points set out in the preamble of the LPA. ‘I would add that for the BLA and any lawyer in particular it does not matter what the colour of their skin is, these principles enunciated [in the preamble of the LPA] should form their beacon and be the guiding light in answer to what their responsibilities and priorities should be when they plot the future post the implementation of the Legal Practice Act. For black lawyers in particular, this calls for a much closer examination of conscience and moral values for it has not just been us as professionals who have been down-trodden in the past, but in particular, the vast majority of the black population and yet in many instances and forms we have either tacitly or implicitly acquiesced in acts and behaviour that left them even more vulnerable because of our own accumulation of power or having been co-opted into the previously hallow walls of power we never imagined we could access.’

Speaking about the points raised by the preamble of the LPA, Mr Molefe said the first point raised in the preamble is about providing a legislative framework for transforming and restructuring the legal profession into a profession that is broadly representative of the country’s demographics under a single regulatory body. He asked: ‘So what are our responsibilities and priorities in this regard? Firstly, it is to ensure that whoever leads this profession reflects the demographics of the country ... in all

facets. That does not mean and certainly excludes predestined quotas like prescribing that the regulator must consist of six black males, four black females, two white men or women for that matter. It merely requires that the majority lead, be they male or female, and majority here does not refer to the majority in the profession, but the majority in the country. Reality dictates that those who are the majority be in the leadership irrespective of colour or gender even if they are the minority within the profession. This might be uncomfortable for some but that is the only and simple interpretation that one can ascribe to it.’

Mr Molefe went on further to say: ‘A basic challenge we face and always skirt around, which I actually wish to point out is that whilst still talking the language of transformation in terms of demographics, it is not the real deal when during transformation leaders – be they male or female – continue to be recycled or continue to make themselves available for leadership ostensibly because there is a dearth in leadership in the profession particularly females. Nothing could be further from the truth. We know for a fact that in this profession there a very few women in real positions of power and influence and we generally pay lip service to gender issues yet, we do not find it strange when men are recycled as leaders who continue old habits that go against the grain of the transformation agenda in the country. The real reason for this is simply megalomania and the taste of power amongst some of us men. ... There is yet another element to this transformation agenda that poses a challenge and requires being prioritised in the future. It is not about people but about structures in which the profession operates. The structures we operate in as black lawyers have a particularly negative history and are dripping with colonial links that have particular asymmetry with the concept of flexibility.’

Mr Molefe explained that: ‘Flexibility fundamentally evinces itself in empathy towards your fellow man because you



The Black Lawyers Association National Executive Council pictured with the family of Godfrey Pitje.

look at him or her as a distinct individual with individualistic strengths and their own quirks. Put simply flexibility allows for what we Africans refer to as *Ubuntu*. However, if one looks at legal structures as they currently exist, not only are they rigid, they also tend to lend themselves towards the most extreme of positions in any matter particularly on conduct and discipline. The rules of the societies, for instance, remain rigid and inflexible and do not accommodate peculiarities that are brought into any situation by variables that are introduced by different facts in different circumstances. Two simple examples are glaring: We still treat every attorney, when dealing with compliance or non-compliance to the rules, with a one size fits all approach. If you are guilty of theft be it a small quantum or even a disproportionately high one, the only answer is [to] strike off and that is it. Yet, society recognises that punishment can and ought to differ based on the peculiar circumstances of each case. The question is, what have black lawyers done to change structural rigidities like these in the rules, which we now so vigorously enforce together with those that excluded us in the past and dare I also add formulated them without ours, let alone society's input? Very little would be my answer to this question.'

Mr Molefe said that the second structural rigidity pointing to a lack of transformation is rigidity to embracing fundamental principles of business and continuing to treat issues such as toutting as anathema. 'Toutting is a buzz word that evokes strong emotive reactions within our profession yet quite honestly we live in a hyper competitive world that seeks to entrench competition all the more. Talk in business is always about what one's competitive edge is yet, amongst lawyers we still cling to old archaic approaches that tend to suggest that to tout for work is in itself an evil. According to the Merriam-Webster dictionary, "toutting" means no more than "an attempt to sell (something) typically by a direct or persistent approach" or at worst "to offer tips for a share for any resultant winnings". This is no different than ordinary marketing in business and if money is exchanged and disclosed in the normal course within accounting books, as well as absence of disparaging your opposition it certainly can neither be illegal nor unethical. Where is the creative thinking that is being embraced in other jurisdictions that promote transformation in the legal profession when we cannot even think about change in how we approach as basic as the matters I allude to herein? How are we going to compete with international jurisdictions that allow for free marketing of legal services when we have not even begun to



Chief Executive Officer of the Attorneys Fidelity Fund, Motlatsi Molefe, delivered the keynote address at the Black Lawyers Association national general meeting.

ingest the need for such at a reasonable pace? Mind you, these firms are going to invade our space at some point and we need to be ready to compete even in the marketing of our services to guarantee viability and success.'

Mr Molefe noted that the LPA also called for the embracing of the values underpinning the Constitution and support for the rule of law. He added: 'Embracing the values of our constitution is about healing the divisions of the past and establishing a society based on democratic value, social justice and fundamental human rights. More importantly, it is about promoting a society in which government is based on the will of the people and every citizen being equally protected by the law. A third and key value as enshrined in our constitution is about the improvement of the quality of life all citizens and the freeing up of the potential of each person.'

Mr Molefe said that in the legal profession, it is important to note that substantial effort has been made in both learning and teaching in order to enhance the potential of law students, as well as lawyers over the years. 'Has that obligation changed? I dare say not but complications brought about by the LPA need to be addressed otherwise the resources required to enable us to prioritise the unlocking of the potential of each law graduate and lawyer will be stunted. In this respect, I want to refer you to the provisions of section 46(b) of the current Attorneys Act [53 of 1979] and contrast it with the provisions of section 57(1)(i) of the Legal Practice Act.

Section 46(b) authorises the Board of Control of the AFF to enter into relationships of agency with any third party to perform functions that can be carried

out in terms of this Act. On the other hand section 57(1)(i) of the Legal Practice Act restricts agency only to between the AFF and the Legal Practice Council or any of its sub-structures. This has huge implications to the question of learning and teaching insofar as structures that do not belong to the Council are concerned. That entire freedom of making resources available to voluntary organisations like the BLA, NADEL and any other is taken away completely by this section. ... What is our response to this is the question and I submit post the LPA we need to target an amendment in the Act that will essentially restore the *status ante quo* for without that organisations such as the BLA will struggle to run with their own programmes that are intended for learning and teaching and in that way fail to fulfil its obligation to free up the potential of young and old lawyers,' said Mr Molefe.

In conclusion, Mr Molefe said: 'The last element I would like to address that imposes obligations on us post-LPA is accountability to the public. We need to accept and concede that our image within the society we operate in is horrendous, but also be graceful enough to know that we are responsible for it. In many instances we find ourselves being the butt of bad jokes that leave a lot of distaste in the mouth. It is [not] uncommon in fact that even amongst ourselves we tell jokes that are disparaging about lawyers. ...

Accountability is not only about being seen to discipline those amongst us for miscreant behaviour. It is far wider than that. It is about inclusiveness, transparency and empathy outside of the obvious need to fulfil our mandates diligently. It is also about ensuring that our clients are appraised of their rights *vis-à-vis* ourselves in relation to the mandates they give us. It is about the trust and respect we should show to them before they can even begin to imagine we are human after all and reciprocate same.

We need to foster a new culture of trust in us by our clients and that can only happen if we truly embrace the values I have alluded to already. The days of in camera hearings and dilatory behaviour in dealing with ourselves must and truly be a thing of the past and transparency and the free flow of information be the order of the day. In this can we hope to recapture the lost trust and respect that ordinary citizens had in this noble profession.'

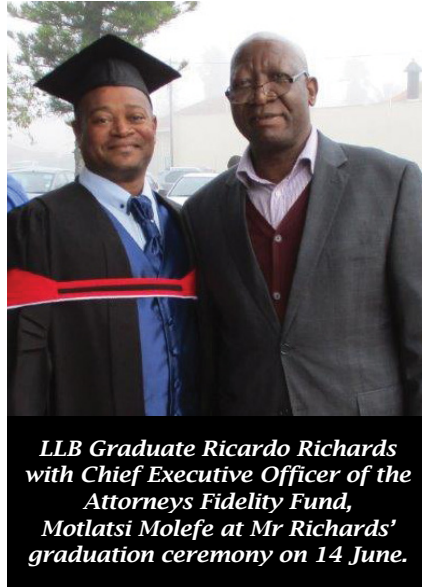
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AFF employee graduates with an LLB

Through a bursary afforded by the Attorneys Fidelity Fund (AFF), 39-year-old Ricardo Richards graduated with an LLB degree on 14 June. Mr Richards, who has always dreamt of a career in law, is currently employed at the AFF as a building safety officer.

Mr Richards' dream was realised after he had a conversation with the Chief Executive Officer of the AFF, Motlatsi Molefe. 'I had a frank one-on-one conversation with Mr Molefe where I told him that I have always wanted to study law,' Mr Richards said.

Mr Richards conducted his LLB degree studies through the University of South Africa. Given the fact that Mr Richards matriculated in 1997, it was difficult for him to embark on his studies. 'It was difficult for me at first. I had to learn how to balance my work life, study life and family life. I am a married father of three and sometimes I had to miss out on family events because I had to study. It took me four and a half years to complete



LLB Graduate Ricardo Richards with Chief Executive Officer of the Attorneys Fidelity Fund, Motlatsi Molefe at Mr Richards' graduation ceremony on 14 June.

my degree. I had limited time to study, I studied at night, during weekends and sometimes during my breaks at work,' Mr Richards said.

Mr Richards noted that the AFF was very supportive of his studies and was given time off to study when necessary. 'I have always had a passion for law. I believe the public has the right to receive the correct information when it comes to the law. I have always admired the work done by law clinics and community centres in assisting the public. That is what the law is all about, assisting those that are in need, especially the disadvantaged,' Mr Richards added.

Currently, the AFF is assisting Mr Richards to acquire articles as he plans to practice as an admitted attorney. 'After doing my articles I would love to work for the AFF. To those who are in a similar situation and thinking of studying law while they work, I say this is a huge step to take, once you get the ball rolling take it one step at a time, you will eventually reach your goal,' Mr Richards said.

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NEW WEBSITE FOR THE PRETORIA BAR

Attorneys looking for counsel that accept briefs in specific fields will be glad to hear that the Pretoria Society of Advocates (generally known as the Pretoria Bar) has launched its new website.

The website can be visited at www.pretoriabar.co.za, where the following information is available:

- Management of the Pretoria Bar;
- Constitution of the Pretoria Bar;
- Committees of the Pretoria Bar;
- Contact details of individual members;
- Fields of practice of individual members;
- Procedure for lodging complaints against members;
- Useful links to the institutions, such as the General Council of the Bar of South Africa and its constituent Bars, Law Societies, courts, Legal Aid bodies and Universities, as well as to sources of law for research purposes;
- Contact details of the Arbitration Foundation of South Africa ('AFSA') as well as its rules, tariffs, venues, filing procedure and Panel of Arbitrators and Mediators;
- Information regarding pupillage.

Of particular importance for attorneys is the page listing the various fields of practice of the individual

members of the Pretoria Bar. By selecting a specific field of practice, a list appears of all members, in order of seniority, who accept briefs in that specific field. By further selecting the name of a specific member, the professional profile of that member appears which shows his or her personal contact details.

In addition, the daily court rolls (i.e. day rolls, motion court rolls and urgent court roll) of the Gauteng High Court, Pretoria, are made available on the website and can conveniently be addressed from the home page of the website.

The Pretoria Bar is justifiably proud of the new website, which is expected to enhance access to not only the services provided by the Pretoria Bar and its members, but also to access to justice in general.

Attorneys who have ideas as to how the website may be improved in order to make it more useful from the point of view of either attorneys or advocates, are invited to contact the General Manager of the Pretoria Bar, Mr Deon Gericke, telephonically at (012) 303-7420 or by e-mail at ptabar@law.co.za with suggestions.

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LSSA takes on *Proxi Smart* model in Gauteng High Court

The Law Society of South Africa (LSSA) filed its answering affidavit in the *Proxi Smart* matter on 7 June. The matter between *Proxi Smart Services (Pty) Ltd v the LSSA and Others* is set down for hearing in the Gauteng Division of the High Court in Pretoria.

Proxi Smart Services plans to render certain 'non-reserved' or 'administrative' conveyancing-related services. The LSSA contends that Proxi Smart's attempt at creating a distinction between 'reserved work' and 'non-reserved work' has no basis in law, and that the full conveyancing process is regarded as professional work performed by conveyancers – who are regulated by the statutory, provincial law societies. This should remain so in the interest of the public.

The LSSA's counter-application seeks orders declaring the Proxi Smart model to be in contravention of various rules, regulations and legislation, and therefore, unlawful.

The other 13 respondents in the matter are the Chief Registrar of Deeds; Roger Dixon; the Justice Minister; the Attorneys Fidelity Fund (AFF); the four statutory provincial law societies; the National Association of Democratic Lawyers; the Black Lawyers Association; the Black Conveyancers Association; the Minister of Rural Development and Land Reform and the National Forum on the Legal Profession.

The LSSA points out the 'unfortunate timing of the application by Proxi Smart, which finds the profession in transition due to the impending coming into effect of the Legal Practice Act 28 of 2014 (expected to be in 2018), as well as the changes envisaged in the deeds registration process envisaged in the Electronic Deeds Registration Systems Bill [B-2016] gazetted for public comment in March this year.'

A misconceived application

The LSSA contends that Proxi Smart's application is misconceived as the Deeds Registries Act 47 of 1937 (the Act) does not define or even use the words 'reserved work'. The logical inference is that the legislator never intended to di-

vide the functions performed by a conveyancer, and that the Act was drafted from the premise that all documents and supporting documents must be submitted to the relevant deeds registry by a conveyancer and had to be drafted, created or secured by a conveyancer or a member of her or his staff working under direct supervision and control of the conveyancer. However, the LSSA adds that, as it is impossible to legislate for every conveyancing procedure, the 'usage, custom and practice of the conveyancing profession' cannot be found codified in the Act.

The LSSA goes on to show that all the steps involved in a typical transfer of immovable property, summarised by Proxi Smart have, by usage, custom and practice over centuries become work that is being performed by conveyancers, and should continue to be performed exclusively by conveyancers. The work defined by Proxi Smart as 'administrative work' is impliedly included in the Act as work that has to be performed by a conveyancer.

The misnomer of the 'typical' transfer

The LSSA adds that the 'typical' transfer outlined by Proxi Smart is a misnomer as, in the experience of conveyancers, there exists no 'typical' transfer of immovable property. Conveyancers are on a daily basis, involved in a great variety of transactions in which a plethora of legal and administrative problems can present themselves.

Protection of the consumer

The protection of the consumer is central to the role of the conveyancer. A number of rules in the Rules for the Attorneys' Profession demand that the conveyancer must account to all parties. The protection afforded to a consumer by the rules require the conveyancer to have full control of the finances and all money deposited in the attorneys' trust account. In addition, the public is protected against theft of trust money deposited with a conveyancer by the AFF.

The LSSA also outlines a number of rules and regulations, which conveyancers participating in the Proxi Smart model would breach. It is dependent on

Proxi Smart 'the estate agent and "their" panel conveyancer hunting as a pack'. The conveyancer would be breaching r 43.1 (sharing of fees), r 48, r 49.8, as well as r 49.17 (anti-touting) of the rules.

The LSSA points out that Proxi Smart's model, which is dependent on an estate agent convincing a prospective seller to make use of Proxi Smart's services (and thus its panel conveyancer) disregards the common law principle that a seller is permitted to nominate his or her own conveyancer. It would also contravene s 11(1) of the Consumer Protection Act 68 of 2008 aimed at prohibiting direct marketing.

In addition, the LSSA submits that the 'parallel mandate management agreement' between Proxi Smart and a panel conveyancer would amount to a restrictive horizontal practice, thus contravening s 4(1) of the Competition Act 89 of 1998.

The LSSA concludes that the approval of the Proxi Smart model would result in –

- conveyancing as a profession losing its attraction to new entrants;
- members of the public losing confidence conveyancers;
- members of the public being denied the protection of statutory bodies overseeing strict compliance by conveyancers to rules directed at ethical and professional behaviour and conduct; and
- conveyancing being attended by persons and institutions that do not qualify as officers of the court, with the concomitant dissipation of the safeguards such a system holds.

The LSSA is represented in this matter by advocates Ish Semenya SC and Allen Liversage, instructed by Maponya Attorneys.

• The LSSA's full answering affidavit, as well as the papers by other parties in this matter, can be accessed on the LSSA website at www.LSSA.org.za under the tab 'About us' then 'Matters'.

• See also editorial 'Conveyancing work encroached upon' (2016 (Dec) DR 3).

Barbara Whittle,
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LSSA welcomes appointment of Justice Raymond Zondo as Deputy Chief Justice

The Law Society of South Africa (LSSA) welcomed the appointment of Justice Raymond Zondo as Deputy Chief Justice, as announced by the President on 7 June.

'Justice Zondo brings 20 years of experience in the judiciary to the Office of Deputy Chief Justice. We offer the support of the attorneys' profession to Justice Zondo in his new role as Deputy Chief Justice,' said LSSA Co-chairpersons David Bekker and Walid Brown in a press release later that day.

The LSSA supported the nomination of Justice Zondo and recommended his appointment as Deputy Chief Justice in correspondence to the Judicial Service Commission (JSC) prior to his interview.

Justice Zondo served as a judge of the Labour Court and then as President of the Labour Appeal Court prior to his appointment as an Acting Judge of the Constitutional Court (CC) from November 2011 to May 2012. He was appointed as Justice of the CC in September 2012.

'The Constitutional Court functions mostly as a Court of Appeal. To this end, the experience that Justice Zondo has obtained as President of the Labour Court and Labour Appeal Court has been invaluable,' said the Co-chairpersons.

They added: 'As Judge of the Labour and Labour Appeal Courts he handed down a number of judgments which shaped the development of a sound labour law jurisprudence for our country. During his leadership as President of the

Labour Appeal Court, he was responsible for the transformation of that court in terms of racial and gender composition.'

In his documents submitted to the JSC for his interview earlier this year, Justice Zondo mentioned the challenges facing the country regarding the appointment of women to leadership positions in the judiciary. 'We urge Justice Zondo to take concrete steps to ensure that women are appointed to leadership positions in the judiciary,' said Mr Bekker and Mr Brown.

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THE SA ATTORNEYS' JOURNAL

DE REBUS

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5 Authors are required to give word counts. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.

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People and practices

Compiled by Shireen Mahomed

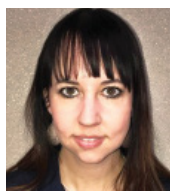
Delpont van den Berg Inc in Pretoria has two new appointments and three promotions.



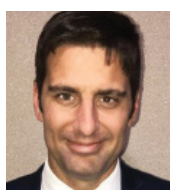
Vijayta Rana has been appointed as a director.



JP Maree has been appointed as a senior associate in the commercial law department.



Liana Kilian-Eastes has been promoted as a senior associate in the bank and finance litigation department.



Zak Scholtz has been promoted as a senior associate in the general and commercial litigation department.



Elize Potgieter has been promoted as a senior associate in the property law department.

Hogan Lovells in Johannesburg has two new appointments.

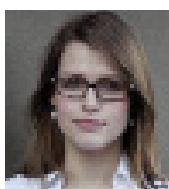


Mandi Krebs has been appointed as an associate in the corporate department. She specialises in healthcare, pharmaceutical law, food industry and advertising law.



Lamis Adam has been appointed as an associate in the banking and finance department. She specialises in transactional work, local and cross-border finance transactions.

Warburton Attorneys in Johannesburg has two new appointments.



Peggy Schoeman has been appointed as an associate.



Marga van der Merwe has been appointed as an associate.

Mncedisi Ndlovu Sedumedi in Johannesburg has three promotions.



Keabetswe Seate has been appointed as a senior associate.



Silas Dziike has been appointed as a senior associate.



Sandile Nhlapo has been promoted as a senior associate.

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FR Malan, AN Oelofse, JT Pretorius

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700 pages



Print: R1,200



Current Annual
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Climate Change: Law and Governance in South Africa

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



212 pages



Print: R450

Land Law and Governance: African Perspectives on Land Tenure and Title

(Contemporary Legal and Applied Research series)

H Mostert, L Verstaappen, J Zevenbergen, L van Schalkwyk (Editors)

Land Law and Governance explores different ways of conceptualising secure land holding in Africa. It brings together voices from different contexts, offering contrasting perspectives and methodological approaches. The book also juxtaposes a range of political and academic viewpoints through theoretical discussions and case studies, and thus opens up the discourse on forms of security of tenure in Africa, in a global context.



Soft cover



142 pages



Print: R250

The Medicines Act: Old and new - A comparative consolidation

Juta Law Editors

The Medicines Act: Old and New provides a visual comparison of the amending Acts and the effects of their amendments in colour tables.



Soft cover



404 pages



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



316 pages



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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Liability of directors of an incorporated law practice

There are conflicting views among legal practitioners as to whether the directors of an incorporated legal practice are liable for the debts and other liabilities of the practice or not. This difference of opinion is more accentuated in the case where one of the directors misappropriates or steals money from the firm's trust account. As far as criminal liability is concerned it is obvious that only the perpetrator of the crime and anyone who aids and abets him in the commission of the crime will be liable for criminal prosecution. The innocent director or partner cannot be held criminally liable. In the context of an attorney's practice where one of the directors steals trust funds, it will be difficult, if not impossible, to establish vicarious criminal liability on the part of the innocent director who knows nothing about the theft. The position is different with regard to the civil liability of the directors in an incorporated legal practice. Attorneys often ask how they can be held liable to repay the trust funds stolen by one of their co-directors when they were not even aware that the latter was stealing the money. In a law firm with two or more directors and where each director operates and controls his 'own' trust bank account, the argument often advanced is that the director whose trust account incurs a deficit should alone be held liable to repay the missing funds. This argument sounds very persuasive, but is it tenable? Are the directors of an incorporated legal practice personally liable for the debts and other liabilities of the practice? If so, to what extent and under what circumstances are they liable? This article deals with the civil liability of the said directors and will provide answers to the questions raised above.

Legislation

Section 23(1)(a) of the Attorneys Act 53 of 1979, as amended, permits a private company to conduct an attorney's practice. The said section provides that a company may conduct a practice if such a company is a 'personal liability company' contemplated in the Companies Act

71 of 2008 (the Companies Act). A personal liability company is defined in the Companies Act as a profit company that meets the criteria of a private company and whose Memorandum of Incorporation states that it is a personal liability company (s 8(2)(c)).

Section 19(3) of the Companies Act provides that: 'If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office'. This section creates a statutory liability, which is intended to protect the company's creditors. It is also important to note that a director's liability is limited to the company's contractual debts and liabilities incurred during the director's term of office. It follows, therefore, that any debts or liabilities, which do not arise out of a contractual relationship with the company, will not be imputed to the directors and former directors of the company even if such debts and liabilities were incurred during the directors' terms of office. This aspect will be discussed further below with reference to theft of trust funds.

Joint and several liability

Section 19(3) of the Companies Act further provides that the directors are jointly and severally liable, together with the company, for the debts and liabilities of the company. This means that the directors are jointly and individually liable to pay the contractual debts and liabilities of the company. Thus a creditor will be entitled to pursue any one of the directors to recover the full amount of the debt. A director who pays the debt or liability has a right of recourse against each of his fellow directors for their proportionate share of the debt. Where a creditor elects to recover the full amount of the debt from only one of the directors, such a director cannot complain about the creditor's decision not to pursue his fellow directors for payment.

The company does not have a right of recourse against the directors if it pays the debt or any portion thereof. The liquidator of the company will also have

no right to institute proceedings against the directors to recover the amounts of claims proved in the winding-up (see *Maritz and Another v Maritz and Pieterse Inc* (SCA) (unreported case no 175/2004, 30-5-2005) (Heher JA) .

Case law

In *Laniyan v Negota SSH (Gauteng) Incorporated and Others* [2013] 2 All SA 309 (GSJ) the court considered the provisions of s 53(b) of the Companies Act 61 of 1973 (the 1973 Act), a precursor to the current s 19(3) of the Companies Act, read with s 23(1)(a) of the Attorneys Act, as well as s 19(3) of the Companies Act. The prominent facts of this case are briefly as follows: The applicant purchased an immovable property in terms of a written sale agreement. The first respondent, an incorporated law practice, was appointed as the seller's attorneys. The agreement further stipulated that the applicant should deposit the full purchase price into the first respondent's trust bank account and that the money should be invested in an interest bearing account for the benefit of the applicant pending the transfer of the property into his name. The fourth respondent, one of the directors of the firm, misappropriated the entire purchase price. The applicant sought the final liquidation of the firm and an order that the four directors of the firm are personally liable to repay the stolen funds in terms of s 53(b) of the Companies Act read with s 23(1)(a) of the Attorneys Act.

The essential question was whether there was a contractual relationship between the applicant and the seller's attorneys (the firm). In other words, was the firm acting as an agent for both the applicant and the seller in dealing with the property transaction? The court had to decide whether the applicant was the creditor of the firm and whether the relationship was contractual. The court found that the firm was the applicant's agent based in his mandate to invest the money in an interest bearing account and then pay the money out on registration of transfer. The court further decided that the nature of the applicant's claim against the firm was contractual

and that applicant was the firm's creditor. The firm, as transferring attorney, accepted payment from the applicant of the purchase price, which was to be deposited and invested in trust and paid out on behalf of the applicant. In so doing, the firm assumed a contractual obligation as the applicant's agent. As such, a contractual claim arises against the respondents in terms of s 53(b) of the Companies Act.

The court also referred to *Fundtrust (Pty) Ltd (In liquidation) v Van Deventer* 1997 (1) SA 710 (A) in which Hefer JA held that the word 'contracted' referred only to contractual debts and liabilities of a company. The judge also held that this limited interpretation of the word 'contracted' should not lead to the anomalous result that directors would be liable for a contractual debt owed to the company but not for money stolen from such creditors.

In view of the foregoing, the court in the *Laniyan* case dismissed the respondents' argument that the applicant's claim was not based in contract. The four directors were thus held personally liable and were ordered, jointly and severally, together with the company, to repay the stolen money. The respondents had

initially argued – which argument was subsequently abandoned – that they were not aware of the theft of the money by one of the directors. In this regard, Weiner J remarked that the respondents' ignorance provides no defence to their personal liability in terms of s 53(b) of the Companies Act.

Conclusion

It is clear from the foregoing discussion that the directors and former directors of an incorporated law practice are liable, jointly and severally, together with the company, for the debts and liabilities of the company contracted during their terms of office. The discussion has also highlighted the fact that where one of the practitioners misappropriates trust funds, all the practitioners who were the directors of the law practice when the funds were misappropriated will be liable to repay the stolen funds. A director's ignorance of what is happening in the firm's trust account will not serve as a basis for him or her to escape liability in the event of theft of trust money by his co-directors.

There should be increased vigilance on the part of practitioners in order to prevent the risk of trust funds being misap-

propriated. It is not prudent for the firm to permit a situation where a particular director has unfettered and exclusive control of the firm's trust account. The existence of several trust accounts in the firm does not only cause administrative and accounting problems for the firm, but also provides fertile ground for the misappropriation of trust money. It will amount to gross negligence on the part of a director who does nothing to monitor the activities of his or her co-director especially where trust money is concerned. This may also amount to a breach of the director's statutory duties as codified in s 76(3) of the Companies Act.

Furthermore, it is imperative for practitioners to introduce measures designed to curb rampant theft of trust money. This will include keeping proper accounting records and adhering to the rules governing trust accounts.

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Unravelling s 103 of the Firearms Control Act

Section 103 of the Firearms Control Act 60 of 2000 (the Act) deals with the declaration of unfitness of a convicted person to possess a firearm. In practice it is extremely important for legal practitioners practicing criminal law to be aware of these provisions and what the consequences would be for their clients. This provision only comes into play if the accused is convicted of certain criminal offences.

Section 103(1) of the Act

This section states that: 'Unless the court determines otherwise' a person becomes unfit to possess a firearm if convicted of an offence, which is listed in that subsection. Therefore, a person is *ex lege* (by operation of the law) automatically declared unfit to possess a firearm. The court – when making a finding – will in practice state that 'no order is made'.

It is very important to know which offences fall within this subsection. The offences listed in subs 1 are as follows –

(a) unlawful possession of a firearm or ammunition;

(b) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;

(c) any offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;

(d) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;

(e) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;

(f) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;

(h) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(i) any offence involving physical or sexual abuse occurring in a domestic relationship defined in section 1 of the Domestic Violence Act [116 of 1998];

(j) any offence involving the abuse of alcohol or drugs;

(k) any offence involving dealing in drugs;

(l) any offence in terms of the Domestic Violence Act ... in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(m) any offence in terms of the Explosives Act [26 of 1956] in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(n) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping or child stealing; or

(o) any conspiracy, incitement or attempt to commit an offence referred to above.'

Section 103(2) of the Act

This section applies to cases where the convicted person does not fall into the categories listed in subs 1, but falls into categories listed in sch 2 of the Act. This subsection gives the court a discretion to decide whether to declare a person unfit to possess a firearm.

Schedule 2 refers to the offences of: High treason; sedition; malicious damage to property; entering premises with the intent to commit an offence under either the common law or a statutory provision; culpable homicide; and extortion.

When is the inquiry done?

In practice it is usually done after a conviction and the previous convictions of the accused has been proved.

Procedure for the inquiry

The accused can present his or her case by testifying and calling witnesses. The state will then have the same opportunity. Both parties will be given the opportunity to address the court and the court can deliver judgment.

From personal experience, however, legal practitioners merely address the court from the Bar without leading evidence in this regard. The court, after

hearing the address by both defence and the state, then makes a finding in terms of s 103(1) or (2).

Three decided cases and the court's perspective

In *S v Lukwe* 2005 (2) SACR 578 (W), a matter that was sent on automatic review as the accused appeared in person. Borchers J dealt with the court *a quo*'s findings in declaring the accused unfit to possess a firearm in terms of the provisions of s 103(2)(a) of the Act. The accused was convicted of theft and received a wholly suspended sentence without the option of a fine. The court *a quo* explained to the undefended accused that he was entitled to state reasons why he should not be declared unfit to possess a firearm. The accused responded that he one day wanted to become a policeman or security officer.

The review court held as follows:

'[T]hat the wholly suspended sentence imposed upon the accused fell within the ambit of s 103(1)(g) of the Act, which stated that, unless the court determined otherwise, a person became unfit to possess a firearm if convicted of "any offence involving [violence, sexual abuse or] dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine".'

The court held that the inquiry had to have been conducted in terms of s 103(1) of the Act and the court, therefore, erred by not explaining to the accused that he was entitled to place before the court the fact that he was fit to possess a firearm, which might satisfy the court. Absent to such an explanation, the accused placed before the court facts, which related to his prospective 'need' to possess a firearm and not to his 'fitness' to possess a firearm. The court held that 'fitness' and 'need' were two different concepts. The matter was referred back to the magistrate for an inquiry to be held in terms of s 103(1) of the Act.

S v Smith 2006 (1) SACR 307 (W) dealt with the provisions of a declaration of unfitness to possess a firearm in terms of s 103(2)(a) of the Act. This provision requires a court, which convicts a person of a crime mentioned in sch 2 to the Act, and which was not a crime mentioned

in s 103(1), to inquire and determine whether that person was unfit to possess a firearm. The accused pleaded guilty to a charge of theft and after sentence was passed, he was declared unfit to possess a firearm in terms of s 103(2)(a). The High Court held *in casu* that there were no facts on record on which the accused could realistically be declared unfit to possess a firearm. It held that the inquiry (an act of seeking information) had not occurred, and it was peremptory that such an inquiry be held. The matter was remitted to the court *a quo*, so that the necessary inquiry could be conducted. In this case the magistrate merely asked the accused to advance reasons why he should or should not be entitled to possess a firearm and the accused replied that he did not need a firearm. The court stated that what is required by the judicial officer is for him to ask relevant questions to establish whether the conduct of the accused and/or circumstances surrounding the commission of the offence merits taking away the accused rights to possess a firearm. This is especially so where the offence committed bears little or no relation to the use of firearms.

In *S v Mkhonza* 2010 (1) SACR 602 (KZP) it was held that when the Legislature vested in the courts the jurisdiction to determine that the statutory unfitness to possess a firearm imposed under s 103(1) of the Act should not apply, it did not intend the courts to adopt a supine approach. These matters, are dependent entirely on whether the accused has the knowledge, means and resources to place a proper case before it, that the disqualification should not apply to them, and in all other cases for the disqualification to apply as a matter of rote. Therefore, the court makes it clear that there is an obligation on the trial court to consider – having regard to all relevant factors – whether the case is one where the statutory disqualification from possessing a firearm should remain in place, or whether it should determine otherwise. The court should have regard to any factor that bears on the issue and, if there is reason to believe that all material facts bearing on that decision are not before it, to cause those facts to be discovered and placed before it.

The court offers a legal practitioner guidance on what factors may be considered relevant. Although not comprehensive they are, *inter alia*:

- The accused's age and personal circumstances.
- The nature of any previous convictions or the absence thereof.
- The nature and seriousness of the crime for which he or she has been found guilty and the connection that the crime has with the use of a firearm.

- Whether there is any background that suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences.

- Whether it is in the interest of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.
- The period during which the accused possessed a licensed firearm and whether there is any indication of previous irresponsibility in regard to that possession and use.

The onus of satisfying the court that it should determine otherwise, rests on the accused. The burden is on a balance of probabilities.

What happens after the court has made a determination that the person is unfit to possess a firearm in terms of subs 1 or a declaration in terms of subs 2?

It must notify the Registrar in writing of that conviction, determination or declaration. Such notice must be accompanied by a court order for the immediate search for and seizure of –

- all competency certificates, licences, authorisations and permits issued to the relevant person in terms of this Act; [and]
- all firearms [and ammunition] in his or her possession.

Any item seized must be kept by the South African Police Service or by the National Defence Force until an appeal against conviction or sentence has been finalised or the time frame for an appeal has lapsed.

Is the decision of the court in terms of s 103 appealable?

Yes. In the *Mkhonza* matter the High Court dealt with an application for leave to appeal solely against the refusal to declare otherwise in terms of s 103(1) of the Act. The accused was grossly negligent in the loss of his firearm but the Supreme Court of Appeal considered that for ten years he was in responsible possession. The High Court set aside the court *a quo* decision and replaced it with a decision that meant that the accused remained fit to possess a firearm.



Picture source: Gallo Images/Stock

Proof of declaration of unfitness

Section 105 provides that: 'A certificate purporting to have been signed by the Registrar or by the registrar of a High Court, the clerk of a magistrates' court or the clerk of a military court, stating that the person mentioned in the certificate has become or has been declared unfit to possess a firearm, or has been convicted of a specific offence or crime, is upon production thereof by any person, *prima facie* evidence of the facts stated in that certificate.'

Duration of the disqualification

In terms of s 9(4) of the Act, the disqualification contemplated in s 103 ends on the expiry of a period of five years calculated from the date on which the person became or was declared unfit, or the expiry of the period for which the declaration is valid, whichever event occurs first.

Conclusion

It is therefore, very important for a practitioner to take full and proper instructions from the client regarding this provision due to consequences that flow therefrom.

Sherika Maharaj LLB (Unisa) is an attorney at the East London Justice Centre.



By Jana Doussy and Jaco Grobler

Purchasing a franchise

Deciding on and investing in a franchise may be one of the biggest financial decisions a person or company may make. It is, therefore, important to consider all aspects, which will play a role in such a transaction, as well as in the operational activities thereafter. In this article, we have made a summary of things to consider.

What type of franchise is the target entity?

A single unit franchise is a franchise owned and operated by the franchisee. It is the simplest format and the most widely used. If the owner owns more than one franchise, the model becomes that of a multi-unit operator.

An area developer acquires the right to establish one franchise within a specified territory, operate it for his own account and subsequently sell sub-franchises to others within the same territory. The area developer assumes the role of the franchisor in this territory and the fees paid by the sub-franchisees are shares between the area developer and the franchisor on the formula agreed to.

A satellite franchise is where a satellite franchise food entity only has a limited part of the menu of the franchisee.

A fractional franchise is where a franchisee occupies premises within an established business. For example, setting up a hamburger franchise at a petrol station.

Branch conversion is where a company owned store is converted to a franchise by selling it to a prospective franchisee.

A master licence agreement is where a foreign franchisor grants a local individual or company, to be known as the master licensee, franchise rights, usually to the entire country or even a region. The licensee assumes the rights and obligations of the franchisor inside South Africa and shares fee income with the foreign principal.

Product franchise is the forerunner of business format franchising. It is used by companies who need to establish outlets across the country quickly, but have been reluctant to make the required investment into the necessary infrastructure and take on the management problems this would entail. They appoint franchisees instead and in return of exclusivity they offer non-exclusive territorial protection, product training and some branding.

A manufacturing franchise is, in essence, a licence where one manufacturer



Picture source: Gallo Images/Stock

grants a licence to another manufacturer to produce a certain product. The licensor will provide technical expertise and is likely to control adherence to technical specifications.

Tandem franchising is where the franchise starts out as a joint venture between the franchisor and the franchisee. Usually for employees or Black Economic Empowerment development. At the outset the candidate is given a small stake in the business, which he or she will jointly operate with the mentor provided by the franchisor. Profits generated in the business are usually retained for the purpose of allowing the candidate to purchase the rest of the shares in the business. At a point the franchisor will withdraw from its mentoring position and the arrangement will convert into a standard franchise agreement.

A conversion franchise is where the franchisor, instead of setting up a new outlet from scratch, recruits a franchisee from the ranks of the established independent operators in the same type of business. The outlet receives a corporate image make-over and the franchisee and staff will be trained in the franchisor's business methods.

The above list is not intended to be a full list of categories of different franchises available, franchises can also consist of various specified characters from different categories.

Information needed in order to obtain financing for the purchase of the franchise

Chances are slim that a prospective fran-

chisee will be in a position to finance the operations of the franchise until it becomes self-sustaining. When franchisees make the decision to invest in a franchise they are usually in a blur of overwhelming information, and it is helpful to ask the franchisor to assist with finding the right investors. Financial institutions will want specific information and will ask pertinent questions before financing such a project. They will firstly want specific information from the prospective franchisee. Such questions will be subjective according to the status of the prospective franchisee and are not discussed here. Their questions with regard to the franchisor and the prospective franchisee's answers thereto in essence forms the basis of a due diligence, firstly, for the banks and secondly, for the prospective franchisee. The prospective franchisee should accordingly accept that there is a clear substantial risk if the information obtained to answer the questions of the financial institution are not satisfactory. The following is a non-exhaustive list of questions that the prospective franchisee and financier should ask:

The franchisor and its market

- Is the franchisor well-established and does it have a sound track record?
- Is the brand well respected in its market and in its sector?
- Is the market reasonably robust, with the realistic chance to grow?
- Since when has the franchisor expanded through franchising?
- Does the franchisor display a good understanding of the franchise concept?

- Is the franchisor prepared to uphold sound franchising principles?
- When was the franchisor established and for how long?
- Who are the shareholders of the franchisor?
- Who are the directors of the franchisor?
- Has the franchisor or its director's encountered material debt, criminal or civil proceedings in the past five years?
- How many of the business units did the franchisor operate before franchising was commenced?
 - Where were those business units located (to ensure that the business has been tested in various markets)?
 - Did these units produce reasonable profits?
- Is the franchisor's intellectual property legally protected?
- How many franchises are there at present and how many units are operated by the franchisor?
- Where does the franchisor undertake product testing and assessment?

Franchise documentation

- Is the franchise agreement sufficiently balanced to adequately protect the franchisee's rights, yet give the franchisor power to control errant franchisees and protect the brand?
- Does the franchise agreement contain any clauses that could be harmful to the interest of the prospective franchisee and financier?
- Does the operational manual appear to be comprehensive and up to date?
- Does the disclosure document exist and is it sufficiently detailed?
- Do the financial projections included in the disclosure document stand up to scrutiny?
- Is the franchisor a member of the Franchise Association of South Africa, an institute whose aim is to develop and safeguard the business environment for ethical franchising?

Franchisee support

- Has a dedicated franchisee support infrastructure been established?
- Does the franchisor provide adequate initial and ongoing training?
- Is the field support team pro-active and supportive of franchisees?
- What is the planned frequency of visits to franchisees?
- Are regional and national meetings or conventions held?
- Does the franchisor undertake market research, product development and similar activities that are likely to enhance its long term success?
- Does the franchisor provide meaningful assistance with local promotional efforts?
- Is the franchisor's IT infrastructure up to current standards?

- Does the franchisor operate a formal assistance for franchisees, which are in distress?
- What is the relationship between the franchisor and its established franchisees like?
- Does formal franchisee representation exist?

The product or service

- Is the product new or does it have an established market?
- Is the product protected through patents or trade marks and if so, who owns these patents or trade marks?
- Does the franchisor have a formal process for product development in place?
- Is the supply of parts or raw materials needed to produce the product secure? How so?
- Are alternative sources of supply available should problems arise?
- Is the franchisor the supplier of the product? Or does the franchisor provide the necessary information of the supplier?
- Under which circumstances will a franchisee be able and allowed to purchase from other sources?

The market

- What is the total investment required?
- How much of this can realistically be financed?
- Does the franchisor assist in obtaining finance? If so, how?
- What is the upfront fee and what does the franchisee receive?
- How much will a franchisee have to invest in capital equipment, furniture and fittings?
- How much working capital should a franchisee provide for?
- What other expenses can a franchisee expect to incur during the initial period?
- How soon before a franchisee will have to invest additional capital and for what purpose?
- Does the franchisor provide the franchisee with a set of financial projections?
- Is it possible to obtain a set of actual trading results from one of the other franchises already in production?

Ongoing franchise fees and purchases

- How much is the franchisor's management services fee?
- How will this fee be calculated and what is payable?
- Is the fee subject to a minimum fixed payment? If so, how much?
- Does the fee percentage decrease once the franchisee exceeds a predetermined level of sales and how does it work?
- Will the franchisee be required to contribute to a marketing or advertising fund? If so, how much?

- Will the franchisee be obliged to spend additional money on local advertising? If so, how much and how is it administered?
- If the franchisee is obliged to purchase goods from the franchisor or a prescribed supplier, is there a minimum amount, be it in product units or Rand terms, that have to be purchased each month?
- Are there any other periodic or ongoing fees? If so, how are they calculated and administered?

Legal aspects to be discussed with the prospective franchisor

- Once the franchisee has received the disclosure document and the franchise agreement, does the franchisor observe a cooling off period before the franchisee is permitted to sign the agreement?
- Is the franchisee permitted to show the disclosure document to his legal advisers?
- Will the franchisee be required to sign a confidentiality undertaking before he or she receives confidential information and documentation like the disclosure document?
- Is the franchise agreement negotiable, within reason, or is it unalterable?
- What is the initial term of the franchise agreement?
- Does the agreement contain an option to renew, and if so, what are the terms and conditions?
- If the franchisee has to pay any kind of deposit or option fee, what are the terms and in what circumstances, if any, will he or she receive a refund?
- Would the area and site the franchisee plans to invest in be subject to territorial constraints of any kind?
- Does the franchisee have the right to sell his or her franchise, and if so, what restrictions, if any, will apply?
- Will the new purchaser of the franchise have to be approved by franchisor and pay a franchise fee?
- Are there restrictions on heirs?
- May the franchisee entrust day-to-day management to a manager?
- Does the franchise agreement contain restraints that endure after the term of the agreement?

The aspects mentioned above is not an exhaustive list, but are some of the most important questions to ask. Specific aspects and questions to be raised with the franchisor should be discussed with a professional adviser before a final decision to invest is made.

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By Dr
Fareed
Moosa

Withdrawal of an admission in a plea

A defendant may, in terms of the rules of the High and lower courts, admit a fact alleged in a combined summons or declaration. An admission may be express or, in terms of the Rules regulating the conduct of the proceedings of the magistrates' courts of South Africa r 17(3)(a) and Uniform Rules of Court r 22(3), be deemed to be. Unless a defendant pleads otherwise, all necessary implications or inevitable consequences arising from an admitted fact are also regarded as admitted (see *DE van Logerenberg Jones & Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10ed (Cape Town: Juta 2012) vol 1 at 17 – 18). In terms of s 15 of the Civil Proceedings Evidence Act 25 of 1965, a plaintiff is absolved from the onus to lead evidence to prove an admitted fact on the pleadings (see also *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452F). A substantive application for leave to amend a plea would be necessary if a plaintiff gives notice of an intention to oppose a defendant's intention to withdraw an admission and its concomitant implications or natural consequences. In such applications, the legal question arises as to the nature and extent of the onus resting on a defendant. This article seeks to discuss this question.

The main principles governing amendment applications are crystallised in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9. *In casu*, it was held that the 'practical rule that emerges ... is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".' Ultimately, determining if an amendment ought to be granted is adjudicated with reference to whether,

all relevant things considered and balanced to the extent necessary, the scales tilt in favour of a conclusion that the interests of justice demands the granting (or not) of a proposed amendment.

An application to withdraw an admission in a plea must be properly motivated and justified (see *JR Janisch (Pty) Ltd v WM Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170). In *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H – 111A, Hiemstra J held that a withdrawal 'requires full explanation to convince the Court of the *bona fides* thereof'. In *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1150 reference was made to a 'satisfactory explanation' for the intention to withdraw an admission of fact. In *Amod v South African Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614H – 615A, Leon J held that 'the Court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him then the application to amend will be refused. It should, however, be noted that the fact that the amendment will cause the respondent to lose his case is not of itself "prejudice" or "injustice" in the sense discussed above.'

In the light of the foregoing, a defendant must, in order for its *bona fides* to be properly assessed as regards seeking the amendment of its plea, explain the circumstances surrounding the making of an admission and the basis for seeking its withdrawal. Indeed, an onus rests on a defendant to prove its *bona fides* as regards withdrawal of an admission (see *Trans-Drakensburg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640 – 641 and *Brandon v Minister of Law and Order and Another* 1997 (3) SA 68 (C) at 75B). It is a trite principle that an applicant must, in application proceedings, stand or fall by its founding papers. An applicant cannot make out a case in reply (see *Strauss v Strauss*

[1998] 4 All SA 137 (C) and *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others* [2014] 3 All SA 1 (SCA) at para 16). Thus, a founding affidavit ought to contain an explanation for the making of an admission and the grounds for seeking its withdrawal.

This raises the issue whether failure to plead a reasonable or satisfactory explanation for making an admission and seeking its withdrawal is fatal to an application for leave to withdraw same. I submit that the answer is 'no'. Whether an amendment ought to be granted is a matter in the discretion of a judicial officer, whose discretion must be exercised judiciously after giving due consideration to all relevant legal and factual considerations (see *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77). An explanation for making an admission and seeking its withdrawal, or the lack of any such explanation, is but one such factor. It would be an injudicious exercise of discretion if an amendment application were to be dismissed purely on the basis that a defendant failed to provide an explanation, or a satisfactory one, for the making and/or withdrawal of an admission appearing on a pleading. This view aligns with the principle that amendment applications involve less formalism and rigidity, and that emphasis is placed on achieving a result that would ensure a proper ventilation of the real issues between the litigants. Such a result would satisfy the interests of justice. I submit further that in a modern, democratic system of justice like that applied in South Africa, a strict, overly formalistic approach ought to be avoided in the adjudication of amendment applications in which a litigant seeks to withdraw an admission.

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Changes in the NCA and the interpretation of the reinstatement mechanism

By
Arno
Duvenhage

The judgment of the Constitutional Court (CC) in *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) resulted in a paradigm shift within the legal fraternity and in the manner in which credit providers approach collections.

The impact of the *Nkata* judgment has prompted this article. This article will focus on ss 129(3) and 129(4) of the National Credit Act 34 of 2005 (NCA), as amended by ss 32(a) and 32(b) of the National Credit Amendment Act 19 of 2014 (the Amendment Act). It will specifically consider and comment on the principle that a consumer may reinstate a credit agreement as an operation of law, as enunciated by the CC in *Nkata*.

Section 129(3) and (4) of the NCA prior to the Amendment Act

These sections read as follows prior to its amendment –

‘Subject to subsection (4), a consumer may

(a) at any time before the credit provider has cancelled the agreement *reinstate* a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider’s permitted default charges and reasonable costs of enforcing the agreement up to the time of *reinstatement*; and

(b) *after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*

(4) A consumer may not re-instate a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or
(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123’ (my italics).

Principles enunciated by the CC in *Nkata*

In the first footnote of the main judgment, Cameron J recognised that the litigation in *Nkata*, preceded the amendments to the NCA, which came into operation on 13 March 2015.

Therefore, when the CC handed down judgment on 21 April 2016, it acknowledged that the NCA had been amended. It appears that the CC reasoned that it was ultimately asked to consider a matter on appeal, which matter, had been decided by the High Court on 16 Janu-

ary 2014. Accordingly, *Nkata* had been litigated in a court of first instance prior to the effectual amendment of the NCA on 13 March 2015.

In the majority judgment, Moseneke DCJ states unequivocally that an interpretive task is undertaken (at para 92 read with para 99) to clarify the pur-



for purposes of reinstatement of a credit agreement, the consumer is the protagonist.

- The reinstatement occurs by operation of law because the wording of the provision is clear that the consumer's payment in the prescribed manner is sufficient to trigger re-instatement (at para 105).

- Reinstatement holds the benefit that a consumer may reclaim possession of attached property. For most consumers that would be the pressing purpose of bringing arrears up to date (at para 106).

Amendment of the NCA by s 32(a) and (b) of the Amendment Act

On 13 March 2015 and in terms of the Amendment Act, the amended NCA became effective. Sections 129(3) and (4) currently read as follows:

'Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the *default was remedied*.

(4) A credit provider may not re-instate or revive a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123' (my italics).

Material differences between the wording of ss 129(3) and (4) pre- and post NCA amendment

From the above expose of the position pre- and post-amendment of the NCA, it appears that legislature has effected the following changes:

- Instead of a consumer being able to 'reinstate' a credit agreement, the consumer may now 'remedy a default';

- Section 129(3)(b), which allowed for the repossession of property held pursuant to an attachment order, has been repealed in its entirety and does not appear in the amended NCA.

- The amended s 129(4) entails the substitution of the word 'consumer' with the words 'credit provider'. Consequently, a credit provider, rather than a consumer,

appears to be afforded the ability to re-instate or revive a credit agreement, save in specific instances, which are indicated in subs (a) – (c).

Application of amended ss 129(3) and (4) to credit agreements

Determining the extent to which the amended provisions apply to credit agreements is not a mere formality.

In an attempt to achieve brevity, the following interpretational aspects are noteworthy:

- The transitional provisions, as contained in s 4 of sch 3 to the NCA, provides a 'table of application'. This table indicates that the amended ss 129(3) and (4), which form part of ch 6 of the NCA, applies fully to pre-existing credit agreements from the effective date.

- The Supreme Court of Appeal – in the recent judgment of *Kaknis v Absa Bank Ltd, Kaknis v MAN Financial Services SA (Pty) Ltd* [2017] 2 All SA 1 (SCA) – had to consider, *inter alia*, whether s 4 of sch 3 of the NCA validated or justified the retrospective application of s 126(B)(1)(b)(ii) of the amended NCA.

- The court in the *Kaknis* case, after showcasing divided trains of thought on the interpretation of s 4 to sch 3 of the transitional provisions of the NCA, stated in its majority judgment per Van der Merwe JA:

'In this context the meaning of item 4 of schedule 3 is plain. It simply makes specified provisions of the NCA applicable to certain credit agreements that had been entered into before the commencement of the provisions' (see para 39).

Taking a simplistic view, ss 129(3) and (4) of the amended NCA became applicable and/or effective on 13 March 2015.

Therefore, any legal dispute regarding these two provisions, dealt with in a court/tribunal of first instance from 13 March 2015, should be approached and considered based on the wording introduced by ss 32(a) and (b) of the Amendment Act.

However, it should be kept in mind that the reinstatement of a credit agreement is subject to the settlement of arrears and legal costs (duly demanded). Therefore, due to the CC determining that reinstatement occurs *ex lege*, the date on which the relevant arrears were settled will have an impact on whether the NCA pre- or post-amendment applies.

Applying amended ss 129(3) and (4) to principles enunciated by CC in *Nkata*

When the interpretation and reasoning of the CC in *Nkata*, in finding that reinstatement of a credit agreement occurs

pose of reinstating a credit agreement in terms of ss 129(3) and (4).

In essence, the majority judgment reasoned as follows:

- The purpose of s 129(3) is to urge consumers to pay their overdue amounts, default charges and legal costs to their lenders and, in turn, consumers in good standing are rewarded with reinstatement of the credit accord and the return of their attached property (at para 100).

- The court observed at the outset that ss 129(3) and (4) start with what a consumer may or may not do (at para 104) and, therefore, the clear import is that

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by the operation of law, is applied to the amended ss 129(3) and (4), the following becomes apparent:

- The wording of the provisions which the CC relied on, to justify reinstatement by operation of law, has now been reformulated by legislature and showcases material changes.
- There is an intentional substitution by legislature of the word 'reinstate' with the word 'remedy'. From a simple definition perspective, the words 'reinstate' and 'remedy' cannot be attributed the same meaning or effect within the context of s 129(3).
- The CC regarded s 129(3)(b) of the NCA (now entirely repealed) as an important cog in the reinstatement wheel. It having enabled consumers to make the required payments and be rewarded with the reinstatement of the credit agreement and return of their attached property. The resumption of possession of property has now been entirely excluded by legislature.
- It is distinctively more difficult to conclude that a consumer is the protagonist for purposes of reinstatement, as the wording of the relevant provisions are no longer as clear as they were when interpreted by the CC.

Alternative interpretation

On a plain reading of the amended ss 129(3) and (4), an alternative interpretation could reason as follows:

- The legislature intends to allow a consumer to remedy his or her default prior to cancellation, termination or enforcement of the credit agreement.
- Once such default is remedied, it no longer includes an opportunity for the consumer to claim the resumption to possession of repossessed property.
- A consumer can no longer be regarded as the sole protagonist. It appears once a default is remedied by a consumer, only a credit provider can facilitate the reinstatement of such a credit agreement.
- The credit provider may only reinstate or revive a credit agreement in the absence of the exceptions set out in s 129(4)(a) – (c).
- Reinstatement by operation of law is precluded by the amended ss 129(3) and (4) of the NCA.
- Therefore, the principles confirmed by the CC in *Nkata*, to the extent that it relates to the automatic reinstatement by law of credit agreements, does not apply to the current NCA.

Problematic aspects to an alternative interpretation

An alternative interpretation has not been the subject matter of any judicial interpretation to date.

In contrast, an interpretation that, the reinstatement of a credit agreement oc-

curs by the operation of law, holds legal authority and certainty as a result of the *Nkata* trilogy.

Unfortunately, the NCA has not defined the words 'reinstate' or 'revive'. This begs the question, what procedure (if any) has legislature envisaged, to facilitate the reinstatement or revival of a credit agreement by a credit provider *vis-à-vis* a consumer who has remedied his or her breach?

If the reinstatement of a credit agreement is at the sole discretion of the credit provider, alternatively part of a consultative process and excludes an opportunity for a consumer to resume possession of his or her repossessed property, can it be said to hold any tangible benefit for a consumer in the credit market?

For an interpretative analysis of the ambiguity created by the amendments to ss 129(3) and (4) of the NCA, the article by R Brits 'The "reinstate" of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act' (2015) 48 *De Jure* 75, is an absolute necessity.

Role of legal practitioners in advising on ss 129 (3) and (4) and the reinstatement mechanism

The ever changing legal playing field created by the NCA and the economic pressures experienced by both credit providers and consumers, invariably raises the stakes regarding legal advice in this sector.

Sections 129 (3) and (4) can have predominantly one of the following two effects:

- Benefit a defaulting consumer by allowing him or her to thwart either the – continuation of litigation proceedings; – enforceability of any court orders in favour of the credit provider; and – sale of any repossessed property.
- Benefit a credit provider by not being compelled to reinstate a credit agreement and thereby retaining its – capacity to litigate the matter to finality; – obtain or retain court orders in its favour; or – selling repossessed property to a third party without any concerns of possible invalidity of such sale.

I submit that the following considerations may be helpful when having to advise on the applicability of ss 129(3) and (4):

- Determining the suggested date on which the arrears were settled and advising on whether the NCA pre- or post-amendment applies.
- Considering the cancellation, termination or enforcement of the credit agreement in terms of s 129(4)(c) juxtaposed

with the trite principles of cancellation or specific performance in terms of the law of contract (see *Standard Bank of South Africa Limited v Botes t/a JHLS Botes Vervoer* (NWM) (unreported case no M85/15, 3-9-2015) (Landman JJ)).

- Should the credit agreement have been validly cancelled, terminated or enforced prior to the settlement of arrears, the reinstatement of such credit agreement will be precluded in terms of both the pre- and post-amendment NCA.
- In the instance that the credit agreement has not been validly cancelled, terminated or enforced it needs to be determined whether the wording of ss 129(3) and (4) pre- or post-amendment applies.
- Should it be established that the wording, as introduced by ss 32(a) and (b) of the Amendment Act apply, it would be apposite to advise clients, *inter alia*, that – the wording that introduced the so called reinstatement mechanism, has changed; – the wording is open to interpretation and has not been the subject matter of judicial interpretation; and – the wording may or may not, re-balance the rights and obligations between consumers and credit providers within the context of ss 129(3) and (4) of the NCA.

Conclusion

The CC judgment in *Nkata* is authority from our highest court and stands to be applied within the parameters that it provides for. However, when considering the principle of reinstating a credit agreement as an operation of law, the legal fraternity and especially South African courts should be cautious in uniformly applying the principles of *Nkata* without considering and interpreting ss 129(3) and (4) of the NCA as it stands today.

See also –

- David Mohale 'Protection offered by s 129 of the National Credit Act' 2016 (July) *DR* 23;
- Harold Smit and Sabina Ismael Essa 'Nkata: The court's interpretation of s 129 of the NCA and the meaning of "reinstatement"' 2016 (July) *DR* 28; and
- Gian Louw 'Banks beware: Reinstatement of mortgage loan agreements' 2016 (July) *DR* 52.

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Holding delinquent directors personally liable

By
Emile
Myburgh

One of the fears expressed on the new Companies Act 71 of 2008 (the new Act), before it entered into force on 1 May 2011, was about the increased responsibilities and liabilities for directors. At the time it was thought that the new Act would stifle entrepreneurship because fewer business people would be willing to subject themselves to these new risks. Section 424 of the Companies Act 61 of 1973 (the 1973 Act) balanced the need to protect directors and creditors perfectly well, so why

start from scratch with something new and unknown?

It turns out that the new situation is not that different from the former situation. If anything, the rights of creditors and obligations of directors are now much clearer than they were under the 1973 Act. This article looks at how a creditor can hold a director personally liable for unpaid debts owed to them by a company in the light of the small but growing body of jurisprudence dealing with directors' liability under the new Act.

The provisions of the new Act

Section 22(1) of the new Act prohibits reckless trading in the following words: 'A company must not –

(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose ...'.

Section 218(2) of the new Act further provides that: 'Any person who contravenes any provision of this Act is liable to any other person for any loss or dam-

age suffered by that person as a result of that contravention.'

These two sections are the basis on which a director who contravenes the provisions of s 22(1) – by trading recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose, and thereby causes loss or damage to any person – can be held liable for that loss or damage. It is easy to argue that a company who does not pay its creditors, in other words, that breaches its contract with the creditors, is, at the very least, defrauding its creditors and the long line of authorities on s 424 of the 1973 Act confirms that.

But it gets better when one brings the provisions of ss 76, 77 and 162 of the new Act into consideration. In terms of ss 77(2)(a), (3)(b) and (3)(c), a director may be held liable for breaching his or her common law and statutory fiduciary duties.

Section 77(2) states: 'A director of a company may be held liable –

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs *sustained by the company* as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b); ...'

Section 77(3) states: 'A director of a company is liable for any loss, damages or costs *sustained by the company* as a direct or indirect consequence of the director having –

...
(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;' (my italics).

Case law on the new Act

The words 'sustained by the company' in these two subsections have been interpreted by practitioners to mean that only the company has a claim against a director who breached any of the provisions mentioned in s 77(2) and (3) of the new Act. This argument was advanced in *Rabinowitz v Van Graan And Others* 2013 (5) SA 315 (GSJ) but was rejected by Du Plessis AJ at para 22 in the following words: 'I ... find that a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of s 22(1) thereof.'

Counsel for the defendant directors in the so far unreported case of *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (WCC) (unreported case no 22288/2014, 1-4-2016) (Mantame J) tried

the same argument to ward off the plaintiff's attempt to hold them personally liable for the debts of the company. They took an exception to the plaintiff's particulars of claim by arguing that s 77(3) of the new Act 'does not grant a creditor of a company a statutory cause of action to claim the loss, damages and or costs it has suffered from a director of a company' (para 7.2). Counsel for the defendants compared s 77(3) of the new Act with s 424 of the 1973 Act, which holds, *inter alia*, that a creditor can hold a director liable for all or any of the debts or other liabilities of the company when it is shown that the business of the company was or is being carried on recklessly or with intent to defraud creditors of the company. Section 424 still has a limited application in the event of liquidation proceedings against the company (s 9 of sch 5 of the new Act). It was argued that s 77(3) of the new Act was drafted differently from the provisions of s 424 of the 1973 Act and, '[h]ad the legislature wished to create a liability in the manner contemplated by Section 424, Section 77 would have been drafted in similar terms, but this was not done.' It was further argued that, when directors are genuinely in breach of their obligations in terms of s 77, the creditor must institute action against the company, and not against the directors.

If anything, the rights of creditors and obligations of directors are now much clearer than they were under the 1973 Act.

However, the court disagreed and resorted to how statutes must be interpreted. It quoted with approval the following excerpt from *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18: 'Interpretation is the process of attributing meaning to the words used in a document ... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. ... Where more than one meaning is possible each possibility must be weighed in the light of all these factors. ... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' By applying this reasoning, the court held that an interpretation, which favours holding directors person-

ally liable in terms of s 77(3), leads to a sensible and businesslike result. It then cited the *Rabinowitz* decision with approval and dismissed the exception. Thus, a creditor that relies on s 77(3) to hold directors personally liable for the debts of a company to a creditor, discloses a cause of action in its particulars of claim that is not excipiable.

Section 76 of the new Act is an additional ground on which a creditor can hold a director personally liable. Section 76(3)(a) and (b) read as follows:

'(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director –

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; ...'

Subsections (4) and (5) provides defences that a director can use to ward off liability in terms of s 76. However, it is difficult to see how a director of a company that breaches a contract by not paying its creditors is acting in good faith, for a proper purpose and in the best interests of the company. The case law cited support this argument.

Section 77(3), quoted above, expressly provides that a director is liable for any loss, damages or costs contemplated in s 76(3)(a) or (b).

This argument was analysed in the *Blue Farm Fashions* case, as well as in *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others* [2014] 3 All SA 454 (GJ), from para 40 onwards. The *Sanlam* case was once again an exception against a claim attempting to hold directors personally liable for the debts of a company towards a creditor. The claim was based on the directors allegedly acting recklessly by their participation in the affairs of the company when it was commercially and legally insolvent. The plaintiff based its claim on s 424 of the 1973 Act and in the alternative on s 77(3) (b) of the new Act. The plaintiff alleged that the defendant directors were personally liable for the debts of the company in terms of s 77(3)(b) due to their breach of the provisions of s 76. The court agreed that it discloses a cause of action and dismissed the exception.

Delinquency and criminal liability

Whenever a court finds that a person contravened s 77(3)(a), (b) or (c), a court must make an order declaring such a person delinquent in terms of s 162(5) (c)(iv). This section is worded in peremptory terms, in other words, there is no alternative. This means that such a person, in addition to being personally liable for the company's debts, will not be allowed to act as director of any company again

for a period of at least seven years, subject to certain conditions imposed by the court (such as limiting the delinquency to a particular category of companies (s 162(6)(b)).

In *Gihwala and Others v Grancy Property Ltd And Others* 2017 (2) SA 337 (SCA), the directors tried to attack the constitutionality of s 162(5)(c) on the grounds that it infringed s 22 of the Constitution because, they argued, it limited their constitutional right to choose their trade, occupation or profession freely. The court rejected this argument noting, among other things, that s 162(5)(c) serves 'to protect the investing public against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the harm caused by the misconduct of delinquent directors. Section 162 was an appropriate and proportionate means to achieve such a purpose.' The court also held that conduct covered by s 162 committed before the new Act came into effect, could also lead to a director being declared delinquent.

In addition, s 214(1)(c) criminalises the conduct described in s 22(1):

'(1) A person is guilty of an offence if the person –

...

(c) was knowingly a party to –

(ii) an act or omission by a business calculated to defraud a creditor, employ-

ee or security holder of the company, or with another fraudulent purpose; ...'

The penalty for the offence created in s 214(1)(c) is, in terms of s 216(a), a fine or imprisonment for a period not exceeding ten years, or both a fine and imprisonment.

Conclusion

From the above court cases, a clear pattern can be seen emerging to hold directors personally liable in terms of the 2008 Act, even in the absence of liquidation proceedings and without the need first to institute proceedings against the company concerned. The directors may even end up in prison.

The legal position of directors' personal liability in terms of the new Act can thus be summarised as follows: When not paying a creditor without a valid reason, it can be argued that a director contravenes the provisions of s 22(1) by trading recklessly, with gross negligence, with intent to defraud any person or for a fraudulent purpose. By contravening s 22(1) a director also contravenes their fiduciary duties as set out in s 76, which in turn, is a contravention of s 77, which further renders a director personally liable for the debts of the company. Section 218(2) makes any person liable to any other person for any loss or damages suffered by that person as a result of a contravention of the Act, and not

paying a creditor can result in the contravention of various sections of the Act. Wrongfulness is not required (Piet Delport and Quintus Vorster *Henochsberg on the Companies Act 71 of 2008 vol 1* (Durban: LexisNexis 2011) on s 218). The contravention of s 77 will, in addition, necessarily result in the director being declared delinquent in terms of s 162(5)(c), while the contravention of s 22(1) is criminalised by s 214.

These provisions are a powerful tool in the hands of creditors and the Supreme Court of Appeal has shown in the *Gihwala* case that it clearly favours this new dispensation. The consequences for directors when a company, in breach of contract, does not pay its creditors can be severe. Considering that companies who operate in contravention of s 22(1) are often insolvent, creditors should not hesitate to go after the directors of companies who do not pay them, without first resorting to liquidation proceedings. After all, it is the directors who defraud the creditors and such directors should not be allowed to hide behind the legal personality of the company.

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A cautionary tale about the purchase of trust property by trustees

By Edrick Roux and Lucinda Horn

We have all heard the age old adage that opportunity only knocks once, which at face value seems like encouragement to pursue an opportunity that presents itself without regret, usually on a 'high risk, high reward' basis. However, as with all things in life, it should be read with a pinch of caution thrown into the mix, especially when the opportunity in question relates to trust property that a trustee can purchase from the trust.

Due to the *sui generis* nature of a trust, buying property from a trust at the very best of times can be a harrowing process for the uninitiated. It is riddled with various requirements and regulations which are to be complied with, ranging from the required consensus required by the trustees to attend to the necessary purchase right down to whether the trust deed even affords the power to the trustees to attend to the purchase, or for that matter the sale, in the first place.

Accordingly it is not simply a process of entering into an agreement for the purchase and sale of a specific property, but rather a tactical decision of the trustees, which requires the necessary logistical support as envisioned in the trust deed.

What often complicates these purchases even further is the fact that the purchase from the trust will usually be to the advantage of the trustees, which can be seen as a potential conflict of interest. It may be prudent for trustees, or for that matter any individuals in a fiduciary

position, to keep the following quote in mind:

'Nothing is more difficult than the art of maneuvering for seizing favorable positions beforehand. What is difficult about it is to make the devious route the most direct and to turn disadvantage to advantage' (Gerald Michaelson and Steven Michaelson *Sun Tsu for Success* (Adams Media 2003)).

There is a proverbial minefield of potential complications, which may arise where a trustee seeks to purchase property from a trust for his personal use. From claims that the benefit derived by the trustee is detrimental to the beneficiary (see *Wiid and Others v Wiid and Others* [2016] JOL 37360 (NCK)) to allegations of potential mismanagement of the trust funds being levied at the relevant trustee (see *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA)).

In the case of *Kidbrooke Place Management Association and Another v Walton and Others* NNO 2015 (4) SA 112 (WCC) an application was brought for the removal of a trustee from office due to, *inter alia*, allegations that they had breached their fiduciary duties. The primary issue in the case was around the *locus standi* of the applicant's to bring the application, revolving around whether the parties had a 'sufficient interest', however, the grounds for the removal related directly to the breach of their fiduciary duties.

Although it may seem quite clear that a conflict of interest between trustees and the trust beneficiaries should be avoided, there are some times when the lines are blurred and certain conduct could be allowed even though it may technically be a conflict of interest (ie, where trustees are authorised to contract with the

trust in terms of the trust deed and treat the transaction in such a manner that there can be no detriment to the beneficiaries).

Purchase of trust property by the trustees of the trust

In the *Kidbrooke* case it was alleged that the trustees breached their fiduciary duties in that they:

- Sold trust property to companies that they held either direct or indirect proprietary interests with which trust property was subsequently sold again at a profit. Effectively the relevant trustees were thus contracting with themselves;
- Commission was earned on the sale of life rights in the development by a CC (Codé Design), the members of which were one of the respondents and his spouse. Accordingly the allegation was that there was a conflict of interest between the trustee and his profitable involvement in the CC.

In the *Kidbrooke* case there was no doubt that there was a breach of the fiduciary duties of the trustees, specifically since they contravened two express provisions of the trust deed itself, namely:

'No trustee who has a direct or personal interest in the method or result of the exercising of any of the powers of discretions vested in him by law or in terms of this trust deed may exercise or concur in the exercise of such powers or discretions, and must allow his co-trustees or co-trustee to act alone in the exercise of the powers and discretion aforesaid in relation to such matter.

... Each trustee who has an interest in any transaction affecting the trust fund, shall be obliged to disclose beforehand the nature and extent of his interest when exercising any power or discretion in such manner.'

Accordingly, their conduct would not be easily defensible in the current case. However, there are various cases where trustees would be able, and where it would be desirable for them to do so, to purchase property from a trust in their personal capacities. However, in order to avoid any potential conflict of interest or allegations of mismanagement additional measures may be required to ensure that the trustees rather err on the side of caution.

Additional measures to safeguard trustees when they wish to purchase trust property for their own use

As the presiding officer in the *Kidbrooke* case, Binns-Ward J suggested the following as contributing to the impropriety on the part of the trustees in respect of the breach of their fiduciary duties: 'Cameron *et al op cit* suggest ... that the purchase of immovable property by the trustees from a trust is something that is required by custom in South Africa to be sanctioned by a court. The authors cite *Peffer's NO and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1965 (2) SA 53 (C) at 57 in support of the proposition.'

Read with: 'The judgment in that matter described the custom as applying in respect of the purchase by an executor of a deceased estate of property in the estate, but I can think of no reason why the rationale for the custom should not apply equally in the context of the purchase by a trustee of immovable property from a trust. There is no material difference in the character of the fiduciary relationship involved ... In the current matter, *not only* did the trustees *not see fit to seek such sanction*, they *failed to take independent advice* or *make prior disclosure to the beneficiaries* of their actions' (our italics).

Accordingly in light of the suggestions that were made by Binns-Ward J, it would seem that it is possible to dilute specific elements, which would serve to at least mitigate, if not completely remove any impropriety on the part of the trustees when trustees purchase trust prop-

erty from the trust for their personal use.

We suggest that these elements are, and should ideally be followed in the sequence set out below, as follows:

- A thorough perusal of the trust deed should be embarked on to determine whether the powers and duties which are afforded to the trustees allow for such an action, potentially seeking professional advice in this regard should there be any concerns as to the ability of the trustees to be involved in purchases of this nature.
- In addition to a technical perusal of the trust deed, a perusal of objects of the trust in order to determine whether the purchase of the relevant trust property will not be contrary to the purpose for which the trust was created.
- In the event where the serving trustees wish to purchase trust property from the trust, it would be prudent to inform the beneficiaries of the intention to purchase the trust property.

Ultimately it will come down to a simple question – whether it is appropriate for the trustees of the trust to attempt to purchase trust property from the trust?

- Approach independent advisers to determine the viability of the purchase and to confirm that the purchase will not be to the detriment of the trust beneficiaries.

- An application to the court, likely by way of seeking a declaratory order, asking the court's leave and sanction in order to proceed with the purchase of the property.

Should all of the steps above have been followed, provided of course that no objections are raised in respect of any of the abovementioned, there should be no reason for any party to claim that there was impropriety on the part of any of the trustees when purchasing the trust property, as they were involved in the process, it was determined it would not be to their detriment and the court had sanctioned the purchase.

Additional consideration

Due to the nature of trusts and the role that they generally play in estate planning exercises, they often contain various types of assets and are often not simply limited to containing immovable property.

Among the most prominent assets held in trusts are shares and/or other investments, which may often be quite substantial from a financial perspective.

The judgment in the *Kidbrooke* case specifically refers to the custom where immovable property is to be purchased, however, it may be prudent for the trustees to err on the side of caution in all cases where there is a significant risk that it may be alleged that there is either impropriety or a breach of fiduciary duties on the part of the trustees.

From a practical point of view, the process should be exactly the same as the process that has been suggested in respect of immovable property and should give the trustees, and likely the beneficiaries, some peace of mind in these kinds of dealings.

Conclusion

Ultimately all of the information contained above will come down to a simple question – whether it is appropriate for the trustees of the trust to attempt to purchase trust property from the trust?

This question is undoubtedly a factual question, which can only be answered on a case by case basis. It must be noted that trustees serve a fiduciary function and although there may be situations where such purchases may be allowed, it should not become the norm in practice to allow for such purchases to occur frequently, lest an unhealthy precedent should arise.

Should a trustee have breached his or her fiduciary duties towards the beneficiaries, the consequences may be severe – these could range from removal from office as trustee together with potential costs orders being made against them to potential claims for damages being instituted against them by the beneficiaries of the trust.

As with most things in life, acquiring certainty before attempting to take action would be a prudent course of action, and in this case may well save the trustees the costs of legal action and the embarrassment of being removed from office.

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An unspooled tape – copyright law in need of fixing

By
Jenalee
Harrison

Picture source: Gallo Images/Stock



Copyright law in many countries has been used to limit parallel importation of goods into a country without the express permission of the copyright owner. These imports are not illegal, immoral or unlawful and are not fundamentally different to ordinary imports (Kerstin Maria Rippel and Roux de Villiers 'Legalising Parallel Imports under Intellectual Property Law' (2004) 15 *Stellenbosch Law Review* 550). The limitations on the importation of these goods depends on the copyright law of that particular country and the policy considerations that inform the interpretation of that law.

This article advocates for South Africa (SA) to either incorporate the doctrine of exhaustion into our law, as done in the United States (US), or at least for the doctrine to be a relevant consideration in determining whether the parallel imports should be prohibited, as done in Singapore.

Parallel importation and exhaustion

Parallel importation occurs when distribution of a genuine product occurs through non-authorised channels, being manufactured in jurisdiction X either by the intellectual property (IP) owner, or with his or her consent, and then being imported into jurisdiction Y without the IP owner's consent. These 'grey' goods are then often sold in competition with goods sold by the authorised distribu-

tor or licensee who has acquired trading rights to sell in jurisdiction Y (see Sadulla Karjiker 'The first-sale doctrine: Parallel importation and beyond' (2015) 26 *Stellenbosch Law Review* 633 at 637).

There is no international consensus on the extent of the protection that IP rights must afford IP owners against parallel imports. Article 6 of Trade-Related Aspects of Intellectual Property (TRIPS) provides that member states of the World Trade Organisation may opt for national, regional or international exhaustion (World Intellectual Property Organisation 'International Exhaustion and Parallel Importation' www.wipo.int, accessed 26-5-2017). The doctrine of exhaustion, sometimes referred to as the first sale doctrine, refers to the level of control a copyright owner has over distribution rights after the first sale. This doctrine can be limited in terms of the geographical area to which it applies. For example, national exhaustion refers to the scenario where a copyright owner no longer has control over commercial exploitation in the domestic market but can still oppose the importation from a foreign country. Regional exhaustion refers to the scenario where the first sale exhausts any rights the IP owner has in that geographical region (Warwick A Rothnie 'Parallel Imports and Copyright' (2005) 6 *Bus.L.Int'l* 326 at 341). For example, European Economic Area follows regional exhaustion. Finally, international exhaustion involves an IP owner's rights being exhausted as soon as there is a sale anywhere in the world, either

by the IP owner themselves or with their consent.

South Africa

Section 23(2) of the Copyright Act 98 of 1978 deems parallel imports to constitute a copyright infringement if the work is imported into SA without the consent of the copyright owner and when the importer knew that the making of the article 'would have constituted such an infringement if the article had been made in [South Africa]' (s 23(2) of the Copyright Act). This requires the courts to postulate the manufacturing of the product in SA by the person who manufactured it abroad (Owen H Dean 'Parallel Importation - Infringements of Copyright' (1983) Centenary Volume *SALJ* 258 at 262). If the person who reproduces the work abroad has the rights to reproduce the work in SA then the products will not constitute infringing copies, as the reproduction of the products would be authorised by the copyright owner. However, if the reproduction of the copy is only authorised in the country in which it is manufactured then it will be an infringing copy if it was hypothetically reproduced in SA (Dean (*op cit*)).

The matter of *Frank & Hirsch (Pty) Ltd v Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A) illustrated the use of copyright assignment in order to pass the hypothetical test of s 23(2). Frank & Hirsch were the exclusive distributors in SA of TDK blank cassette tapes. Roopanand Brothers imported the blank cassette

tapes from a third party in Singapore who acquired the tapes from TDK Electronics Co Ltd of Japan (TDK Electronics). TDK Electronics manufactured and distributed the tapes with no geographical restraint, meaning that it would not have passed the hypothetical test of s 23(2). As a result, TDK Electronics assigned the copyright of the literary and artistic works in the trade dress and the get-up of the cassette tapes to Frank & Hirsch (*Frank & Hirsch (op cit)* at 523). This assignment of the copyright created a situation where, if TDK Electronics manufactured the get-up in SA, they would have been infringing copies (*Frank & Hirsch (op cit)* at 527). Accordingly the Court held that Frank & Hirsch had established copyright infringement in the get-up of the cassette tapes. Some academics believe that this is a viable and effective use of copyright, while others have argued that this indirect method is artificial and was not the intention of the legislature or TRIPS (Rippel & De Villers (*op cit*) at 569).

South Africa does not follow national or international exhaustion; whether or not a copy is infringing depends on the extent of the rights vested in the manufacturer abroad, not the origin of the copy. The concept of exhaustion is central to the issue of parallel importation, but has received minimal to no consideration in SA. A decision on exhaustion cannot be undertaken without an engagement in policy considerations surrounding parallel imports, which seems to have been a topic that SA courts have been hesitant to engage in.

United States

Section 109(a) of the Copyright Act of 1976 states that a copyright owner's distribution right is exhausted after the first sale of a copy lawfully made under that title while s 602(1)(a) prohibits importation into the US of work acquired outside US without the authority of the copyright owner. There are two different interpretations that could be adopted after the combined reading of these two provisions.

The first interpretation is that s 109 only refers to copies made lawfully in the US. This interpretation would allow for the prohibition against parallel imports of less expensive foreign made copies. Many courts undertook that this was the correct interpretation of these two provisions, which meant that the US would be following a doctrine of national copyright exhaustion (Irene Calboli 'The United States Supreme Court's Decision in *Kirtsaeng v Wiley & Sons*: An "Inevitable" Step in Which Direction?' (2014) 45 *IIC* 75 at 78). The second interpretation, following an international exhaustion approach is that s 602(1)(a) does not limit s 109(a) and that copyright extends to all products lawfully made regardless

of where it was manufactured (Calboli (*op cit*) at 79).

In the recent judgment of *Kirtsaeng v John Wiley & Sons Inc* 133 S.Ct 1351 (2013), Kirtsaeng was sued for copyright infringement by John Wiley & Sons for purchasing, importing and selling Asian editions of their textbooks. Kirtsaeng argued that the first sale doctrine applied as the textbooks were made by an Asian subsidiary of John Wiley & Sons and, therefore, did not constitute copyright infringements (at 1352). The court stated that Congress could not have intended a system where only goods manufactured in the US would be subject to copyright exhaustion. The court could also not find a copyright law principle that suggested that publishers had a right to price discriminate between different jurisdictions (at 1370). The dissenting contended that the majority's interpretation was at odds with the intention of Congress, who wanted to protect copyright owners from cheaper copies. Further the majority's position was in conflict with International Trade Agreements that the US had with other countries, which seemed to support national copyright exhaustion (at 1384).

The need to have national law and the US's international obligations in alignment may result in Congress overruling the *Kirtsaeng* judgment (Calboli (*op cit*) at 88). It has also been argued that the legislature needs to amend the Copyright Act of 1976 and prohibit reliance on the copyright of the get-up to prevent parallel import (Irene Calboli and Mary LaFrance 'The case for a Legislative Amendment against "Accessory copyright" for Grey Market Products: What Can the U.S. Learn from Singapore and Australia?' 2013 (Dec) *Sing. J.L.S.* 253 at 255).

Singapore

Section 32 and 104 of the Singapore Copyright Act 1987 states that liability for parallel imports is dependent on the importation being –

- for commercial purposes;
- imported without the consent of the copyright owner; and
- imported without the license of the owner of copyright.

However, it was uncertain whether reference to the 'copyright owner' meant the manufacturer in Singapore or the foreign place of manufacture (George Wei 'A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright in Singapore' (2012) 24 *SaC LJ* 867 at 875).

In *Public Prosecutor v Ngoh Chin Heng & Teo Ai Nee* [1993] 3 SLR (R) 755, the court held that the consent needed must relate to the manufacture of the copy in Singapore (the place of import) and not the actual place of manufacture in the foreign country (OH Dean 'Copyright v

Grey Goods in South Africa, Australia and Singapore' (1994) *SALJ* 746-756).

(1994) *SALJ* 753). This was the interpretation that the legislature intended as it would prevent imports from countries that do not have adequate copyright laws – the court noted policy arguments but stipulated that policy formation on parallel imports is a task for the legislature and not the judiciary (the *Ngoh Chin Heng* case at 31). Many interpreted this judgment as a movement towards national copyright exhaustion, which did not coincide with the liberal approach that Singapore had previously adopted to parallel imports (Wei (*op cit*) at 887).

The legislature provided clarity by stating in the 1994 Copyright Amendment Act that the copyright owner was the owner in the foreign country of manufacture reaffirming Singapore's international exhaustion approach (Wei (*op cit*) at 887). The amendment also stated that if there is no copyright owner in the foreign country of manufacture then reference to the copyright owner meant the owner in Singapore. Further it prohibited the assignment and use of copyright of the get-up to prevent parallel imports (Calboli and LaFrance (*op cit*) at 263).

Conclusion

Parallel imports have to date received depthless treatment in South African law. Section 23(2) of the South African Copyright Act is applied too literally without any consideration of policy arguments (Karjiker (*op cit*) at 663 – 664). This has caused legal *lacunas*, such as the assignment of get-up in order to prevent parallel imports when the work initially does not pass the hypothetical test, with little to no engagement from courts on whether this would even be desirable.

An in-depth analysis needs to be undertaken by the legislature if the courts are not prepared to engage with these issues. In Singapore, the legislature undertook to make amendments after policy arguments made it evident that international copyright exhaustion would be the most beneficial doctrine to follow whereas in the US, the courts engaged with policy considerations surrounding international exhaustion.

Section 23(2) of the South African Copyright Act has created murky waters – SA follows neither national nor international exhaustion. The way forward is to, first, decide on which exhaustion doctrine will suit SA's unique needs, and to then amend copyright law in order to reflect this position.

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By
Madeleine
Truter

Picture source: Gallifrey Images/iStock



The *voetstoots* clause – should latent defects be disclosed in property sales?

Many disputes have arisen from the fact that purchasers and sellers of property do not understand what the *voetstoots* clause means. The term *voetstoots* is a Dutch word, and is a principle found in the South African common law. It literally means sold 'with a shove of the foot'. Even though some purchasers may not be aware of this, when you buy a property, there is an implied warranty that the property is sold free from any defects. It is, however, possible for the seller to contract out of this implied warranty by inserting a clause into the sale agreement that provides for the sale to be *voetstoots*. This simply means that what you see is what you get, and that no warranties exist. In other words, the purchaser agrees to buy the property as it appears at the time of the sale, and that there will be no claims against the seller for defects, which are discovered later on.

A seller is only liable to the purchaser for defects if the seller knew about a defect, and did not tell the purchaser about it. Most sale agreements contain a *voetstoots* clause freeing the seller from

any liability for patent or latent defects, which the purchaser may later find when taking possession of the property. There are, however, exceptions that allow the purchaser to cancel the sale agreement, or sue the seller for a reduction in the selling price. These exceptions include –

- the property had the defect at the time of the sale;
- the seller deliberately concealed the defect as he or she knew that if it was not concealed and the purchaser saw it, the purchaser would either not have continued with the transaction, or the purchaser would have negotiated a more favourable purchase price;
- the seller knew of the defect and did not disclose the defect to the purchaser; and
- the seller made a fraudulent or innocent material misrepresentation.

The effect of the Consumer Protection Act on the *voetstoots* clause

The Consumer Protection Act 68 of 2008 (CPA) came into effect on 1 April 2011. The effect of the CPA on the sale of properties has been far reaching, and

specifically includes the right of a purchaser (who is also classified as a consumer under the CPA) to be informed of all the details regarding the property being purchased. Sellers will no longer be able to hide behind the *voetstoots* clause to save themselves from later claims by purchasers, if they were aware of defects in the property.

The CPA addresses this issue by an 'implied warranty of quality' in respect of each transaction that falls within its ambit. The only way sellers can get past the implied warranty of quality is to describe the condition of the property in specific detail, to make it clear in which condition the property is being sold. The purchaser then has to 'expressly [agree]' to accept the property in its current condition. Only if the purchaser knowingly acted in a manner consistent with accepting the property in a less than ideal condition, would the implied warranty of quality fall away. Every defect must be described in the sale agreement that the purchaser signs. This means that sellers will need to amplify their sale agreements in order to make provision for any and all defects that could possibly be present in the property being sold.

Can the voetstoets clause protect a seller against no building plans?

In the case of *Havivise v Heydricks and Another* 2014 (1) SA 235 (KZP), it was found that the absence of approved building plans constitutes a latent defect, and that a *voetstoets* clause can protect an innocent seller. The parties in this case concluded a written sale agreement in terms of which the respondents bought a property in Port Shepstone from the appellant. Subsequent to having taken transfer, the first respondent approached the local municipality because he and the second respondent wanted to build a flat on top of the existing double garage and outbuildings. However, on inspection of the municipality's files, the first respondent discovered that a letter dated 26 June 1991 had been drafted by the municipality for the appellant's attention, stating that it had come to the attention of the municipality that an illegal structure (which was presumably a carport) was in the process of being built on the property, in the absence of plans having been submitted to the local engineering department for approval. The file also did not contain any plans for the existing double garage that formed part of the property, which the respondents had bought. Subsequent to consultations with an architect and a civil engineer, it was confirmed that not only were there no building plans for the double garage, but the structure which had also been erected, did not meet the usual standards in terms of building regulations.

The first respondent admitted the following, namely that –

- he did not obtain a copy of the title deeds before buying the property;
- he did not approach the municipality to inspect the building plans before buying the property; and
- he and the second respondent had assumed that everything was in order.

The double garage, however, was an illegal structure which did not conform to municipal bylaws.

The first respondent thereupon approached the court for an order obliging the appellant to pay for his damages, being the cost to erect a new double garage in accordance with approved building plans, which complied with building regulations. The appellant defended the matter relying on the *voetstoets* clause that was contained in the sale agreement. The appellant alleged that when she bought the property, there was already a carport in existence and she visited the property only once a year, and that after she had purchased the property, her mother and her brother filled in the walls of the existing carport without her knowledge, or without obtaining her consent. She also did not deem

it necessary to ask them whether they had obtained permission or submitted plans, as she was not interested in the maintenance of the property as she only bought it for her mother to occupy and she left the maintenance issues to her brother. When she saw that the walls had been erected, it did not occur to her that she should ascertain whether this had been done in accordance with accepted building standards. She also never spoke to the first respondent before he took transfer of the property.

The magistrate found that there was a duty on the appellant to inquire whether plans had been obtained for the double garage and to inform the respondents that it was an illegal structure. It could also be inferred that the appellant did not make such disclosure because she wanted a higher price for the property. The appellant's silence in this regard fell within the ambit of non-disclosure, which was similar in many respects to misrepresentation, inducing the respondents to buy the property. It was an implied term in the sale agreement that the structure had been erected in compliance with the National Building Regulations and Building Standards Act 103 of 1977, as amended from time to time, and/or with the municipality's approval.

The respondents were accordingly entitled to judgment on the merits, which the magistrate granted, and the appellant appealed against this judgment on the following grounds, namely:

- that the magistrate erred in concluding that it was not necessary to make a finding on whether the appellant's non-disclosure was fraudulent, and that a mere finding of non-disclosure was sufficient for the appellant to attract liability;
- not concluding that a finding of fraudulent misrepresentation required knowledge of unlawfulness (which the appellant did not have);
- not following the judgment in *Odendaal v Ferraris* [2008] 4 All SA 529 (SCA), which judgment was given on 1 September 2008, being one month before the magistrate delivered his judgment in the court *a quo*; and
- finding in the respondents' favour in the face of their failure to have proved that the appellant had deliberately concealed the existence of latent defects with the intention to defraud.

It was contended on behalf of the respondents that the issue, which the court had to determine rested on a crisp legal point, namely, did the trial court correctly determine that it was an implied term of the sale agreement that structures had been erected in compliance with building regulations and with the approval of the municipality, and not on the factual question of whether or not the appellant had knowledge of the illegality of the structure at the time that

the sale was concluded?

What constitutes a latent defect?

In the *Odendaal* case, the Supreme Court of Appeal held that where an illegally erected structure was such that it may require either its demolition or alteration, as a condition for municipal approval of the plans, such facts constitute defects that interfere with the ordinary use of the property, thus constituting a latent defect as understood in the context of *voetstoets*. Accordingly, a *voetstoets* clause also covers the absence of statutory authorisations, and the particular structure in this case was not authorised. The absence of statutory permission, necessary to render the building authorised, was thus a latent defect to which the *voetstoets* clause applied. If a purchaser wanted to avoid the consequences of a *voetstoets* sale, the onus was on him or her to also show that –

- the seller knew of the latent defect and did not disclose it; and
- that the seller deliberately concealed it with the intention to defraud.

There was no evidence that the appellant was aware that the garage had contravened building regulations, and no fraudulent non-disclosure was proved. The court thus concluded that the appellant was protected by the *voetstoets* clause, and could not be held liable for the defect.

Conclusion

A *voetstoets* clause included in the agreement of sale will not take away the seller's liability. The seller has a duty to reveal any latent defects to the purchaser. In such an instance, the seller may be called on to refund part of the purchase price or even accept cancellation of the entire sale, depending on the nature or extent of the defect. The effect of the CPA has been that the *voetstoets* clause will have little power to save a dishonest seller. Notwithstanding the aforementioned, it is still in the purchaser's best interests to have a property thoroughly inspected before signing a sale agreement. An inspection of the property should include the structure, any outbuildings plans, as well as the grounds plans. All problems, whether they seem minor or major, need to be recorded in the sale agreement. It has been mooted for a considerable time to put in place legislation that will make inspections mandatory, which will effectively do away with disputes brought about by the *voetstoets* clause.

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THE LAW REPORTS

May 2017 (3) *South African Law Reports* (pp 1 – 333);
[2016] 1 *All South African Law Reports* March (pp 629 – 882);
[2017] 1 *All South African Law Reports* February (pp 313 – 667);
[2017] 2 *All South African Law Reports* April (pp 1–334)

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:

CAC: Competition Appeal Court
ECP: Eastern Cape Local Division, Port Elizabeth
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Child law

Validity of unlawful surrogacy facilitation agreement and surrogate motherhood agreement: The matter in *Ex Parte HPP and Others; Ex Parte DME and Others* [2017] 2 All SA 171 (GP) involved two applications for confirmation of surrogate motherhood agreements. Each application involved couples (the commissioning parents) who approached a so-called surrogacy co-ordinator (Strydom) who then introduced them to a potential surrogate mother (the surrogate). She charged them a fee of R 5 000 for her services, although the fee was said not to include the introduction to the surrogate. The question which arose was whether the pay-

ment contravened s 301 of the Children's Act 38 of 2005 (the Act). Strydom was joined as a party to the proceedings and was called on to show why the agreements should not be declared unlawful and unenforceable.

In her affidavit, Strydom stated that she did not charge an introduction fee, and that the fee charged was for her services in arranging appointments with a clinical psychologist, arranging medical appointments, monitoring the surrogacy process, offering the surrogate emotional support and consulting with the parties regarding expenses. She stated that having acted as a surrogate mother six times, she was uniquely qualified to assist people in the process. She also stated that she explained complicated medical processes, debriefed the surrogate mother after invasive medical procedures and prepared her emotionally for the procedure.

The court was asked to decide on the lawfulness of two agreements, namely the –
• 'surrogacy facilitation agreement' between Strydom and

the commissioning parents; and

• 'surrogate motherhood agreement' between the surrogate mother and the commissioning parents.

Tolmay J held that the services rendered by Strydom appeared to encroach on the professional fields of legal representatives, psychologists and medical practitioners, when in fact her only qualification was her personal experience as a surrogate mother.

Commercial surrogacy is unlawful in South Africa and payments are limited to those specifically provided for in the Act. Section 301 provides for two distinct categories of expenses. The first consists of costs directly related to the artificial fertilisation and pregnancy, the birth of the child, and confirmation of the motherhood agreement. The second deals with *bona fide* legal and medical expenses. The costs on the first category had to be related to the processes in question. That could not be said of Strydom's services. Her services did not fall within the second category.

Strydom's right to exercise

her chosen profession was not limited. What was limited was her right to ask for payment of expenses, which fell outside what was provided for in s 301. The limitation contained in s 301 was in the public interest and, therefore, justified. The agreements between Strydom and the commissioning parents were thus unlawful and unenforceable.

Next, the court had to decide whether the surrogate motherhood agreements could exist independently where the surrogacy facilitation agreements had been declared invalid. It held that the fact that a collateral unlawful agreement had been entered into tainted the surrogate motherhood agreements even though the relevant requirements of the Act had been complied with. Should courts declare surrogacy agreements valid despite the fact that they are tainted by unlawful surrogacy facilitation agreements, the whole purpose of s 301 might be tainted. However, the parties in the present case were all *bona fide*, and were unaware of the unlawfulness of the facilitation agreements.

The validity of the surro-



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gate motherhood agreements were thus confirmed.

Company law

Effect of restoration of de-registered company on re-vesting of its prospecting rights: The matter in *Aquila Steel (SA) Ltd v Minister of Mineral Resources and Others* 2017 (3) SA 301 (GP) involved a dispute over prospecting and mining rights between competing applicants. It further dealt with various provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which fall outside the scope of the present discussion.

One of the companies involved in the dispute was a company from the United Kingdom (UK), which was established in 1893 and currently named ZiZa Ltd. The issue relevant here related to the legal effect that the de-registration of the company in 2010, and particularly its subsequent re-registration in 2014 on the companies register of England and Wales, had on a prospecting right granted to it in South Africa.

The status of that prospecting right impacted on the position of the applicant in the present case (*Aquila*). Previously, in *Palala Resources (Pty) Ltd v Minister of Mineral Resources* 2016 (6) SA 121 (SCA), the SCA held that mineral rights, which, according to s 56 of the MPRDA, lapse when a company is deregistered, are automatically revived when the company's registration is restored.

Tuchten J held that the decision in *Palala Resources* must be distinguished on the facts. The difference between *Palala Resources* and the present matter is that in *Palala* the mining right was still current and could re-vest in the company on its re-registration. However, in the present case the prospecting right had lapsed due to the expiry of the time for which it had been granted.

The rights conferred by a prospecting right cannot survive the expiry of the period for which the right was granted.

The court thus concluded that the restoration of ZiZa Ltd did not result in the re-vesting of the expired prospecting right. As a result, the restoration also had no legal effect on *Aquila's* prospecting rights.

In passing, it needs to be mentioned that *Aquila* also applied to have the minister's decision that the existence of the ZiZa Ltd prospecting right precluded the grant of the *Aquila* mining right be substituted with that of the court. In this regard the court held that it could only do so if there were exceptional circumstances and if it would be fair, just and equitable to do so.

Delaying the grant of *Aquila's* mining right any longer than was necessary would not advance the declared aim in the preamble to the MPRDA to build an internationally competitive administration and regulatory regime. Regard being had to these considerations the court held that *Aquila*

had established its case for substitution.

• See law reports 'Companies' 2015 (Jan/Feb) DR 52 for the judgment on *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 (6) SA 403 (GP).

Rights of directors to participate in the day-to-day running of a company: In *Kaimowitz v Delahunt and Others* 2017 (3) SA 201 (WCC) the applicant was one of five directors of a company. The applicant was also an employee of the company. In May 2016 the applicant was informed by the respondents (his fellow-directors) that his employment with the company had been terminated, but that he would remain a director. His office would be that of a 'non-executive' director. He was further informed that he would be entitled to exercise all his rights as a director as provided in the Companies Act 71 of 2008 (the Act), as well as the company's Memorandum of Incorporation (MOI). He could still attend all directors' meetings, but he would no longer be involved in the day-to-day management of the company's business. As a result of his consequent exclusion from the daily management of the company, as well as, he alleged, the board meetings thereof, the applicant instituted proceedings against the company and its directors. He sought an order in terms of s 163 of the Act, *inter alia* restraining them from preventing his taking part in the management of the compa-

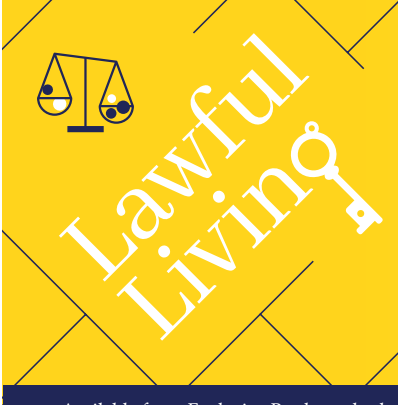
ny's business, and demanding his participation in 'management meetings'. The applicant argued that he was by right entitled to participate in the company's daily management, save to the extent that the Act or the MOI provided otherwise, by virtue of s 66(1) of the Act.

Section 66(1) provided that the 'business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'.

The applicant averred that, the respondents were preventing him from carrying out his lawful obligations as a director. He further argued that such conduct was unlawful, oppressive and prejudicial to him, justifying an order in terms of s 163 of the Act.

Davis J held that a director was not as of right entitled to participate in the day-to-day running of the affairs of the company. The overall supervision of the management of a company resided in its board, which might well delegate such management to a managing director (as was the case here) and/or to a committee of the board.

As a result, the court rejected the application for an order in terms of s 163 of the Act. Further, no case had been made out that the directors and the company had otherwise impeded on the



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applicant's capacity to act as a director and to fulfil his responsibilities to the company.

The application was thus dismissed with costs.

Rights of subscribers to shares: In *Du Plooy NO and Others v De Hollandsche Molten Share Block Ltd and Another* 2017 (3) SA 274 (WCC); [2016] 1 All SA 748 (WCC), the first and second applicants (on behalf of a trust) sought an order that the trust, as a registered owner of a series of shares of first respondent (the company), and alternatively, in the event of it being found that the trust has not been entered into the security register of the company as the owner of these shares, that the company be ordered to enter the name of the trust in the company's security register as the owner of certain shares.

This case raised a number of intricate legal questions, including the following –

- first, whether on incorporation, and without more, the subscribers had matured into members of the company; and
- secondly, whether without taking up the shares, the subscribers could transfer their rights therein to the third to fifth applicants, who were the directors of the company.

In answering these questions, Davis J held that the relevant authorities appeared to draw a distinction between an allotment, which took place after the company had effectively been born and the position with regard to the initial subscribers who became members in terms of the founding memorandum of association. In this regard, Davis J referred with approval to the *obiter* comments in *Moosa v Lalloo and Another* 1957 (4) SA 207 (N) at 210D where the court stated that subscribers to shares in a company are 'to be deemed to have agreed to become members of the Company', and upon its registration they should have been entered as members in its register of members ... Even, however, if they were not so entered, they are to be treated as having become members of the Company, without

the need of any allotment of shares'.

In dealing with the second question, the court in *Du Plooy* referred with approval to *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD) at 666 where it was held that '[o]wnership of shares does not depend upon registration'.

The court accordingly answered both questions affirmatively and ordered that the share register be amended to reflect the trust as shareholder.

The company was ordered to pay the cost of suit.

Competition law

Certificates issued by the Competition Tribunal on merit are *prima facie* proof of prohibited practices: In *Comair Ltd v South African Airways (Pty) Ltd* [2017] 2 All SA 78 (GJ) the court provided important guidelines regarding the evidential value of certificates issued by the Competition Tribunal, as well as guidelines for the quantification of damages resulting from prohibited practices.

The parties to the present case were competing domestic airline businesses in South Africa. They made use of the services of travel agents in order to sell domestic airline tickets, for which they paid by way of commissions.

During the 2000 to 2005 period, South African Airways (SAA) concluded and implemented a so-called 'override incentive schemes' with travel agents in terms of which considerable sums of money were paid to travel agents to book passengers on SAA rather than a rival airline such as Comair or Nationwide.

This led to substantial foreclosure of the rivals in the market for scheduled domestic airline travel, causing such airlines to suffer loss of profit and consumers to be harmed.

The Competition Tribunal considered the effect of SAA's schemes in two separate decisions and in each case ordered that it constituted prohibited practices in contravention of s 8(d)(i) of the Competition Act 89 of 1998

(the Act). The CAC dismissed SAA's appeal.

The judgment in the matter extensively covers the Tribunal and CAC decisions and provides detailed consideration of the damages calculation by the experts.

The plaintiff, Comair, instituted a consolidated damages action to determine the exact amount of SAA's incentive schemes for travel agencies, which caused Comair a loss of profits.

Matojane J held that in terms of s 8(d)(i) of the Act, it is prohibited for a dominant firm to require or induce a supplier or customer not to deal with a competitor, unless such firm can show technological, efficiency or other pro-competitive gains, which outweigh the anti-competitive effect of its conduct. Section 7 of the Act defines 'dominance' as having a certain market share, alternatively being viewed with market power.

The two actions by Comair were brought in terms of s 65(6) of the Act, which creates liability for the person found to have engaged in prohibited anti-competitive conduct for damages to any person harmed by that conduct. Comair filed their court documents with the court certificates from the Tribunal as contemplated in s 65(6)(b) of the Act.

In terms of s 65(7) 'a certificate referred to in ss 6(b)

is conclusive proof of its contents, and is binding on a civil court'. The decision of the Tribunal was confirmed by the CAC – which has the same status as the SCA – and is accordingly binding on the present court.

The only issue before the court was the assessment of the quantum and awarding of damages suffered by Comair as a result of SAA's prohibited practices. Comair claimed that its loss of profits suffered as a result of SAA's abuse of its dominant position in the first claim amounted to at least R 104 million for the first period and R 700 million for the second period.

SAA denied that the loss was caused by its anti-competitive conduct. It was argued that any damages that Comair may have suffered would be negligible because there were other changes in the market taking place during the infringement period that might have had a negative impact on Comair's market share.

There was broad agreement between the experts on the methodology to be used to calculate Comair's damages. If SAA's infringing schemes had an adverse effect on Comair's profits, damages had to equal the revenues that Comair lost as a result of these schemes, adjusted for the costs that Comair might have

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avoided because of reduced passenger numbers. Put differently, in order to put Comair back into the financial position it would have been in but for SAA's infringing schemes, a comparison of the position that Comair was currently in (the 'actual scenario') had to be made with the hypothetical position that Comair would have been in but for the anti-competitive agreements (the 'counterfactual scenario'). The experts agreed that damages equal lost revenues less avoided costs. Lost revenues were equal to Comair's counterfactual revenues minus its actual revenue and avoided costs were equal to the difference between the costs that would have been incurred but for SAA's conduct and actual costs.

In determining the period during which damages were sustained by Comair, the court took into account the lingering effect of the anti-competitive conduct of SAA. It accepted that Comair continued to suffer damages due to the infringing schemes after they ceased.

Applying the approach set out above, and taking into account all relevant factors, the court awarded Comair damages in the sum of R 104,2 million in the first action and R 450 million in the second.

Requirements for a competition issue to be referred to Competition Tribunal: A number of issues arose for decision in *K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd* [2017] 2 All SA 232 (WCC). For space considerations the present discussion will deal with only some of them.

The facts were as follows: K2012150042 (the lessor) sought an order confirming the cancellation of written lease agreements concluded with Zitonix (the lessee). The parties concluded the lease agreements for certain commercial premises in the Gateway Shopping Mall (Gateway), north of Durban, from which the lessee traded under a number of well-known up-market fashion brands.

The lessor further sought an order directing the lessee to vacate the leased premises, failing which the deputy sheriff should be author-

ised to eject the lessee from the premises at the Gateway Shopping Mall, a shopping centre for which the lessor had substitute tenants (H&M) who were eager to occupy the premises.

H&M is a Swedish multinational retail company with over 3 700 stores in 61 countries and it aims to be a large participant in the fashion retail market in South Africa.

The lessee fell into arrears shortly after the lease agreements were concluded, and the lessor cancelled the lease agreements. The group of companies (Platinum) of which the lessee was part, experienced significant financial difficulties, and some of the companies had been placed under business rescue or wound up, or had become dormant. Because of these difficulties, most of the retail leases held by Platinum, including the present lease, were terminated.

Gateway is the largest shopping centre in Africa, also the largest mall in the southern hemisphere and one of the top 50 largest malls in the world. As such the allegation is that the lessor has dominance, within the meaning of the Competition Act 89 of 1998 (the Act).

The lessee raised a number of defences.

Firstly, the lessee argued that the application by the lessor to eject it (the lessee) in order to give occupation to H&M, amounted to an abuse of dominance and that the matter had to be referred to the Competition Tribunal (the Tribunal) in terms of s 65(2) of the Act.

Holderness AJ held that s 65(2) of the Act, which deals with referral by a civil court to the Tribunal, provides that: '[I]n any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and -

... (b) the court must refer that issue to the Tribunal ... to be considered on its merits, if the court is satisfied that -

(i) the issue has not been raised in a frivolous or vexatious manner; and,

(ii) the resolution of that is-

sue is required to determine the final outcome of the action.'

Secondly, the lessee averred that a civil court does not have jurisdiction to determine whether specific conduct contravenes the Act.

The court rejected this averment and held that a civil court does have the power to determine whether such an issue raised in the course of civil proceedings should be referred to the Tribunal or not.

Thirdly, the lessee argued that the lessor's conduct amounted to market dominance.

In this regard the court confirmed that s 8 of the Act regulates the conduct of dominant firms. As a precursor to determining whether the applicants (here: the lessor's) conduct amounted to an abuse of dominance, the respondent (here: the lessee) must first show that the applicant is dominant, as defined in the Act. The starting point is the identification of the market in which the respondent is alleged to meet one of the criteria in s 7. The boundaries of that market must be determined before a market share (or market power) can be attributed to a firm. The relevant markets are typically determined according to the dimensions of product and territory.

The lessee's application for a referral to the Tribunal in terms of s 65(2) of the Act was accordingly refused. The court concluded that the matter should be determined without resolving the competition issues raised and without recourse to the Tribunal.

Credit law

Requirements for credit to be 'reckless': At stake in *Wiese and Another v ABSA Bank Ltd* [2017] 2 All SA 322 (WCC) was the question whether the National Credit Act 34 of 2005 (NCA) permits a credit provider to have regard to the projected income of a separate commercial entity when assessing a consumer's ability to afford to repay a personal loan. More specifically, in circumstances where the loan to be advanced to the customer

is for the specific purpose of purchasing that commercial entity.

In September 2013, the respondent bank (ABSA) issued summons against the appellants (the debtors) jointly and severally for payment in respect of money loaned and advanced together with interest and costs. ABSA also sought an order declaring the debtors' jointly owned immovable property specially executable, given that it served as security for the loans in the form of mortgage bonds registered over the immovable property. The debtors failed to enter appearance to defend and default judgment was granted against them.

In December 2013, the debtors applied for rescission of the default judgment. It was accepted by the parties for purposes of the appeal that the debtors provided a reasonable explanation for their default. What was in issue was whether they set out a *bona fide* defence to ABSA's claim which, *prima facie*, carried some prospect of success should rescission be granted and the matter referred to trial. The defence raised by the debtors was that of reckless credit as provided in ss 80 to 83 of the NCA. The debtors contended that ABSA granted the debtors reckless credit by approving fourth and fifth loans (the subject of the default judgment) during October 2008 in circumstances where it had failed to conduct the required assessment in terms of s 81(2) of the NCA, alternatively where it knew that the loans would render the debtors over-indebted.

The court *a quo* held that there was nothing before it to support the debtors' allegation that ABSA had failed in any of its duties under s 81 of the NCA. It dismissed the debtors' application.

Cloete J held that the requirement of a *bona fide* defence which *prima facie* carries some prospect of success is comprised of two elements. First, the defence must be raised in good faith. Secondly, on the face of it, the defence must have some prospect of success at trial. In the debtors' founding affidavit, the defence of reckless credit

was based squarely on ABSA having failed to conduct any assessment at all in terms of s 81(2). After being confronted with ABSA's version, the debtors changed tack. Being unable to deny that an assessment had in fact been conducted, they claimed that the assessment had not been detailed and that the loans granted were personal rather than business in nature. The court rejected that submission.

The debtors' defence had no *prima facie* prospect of success. It was incumbent on ABSA, when making its s 81(2) assessment, to have regard to the reasonably estimated future revenue flow of a franchise that the first debtor intended purchasing through the vehicle of another entity with funds to be loaned by it. That was what ABSA did.

The distinction which the debtors sought to draw between a personal home loan and a business loan was of no avail. It is the purpose

of the loan that determines what needs to be considered in assessing whether a loan may be granted to a prospective consumer, and not the mechanism of the loan itself. As a result, so the court reasoned, any evidence adduced by the debtors at trial to the mechanism of the loan would be irrelevant in the context of the defence raised to defeat ABSA's claims.

The appeal was dismissed with costs.

Euthanasia

Legality of assisted suicide: In *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA); [2017] 1 All SA 354 (SCA) the court was asked to pronounce on the legality of the highly emotional subject of euthanasia. In the court *a quo* Stransham-Ford (the patient), who had terminal cancer, applied for an order that a doctor could administer or prescribe a lethal agent to end his life; that

the doctor would be exempted from criminal or disciplinary proceedings; and that the common law be developed to allow for such euthanasia or assisted suicide. On 4 May 2015 the court *a quo* handed down its reasons for allowing the order. Unbeknown to the court, the patient had died two hours before the granting of the order.

The Ministers of Justice and Health, the National Director of Public Prosecutions, and the Health Professions Council of South Africa appealed to the SCA.

In setting aside the order Wallis JA reasoned as follows: First, the patient's cause of action died with him, and on his death there was no claim that could be passed to his estate or that could be adjudicated on by the court. This was not disturbed by the fact that his case raised constitutional issues.

Secondly, the order was based on an inadequate consideration of, and a misun-

derstanding of the law, and the issues were insufficiently canvassed. So, for instance, in relation to euthanasia, there was no consideration whether the position on consent should be changed; and the cases did not suggest that assisting suicide would be unlawful in all circumstances.

Thirdly, the factual basis for the order was not established. Thus, the patient's prediction of the manner of his death, absent assisted suicide or euthanasia, was not confirmed; nor was his mental capacity or willingness to go through with either course (indeed this was disconfirmed by later evidence); and there was no evidence that there was a doctor willing to assist.

Further, so the SCA pointed out, there was, in addition, inadequate evidence on which to decide the constitutional issues.

The appeal was upheld, and the court *a quo*'s order authorising euthanasia was set aside.

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• See other articles pertaining to the *Stransham-Ford* matter:

– Nomfundo Manyathi-Jele ‘Judge’s ruling in assisted suicide case divides South Africa’ 2015 (June) *DR* 4.

– Nomfundo Manyathi-Jele ‘Update on assisted suicide case’ 2015 (July) *DR* 23.

– Law reports ‘Euthanasia’ 2015 (Sept) *DR* 42.

– Rinie Steinmann ‘Law and human dignity at odds over assisted suicide’ 2015 (Nov) *DR* 24.

– Sipho Tumelo Mdhluhi ‘Your life, your decision? The Constitution and euthanasia’ 2017 (June) *DR* 25.

Immigration

Qualification for refugee status: In *Okoroafor v Minister of Home Affairs and Another* 2017 (3) SA 291 (ECP) the court was asked to consider the circumstances under which an applicant may qualify for refugee status in terms of the Refugees Act 130 of 1998 (the Refugees Act).

The applicant was a Nigerian national who entered South Africa (SA) in June 2013 on a visitor’s permit. He stayed for an extended period in SA and in 2016 he was convicted of two offences under the Immigration Act 13 of 2002, and was sentenced to a fine or imprisonment; and to imprisonment, which was suspended. He was subsequently arrested and detained pending deportation as an illegal foreigner. He then indicated an intention to apply for asylum, and asked to be released and issued with a permit to enable him to approach a refugee reception office in order to do so. However, the immigration officers refused, apparently on the basis that he did not qualify as a refugee under s 4(1)(b) of the Refugees Act. This provides that a person will not qualify for refugee status if there is reason to believe that he or she has committed a crime, which is not of a political nature and which, if committed in SA, would be punishable by imprisonment.

The applicant then applied for a declaration that his detention was unlawful.

The issues were, *inter alia*, whether the ‘crime’ referred to

in s 4(1)(b) of the Refugees Act was restricted to a crime committed outside SA, or whether it covered a crime committed either outside or inside the country; and who is the correct official to decide that there was ‘reason to believe’ an individual did not qualify for refugee status.

In deciding the first issue, Eksteen J held that it was restricted to crimes committed outside SA. As regards the second issue, the court held that only the Minister of Home Affairs or his delegate could do so.

The application was accordingly granted. The minister or his delegate was further directed, in terms of reg 2(2) of the Regulations in terms of the Refugees Act, forthwith to issue the applicant with an appropriate permit valid for 14 days within which the applicant had to approach a refugee reception office and complete an asylum application.

Wills

Effect on will when death is within three months of dissolution of marriage:

The crisp facts in *Louw NO v Kock and Another* 2017 (3) SA 62 (WCC) were that Ms Kock (the respondent) and Mr Koekemoer (the deceased) had been married for some 29 years and had executed a joint will. They did not have any children but adored animals.

The relevant clauses of their will provided as follows: ‘1. *Death of the first-dying*

We nominate the longer-lived of us as the sole and complete heir of the estate of the first-dying of us.

2. *Death of the longer-lived*

If the longer-lived of us dies without leaving behind a further valid will, then the longer-lived bequeaths his or her property as follows:

2.1 We bequeath to the father of the testator ... the immovable property, or if he does not outlive the longer-lived of us, then to the animal protection society.

2.2 The residue to the animal protection society.’

They eventually divorced, and Mr Koekemoer (the deceased) died less than three

months after the divorce. It appeared as though the respondent had remarried before the deceased’s passing. On the night that the deceased passed away the respondent and her present spouse took occupation of the deceased’s residence where they still reside.

The Master had refused to give effect to clause 1 of the will, by reason of s 2B of the Wills Act 7 of 1953 (the Act). Section 2B deals with the effect of divorce or annulment of a marriage, on a will. It provides that: ‘If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, *unless it appears from the will that the testator intended to benefit his previous spouse* notwithstanding the dissolution of his marriage’ (my italics).

Section 2B in effect provided a three-month grace period for divorcees to draft new wills. This matter was apparently the first case to test the provisions of s 2B.

This had prompted the respondent to bring an action to compel the Master to give effect to clauses 1 and 2 of the will.

The applicant executrix (Louw) excepted to the respondent’s claim, and ultimately brought the present application to dismiss it. The executrix’ assertion was that the claim was bad in law.

The matter turned on whether ‘it appear[ed] from

the will that the testator [here: the deceased] intended to benefit his previous spouse notwithstanding the dissolution of his marriage’.

The respondent argued there was such an intention. The words of the will said she should inherit, and did not say she should not inherit in the event of divorce.

Meer J held that there was no such intention, had there been, it would have had to have been expressly stated. For the intention the respondent advocates to have appeared, the will would have had to provide for the longer-lived to be the sole heir of the estate of first dying notwithstanding the dissolution of their marriage, or words to that effect. The will simply could not be construed to enable a surviving spouse like the plaintiff to inherit after divorce, and thereby not only rebut the statutory presumption created by s 2B of the Act but also circumvent its provisions.

The executrix’ application was accordingly granted, and the respondent’s claim dismissed with costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, business rescue, civil procedure, constitutional practice, criminal procedure, education, equality, evidence, fishing and sealing, insolvency, international criminal law, interpretation of statutes, labour law, lease, local authorities, mining and minerals, property, revenue and shipping.

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Bills

National Public Health Institute of South Africa Bill B16 of 2017.
National Health Laboratory Service Amendment Bill B15 of 2017.
National Environmental Management Laws Amendment Bill B14 of 2017.
Copyright Amendment Bill B13 of 2017.
Criminal Procedure Amendment Bill B2B of 2017.
Criminal Procedure Amendment Bill B2A of 2017.
Courts of Law Amendment Bill B8B of 2016.
Courts of Law Amendment Bill B8A of 2016.

Commencement of Acts

Medicines and Related Substances Amendment Act 72 of 2008. *Commencement:* 1 June 2017. Proc20 GG40869/26-5-2017 (also available in Afrikaans).

Promulgation of Acts

Financial Intelligence Centre Amendment Act 1 of 2017. *Commencement:* To be proclaimed. GN396 GG40821/2-5-2017 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983
Prescribed control measures relating to fall armyworm. GN449 GG40860/26-5-2017.
Civil Aviation Act 13 of 2009
Fifteenth amendment of the Civil Aviation Regulations, 2017. GN R409 GG40831/5-5-2017.
Sixteenth amendment of the Civil Aviation Regulations, 2017. GN R432 GG40846/19-5-2017.
Seventeenth amendment of the Civil Aviation Regulations, 2017. GN R474 GG40870/29-5-2017.

New legislation

Legislation published from
2 – 31 May 2017

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Annual increase in medical tariffs for medical service providers. GenN405 and GenN406 GG40853/22-5-2017 and GenN419 GG40873/30-5-2017.

Continuing Education and Training Act 16 of 2006

Policy and procedures for regulating the opening, merging and closing of community education and training colleges learning sites. GN429 GG40843/15-5-2017.

Deeds Registries Act 47 of 1937

Amendment of regulations. GN R428 GG40842/12-5-2017 (also available in Afrikaans).

Disaster Management Act 57 of 2002

Guideline on the minimum infrastructure requirements for disaster management centres. GenN416 GG40865/26-5-2017.

Guideline on the development and structure of a disaster management plan. GenN415 GG40865/26-5-2017.

Diplomatic Immunities and Privileges Act 37 of 2001

Recognition of the International Committee of the Red Cross (ICRC) for the purposes of granting immunities and privileges in accordance with the agreement between South African and the ICRC. GN421 GG40840/12-5-2017.

Electricity Act 41 of 1987

Licence fees payable by licenced generators of electricity. GN400 GG40827/5-5-2017.

Engineering Profession Act 46 of 2000

Requirements for recognition as a voluntary association. BN60 GG40827/5-5-2017.

Rules: Continuing professional development and renewal of registration. BN86 GG40847/19-5-2017.

Mental Health Care Act 17 of 2002

Guidelines for licensing of residential and day care facilities for people with mental and/or intellectual disabilities. GN441 GG40847/19-5-2017.

National Environmental Management Act 107 of 1998

Regulations relating to qualification criteria, training and identification of and forms to be used by environmental management inspectors and environmental mineral resource inspectors. GN R480 GG40879/31-5-2017.

National Environmental Management: Biodiversity Act 10 of 2004

Lists of marine species that are threatened or protected, restricted activities that are prohibited and exemption from restriction. GN476 GG40875/30-5-2017.
Policy on boat-based whale and dolphin watching. GN479 GG40878/31-5-2017.
Policy on white shark cage diving. GN478 GG40878/31-5-2017.

National Railway Safety Regulator Act 16 of 2002

Determination of permit fees. GN446 GG40847/19-5-2017.

Promotion of National Unity and Reconciliation Act 34 of 1995

Increased amounts in terms of reg 8(2) (a) of the regulations relating to the assistance to victims in respect of basic education. GN R411 GG40833/9-5-2017 (also available in Afrikaans).

Increased amounts in terms of reg 9(2) of the regulations relating to the assistance to victims in respect of higher education and training. GN R412 GG40834/9-5-2017 (also available in Afrikaans).

Road Accident Fund Act 56 of 1996

Adjustment of tariffs. BN92 and BN93 GG40860/26-5-2017.

Sectional Titles Act 95 of 1986

Amendment of regulations. GN R427 GG40842/12-5-2017 (also available in Afrikaans).

Small Claims Courts 61 of 1984

Establishment of a small claims court for the area of Colenso. GN455 GG40860/26-5-2017.

Establishment of a small claims court for the area of Steynsrus. GN456 GG40860/26-5-2017.

Establishment of a small claims court for the area of Warden. GN457 GG40860/26-5-2017.

Special Economic Zones Act 16 of 2014

Declaration of East London as an industrial development zone. GN466 GG40860/26-5-2017.

Draft Bills

Draft Fund-raising Amendment Bill, 2017. GN R469 GG40861/26-5-2017.

Draft delegated legislation

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R408 GG40831/5-5-2017.

Regulations defining the scope of the profession of oral hygiene in terms of the Health Professions Act 56 of 1974. IsiXhosa version – GN435 GG40847/19-5-2017, English version – GN439 GG40847/19-5-2017. Sepedi version – GN440 GG40847/19-5-2017.

Regulations relating to the transparent pricing system for medicines and scheduled substances: Annual adjustment of single exit price of medicines and scheduled substances for 2018 in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN436 GG40847/19-5-2017.

Regulations relating to the transparent pricing system for medicines and scheduled substances: Draft dispensing fee for pharmacists in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN437 GG40847/19-5-2017.

Regulations relating to the transparent pricing system for medicines and scheduled substances: Draft dispensing fee for persons licensed in terms of s 22C(1)(a) of the Medicines and Related Substances Act 101 of 1965 for comment. GN438 GG40847/19-5-2017.

Guidelines for licensing of residential

and day care facilities for people with mental and/or intellectual disabilities in terms of the Mental Health Care Act 17 of 2002 for comment. GN452 GG40860/26-5-2017.

Draft regulations in terms of the Geomatics Professions Act 19 of 2013. GN464 GG40860/26-5-2017.

Determination of the format, form and contents of a safety management system required for safety permits and safety management system reports in terms of the National Railway Safety Regulator Act 16 of 2002 for comment. GN467 GG40860/26-5-2017.



Employment law update



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Reinstatement of employees until a fair consultation procedure is followed

In *Association of Mineworkers and Construction Union and Others v Piet Wes Civils CC and Another* [2017] 5 BLLR 501 (LC), the Association of Mineworkers and Construction Union (AMCU) instituted urgent proceedings in terms of s 189A(13) of the Labour Relations Act 66 of 1995 (LRA) in terms of which it sought the reinstatement of its members who had been dismissed for operational requirements without a consultation process taking place.

The respondent employers provided services to Exxaro coal mine in terms of a contract. Exxaro terminated the contract and the respondent employers consequently terminated the employment contracts of those employees who provided services to Exxaro. The employers did not consult with AMCU or the employees as it was of the view that it was not necessary to do so given the fact that the employees were engaged on fixed term contracts, which expressly stated

that employment would only endure for as long as the employers were contracted to provide services to Exxaro.

Steenkamp J considered the provisions of s 198B of the LRA in terms of which an employer may only employ an employee who earns below the prescribed annual earnings threshold on a fixed term contract or successive fixed term contracts for longer than three months if the nature of the work is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the contract term. Steenkamp J found that the onus was on the employer to show that linking the term of the employment contract to the supply of work by clients was a justifiable reason for fixing the term. If the employers did not discharge this onus then the employment would be deemed to be of an indefinite duration and the employer would be required to consult with the employees before retrenching them.

Steenkamp J referred to recent case law in which it has been held that an event in s 198B of the LRA does not include the termination of a contract by a client of the employer. In this regard, a provision that provides for termination of employment at the behest of a third party undermines an employee's right to fair labour practices and is against public policy, unconstitutional and unenforceable. Steenkamp J remarked that the purpose of s 198B was to provide security of employment and to allow an employment contract to terminate at the behest of a third party would undermine this purpose. Steenkamp J held that the employers had not discharged the onus of showing that there was a justifiable reason for employing the employees on a fixed term contract for longer than three months. Thus, the employment was of indefinite duration and did not simply terminate when Exxaro terminated the

contract. The termination of the contracts may be an operational rationale to justify retrenchment but this could only be determined once a meaningful joint consensus seeking process was followed with the employees.

Steenkamp J ordered the reinstatement of the employees until the employers comply with a fair procedure. Given the fact that s 189A contemplates a consultation process of 60 days after issuing the s 189(3) letter to commence the process, Steenkamp J remarked that once the employees have been reinstated they should be consulted with for 60 days after the date of the judgment, preferably with the assistance of a facilitator. Steenkamp J, however, did not make an order in this regard and simply stipulated that the employers must follow a fair procedure.

Validity of settlement agreement

In *Fleet Africa (Pty) Ltd v Nijs* [2017] 5 BLLR 450 (LAC), the employee had been previously employed by the City of Johannesburg (the city) and her employment had transferred in terms of s 197 of the LRA to an entity, which was subsequently taken over by Fleet Africa. At some point the city entered into an agreement with Fleet Africa in terms of which Fleet Africa rendered fleet management services. The employee was involved in rendering these fleet management services.

The city terminated its contract with Fleet Africa on 29 February 2012 and a dispute arose as to whether the employees who mainly performed the fleet management services should transfer to the city. The dispute was brought to the Labour Court (LC) and was subsequently referred to private arbitration and then an arbitration appeal panel.

At the same time Fleet Management lost another contract with another client and the need to retrench arose. Fleet Africa commenced a retrenchment consultation process, which ran parallel with the arbitration appeal process. On 21 May 2012, the employee entered into a settlement agreement with Fleet Africa in terms of which she would receive a voluntary retrenchment package. The terms of this agreement were that the amounts paid were in full and final settlement of any claims that she had including any entitlement to transfer in terms of s 197 to the city. The city was not aware of the retrenchment consultation process that was underway at the time.

On 29 May 2012, the arbitration appeal award was issued in terms of which it was declared that the employee had retrospectively transferred to the city with effect from 1 March 2012. Fleet Africa then sought to rescind from the settlement agreement arguing that when it entered into the settlement agreement on 21 May 2012 the employee was no longer an employee of Fleet Africa as her employment had transferred to the city on 1 March 2012.

The employee instituted proceedings in the LC seeking an order that the settlement agreement be declared a valid and binding agreement and be made an order of court, which the LC did. Fleet Africa then appealed this decision on the basis that the settlement agreement was null

and void and the LC lacked jurisdiction to determine the matter. In this regard, Fleet Africa argued that the LC failed to take into account the retrospective effect of the arbitration appeal award, which overtook the settlement agreement and resulted in the employee no longer being an employee of Fleet Africa when the settlement agreement was entered into.

The Labour Appeal Court held that for a settlement agreement to satisfy the requirements of s 158(1A) of the LRA there must be a dispute between the parties, which either party has the right to refer to arbitration or to the LC. Fleet Africa relied on s 142A(1) of the LRA, which gives the Commission for Conciliation, Mediation and Arbitration (CCMA) the power to make settlement agreements arbitration awards. Ndlovu JA remarked that s 142A(1) adds to the CCMA's powers while s 158(1A) elaborates on the LC's powers under s 158(1)(c). These sections could, therefore, not be read together. Ndlovu JA had to determine whether there had been a dispute when the settlement agreement was signed. He held that there had been a long-standing dispute and Fleet Africa had adopted a two-pronged strategy to deal with this. In this regard, Fleet Africa had been unaware of what the outcome of the arbitration appeal process would be and, therefore, commenced a s 189 process as an alternative outcome. Both the consultation process and the arbitration process

had a common objective of resolving the dispute.

Fleet Africa argued that the conclusion of the settlement agreement was conditional on the outcome of the arbitration appeal award. Ndlovu JA found that there was no reference to a suspensive condition in the settlement agreement and this would need to have been expressly dealt with in the agreement.

It was held that once the settlement agreement was concluded on 21 May 2012 the employment relationship between Fleet Africa and the employee came to an end and the outstanding arbitration appeal process should have fallen away insofar as it related to that employee. The employee was no longer entitled to transfer in accordance with s 197 as that would have amounted to a double benefit. The court noted that s 197 provides for the automatic transfer of employees unless otherwise agreed in terms of s 197(6). It thus envisages that a s 197 dispute may be resolved by agreement.

It was held that the settlement agreement complied with the requirements of the common law and s 158(1)(c) read with s 158(1A) of the LRA. Thus, the LC properly exercised its discretion to make the settlement agreement an order of court. The appeal was dismissed with costs.



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The potential financial implications on an employer in pre-dismissal arbitration

Sampson v South African Post Office SOC Limited (unreported case no J2106-15, 10-5-2017) (Whitcher J)

Section 188A of the Labour Relations Act 66 of 1995 allows for what is referred to as a pre-dismissal arbitration where an employee and employer, under certain

circumstances, approach a duly authorised body – such as the Commission for Conciliation Mediation and Arbitration (CCMA) – and request an arbitrator to preside over an internal disciplinary hearing. The arbitrator, having heard all the evidence from both parties, will decide whether the employee is guilty of the charges preferred against him or her and if so, will deliver an appropriate sanction, which may include dismissal. The arbitrator's ruling has the same status as a statutory arbitration award, and hence an employee aggrieved by the outcome may approach the Labour Court (LC) to review and set aside the arbitrator's findings in the same manner one reviews any statutory arbitration award. Thus, s 188A was designed to eliminate a duplication of processes where an employer has an internal hearing and thereafter the same process unfolds before the CCMA in arbitration.

The novel question that arose in this case was whether the employment relationship is automatically restored if the LC on review, sets aside the arbitrator's decision to dismiss the employee and if so, whether the employee is entitled to backpay from the date of dismissal to

the date of the order setting aside the arbitrator's ruling.

Background

The applicant employee was suspended with full pay in November 2011, charged for certain acts of misconduct in January 2012 and later partook in a pre-dismissal arbitration in terms of s 188A in June 2012.

On 4 June 2012 the arbitrator delivered a ruling wherein he found the employee guilty of misconduct and handed down the sanction of dismissal. The employee took the arbitrator's ruling on review and absent the employer opposing the application, the LC, on 3 September 2015, set aside the arbitrator's ruling and ordered the matter be heard *de novo* before another arbitrator.

Days after the order was delivered the employee's attorney wrote to the employer advising it that the court order in effect retrospectively reinstated the employee and as such, demanded the employer pay the employee his remuneration he would have earned from date of dismissal to the date the dismissal was set aside. The attorney further sought the employer begin paying the employee

his normal salary as from September 2015.

In a written response the employer rejected the legal consequences of the order as interpreted by the employee and took the view that the dismissal stood until heard by another arbitrator.

This prompted the employee, on 26 October 2015, to approach the LC, firstly, seeking his back pay and secondly, his normal salary from date of the court order to the date he initiated these legal proceedings.

The issue before the court centred firstly on the legal consequences of setting aside a dismissal ruling in terms of s 188A, more specifically whether the employment relationship between the parties had retrospectively revived and secondly what the parties' respective obligations were flowing from the legal consequence of setting aside the dismissal.

In rejecting the employer's argument the court held that setting aside a dismissal pursuant to a pre-dismissal arbitration, the *status quo ante* is restored – meaning parties return to their respective positions as if the dismissal had never occurred. The court held:

'In this matter, the court order set aside the original decision to dismiss the Applicant and the original decision to dismiss him effectively "vanishes" and he is treated as if he had never been dismissed. The order revived retrospectively the contract of employment between the Applicant and the Respondent. In my view, this must be implicit in an order that sets aside, without qualification, a decision to dismiss the Applicant. He

thus reverts to his status as an employee on precautionary suspension.'

In view of the fact the employee had taken up new employment months after his dismissal and currently held the same position; the remuneration the employee received for this period from his current employer would be offset against the remuneration he would have been entitled to receive from the respondent employer had he not been dismissed.

In respect of earnings for the period after the dismissal was set aside, the court noted the employee only claimed payment from the date of his dismissal being set aside (ie, 3 September 2015) to the date he launched legal proceedings *in casu* (ie, 26 October 2015).

The employer argued that the employee was not entitled to any remuneration over this period as he never tendered his services to the employer after 3 September 2015 and, hence, could not have been said to be in the employ of the employer. This was compounded by the fact that the employee continued to remain in the employ of a different entity.

Without downplaying the general principle that an employee is generally entitled to remuneration post reinstatement only if the employee tenders his or her services – the court noted that the employer took the view that the dismissal still stood after the arbitrator's ruling was set aside and, therefore, had the employee resigned from his current employment and attempted to take up his erstwhile position with the employer; the employer would have on the probabilities, denied him such an opportunity. The court therefore saw it fit to order the

employer to pay the employee his salary from 3 September 2015 to 26 October 2015 subtract that what the employee had earned for the same period with his current employment. The employer furthermore was ordered to pay the employee his leave pay owing for the period June 2012 to October 2015.

Since there was some dispute between the parties as to what the employee earned at his current place of employment, the court allowed the parties to resolve this issue on their own, failing which they could approach the court for assistance.

As to the financial risk an employer may have to endure if a dismissal under s 188A is set aside on review, the court held:

'This may all seem a very steep price for the Respondent to pay for an action it took, invoking section 188A, which was designed precisely to avoid long delays in the resolution of disputes and the attendant risk of backpay accumulating in the event of an adverse finding.

...
Noting that the Respondent's risk is to some extent on-going, I can only say that, in my view, my hands are tied. I cannot suspend the legal consequences of the reviewing courts "setting aside" of the section 188A dismissal because the effects seems rather onerous on one party. This case seems to have wandered into something of a legal no-mans' land which might benefit from legislative scrutiny in future and the careful crafting of relief sought when reviewing section 188A decisions or when opposing such reviews.'



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By
Meryl
Federl

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Abbreviation	Title	Publisher	Volume/issue
<i>EL</i>	Employment law	LexisNexis	(2017) 33.1
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaans Onderwys	(2017) April (2017) May
<i>PER</i>	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2017) April (2017) May
<i>SAJHR</i>	South African Journal on Human Rights	Taylor and Francis	(2017) 33.2
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	LexisNexis	(2017) 80.2

Banking law

Nagel, CJ and Pretorius, JT 'Ownership and appropriation of funds deposited in a bank account - *Spar Group Ltd v FirstRand Bank Ltd*' (2017) 80.2 *THRHR* 308.

Company law

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Oosthuizen, JS and Delport, PA 'Rectification of the securities register of a company and the oppression remedy' (2017) 80.2 *THRHR* 228.

Constitutional law

Cachalia, R 'Botching procedure, avoiding substance: A critique of the majority judgment in *My Vote Counts*' (2017) 33.1 *SAJHR* 138.

Venter, F 'Rethinking the language of constitutional comparison' (2017) 33.1 *SAJHR* 72.

Consumer law

Stoop, P, Pearson, G and Kelly-Louw, M 'Balancing responsibilities - financial literacy' (2017) May *PER*.

Credit law

Brits, R, Coetzee, H and van Heerden, C 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo Vadis?*' (2017) 80.2 *THRHR* 177.

Criminal law

Agbor, A 'Prosecuting the offence of misappropriation of public funds: An insight into Cameroon's Special Criminal Court' (2017) *PER* May.

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Customary law

Kohn, L '*Ramuhovhi v President of the Republic of South Africa*: A bittersweet victory for women in "old" polygamous customary marriages' (2017) 33.1 *SAJHR* 120.

Mwambene, L and Kruuse, H 'The thin edge of the wedge: *Ukuthwala*, alienation and consent' (2017) 33.1 *SAJHR* 25.

Manthwa, TA 'Proof of the content of customary law in light of *MM v MN*: A constitutional approach' (2017) 80.2 *THRHR* 300.

Nhlapo, T 'Customary law in post-Apartheid South Africa: Constitutional confrontations in culture, gender and "living law"' (2017) 33.1 *SAJHR* 1.

Delict

Neethling, J 'Vonnisbespreking: Die regspraak bevestig die gedingsvatbaarheid van afrokkeling as *iniuria*' (2017) April *LitNet*.

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Stoop, C 'Children's rights to mother-tongue education in a multilingual world: A comparative analysis between South Africa and Germany' (2017) May *PER*.

Family law

Boniface, A and Rosenberg, W 'The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa' (2017) 80.2 *THRHR* 253.

De Jong, M, Le Roux-Bouwer, J and Manthwa, TA 'Attacking trusts upon divorce and in maintenance matters: Guidelines for the road ahead (1)' (2017) 80.2 *THRHR* 198.

Kruger, H 'The High Court's refusal to resolve issues relating to paternity and parental responsibilities and rights in motion proceedings where there is a pending divorce action - *BR v TM*; *BR v TM: In re LR*' (2017) 80.2 *THRHR* 326.

Insolvency law

Stander, AL and Kloppers, HJ 'Artikel 102 van die Insolvensiewet en notariële verbande: Van onsekerheid na sekerheid?' (2017) 80.2 *THRHR* 287.

International humanitarian law

Heyns, C 'Autonomous weapons in armed conflict and the right to a digni-

fied life: An African perspective' (2017) 33.1 *SAJHR* 46.

Judiciary

Gravett, WH 'Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures' (2017) 80.2 *THRHR* 267.

Judicial processes

Gravett, WH 'The myth of objectivity: Implicit racial bias and the law (part 1)' (2017) April *PER*.

Gravett, WH 'The myth of objectivity: Implicit racial bias and the law (part 2)' (2017) April *PER*.

Labour law

Botes, A and Fourie, L 'Werknemers as lasgewende ouers in surrogasie-aangeleentheid: Die geboorte van nuwe ver- lof-behoefte in Suid-Afrika' (2017) May *PER*.

Grogan, J 'Functus officio, or not? The case of the vacillating arbitrator' (2017) 33.2 *EL* 15.

Grogan, J 'Unrepentant racist - LAC's "soft touch" reversed' (2017) 33.2 *EL* 3.

Van Jaarsveld, SR 'Aard van regsver- houding tussen werkgewer en werkne- mer - word 'n dienskontrak vereis? *Uni- versal Church of the Kingdom of God v Myeni*' (2017) 80.2 *THRHR* 334.

Mediation

Boniface, A and Velthuisen, A 'Skoonlief en die Ondier: 'n Ondersoek na die nut van aanlyn bemiddeling in gesinsgeskille in Suid-Afrika' (2017) May *LitNet*.

Medical law

Van der Westhuizen, CS 'The legal pro- tection of premature and critically ill ne- onates: Can South Africa learn from the Netherlands?' (2017) 80.2 *THRHR* 211.

Van Niekerk, C 'Assisted reproductive technologies and the right to reproduce under South African law' (2017) May *PER*.

Property law

Marais, EJ 'Providing better protection for expropriatees? Preliminary thoughts on the interpretation of "arbitrarily" in clause 2(1) of the Expropriation Bill B4D- 2015' (2017) 33.1 *SAJHR* 97.

Sonnekus, JC 'Beheersing van enkele basiese beginsels van die sakereg maak die verskil - *non nudis pactis transferuntur* - *August General Servicing South Africa (Pty) Ltd v DBT Technologies (Pty) Ltd*' (2017) 80.2 *THRHR* 314.

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By
Martin
van
Staden

Have we been underemphasising public participation?

Public participation in the affairs of government is democracy in action. Government receives a general mandate once every five years, however, public participation serves to legitimise particular policies. When the ANC was elected to government, the people of South Africa (SA) did not by proxy 'endorse' each new policy, such as the Department of Trade and Industry's (DTI) ill-conceived liquor policy, that will effectively ban the sale of alcohol across the country. Democracy penetrates deeper than a formal election twice every decade.

It is often wrongly assumed that public participation is limited to law, and, indeed, the Constitution is clear that Parliament and the provincial legislatures must facilitate public participation when considering new law. However, s 195(1)(e) of the Constitution mandates that the public must be encouraged to participate in the policy-making process as well. This means that even before something has become law and is merely the policy of government, the public must have their say.

In 2010, the Public Service Commission released a report titled 'Template for Developing Guidelines on Public Participation' wherein the commission acknowledged that the 'nature and extent' of public participation has up to then been inadequate, and that guidelines on how public participation should be achieved and how it will eventually inform the resulting policy, should be developed. In light of this awareness by government, it is apt to discuss the two most underemphasised aspects of public participation, namely, impact assessments and engagement in good faith.

The Socio-Economic Impact Assessment (SEIA) System

Section 195(1)(g) of the Constitution requires a transparent policy-making process whereby the public is provided with timely and accurate information. The general requirement of rationality, furthermore, requires that policies must be based on evidence and not the mere whim of officials or politicians.

Government has, to an extent, realised that impact assessments are part

of the broader public participation constitutional framework. In 2015, Cabinet approved the Department of Planning, Monitoring and Evaluation's Socio-Economic Impact Assessment System, which stipulates that a SEIA must be done before a policy is enacted.

Unfortunately, judging by the SEIA conducted by the National Treasury on its proposed Financial Sector Regulation Bill B34B of 2015, as well as the SEIA conducted by the Department of Telecommunications and Postal Services (DTPS) on the National Integrated Information and Communication Technologies (ICT) Policy White Paper, some basic principles and requirements are not being met.

Most regrettably, the departments introducing the policies are doing their own SEIAs, which is inappropriate given the obvious conflict of interest and inevitable confirmation bias. This was clear in both the aforementioned SEIAs, where the faux impact assessments went to great length to try and justify the policy intervention and, while listing in minute detail all the supposed (but baseless) benefits, paid only superficial concern to the detriments.

With the ICT White Paper, furthermore, the DTPS did not release their inadequate SEIA, while there was still opportunity for public engagement.

The department claims the SEIA was conducted in February 2016, and Minister Siyabonga Cwele had already declared the policy 'final' in December 2016. However, the SEIA was published only in January 2017. How can the policy logically be 'final' if the public had not yet seen the SEIA and had not yet engaged government on the results? The requirement of 'timeliness' in s 195(1)(g) of the Constitution mandates that relevant information be revealed before a policy is set in stone. In October 2016, the official opposition lodged a Promotion of Access to Information Act 2 of 2000 request to access the SEIA, but received no response from the DTPS. After 30 days, the application was automatically rejected. The Shadow Minister of Telecommunications and Postal Services of the Democratic Alliance, Marian Shinn, subsequently voiced her concern whether a SEIA had been conducted at all.

Such behaviour by government is a clear indication that engagement was not done in good faith.

A proper SEIA should be conducted by a disinterested party – preferably a party outside government or, at least, an autonomous government unit in the presidency, or a parliamentary select committee – rather than by the agency introducing the policy. The SEIA must honestly and accurately record all the risks and benefits it is able to identify. Crucially, the SEIA must not be a memorandum in support of the policy. In other words, it should not 'agree' with the stated goals of the policy; it must be neutral.

Public engagement in good faith

After an adequate SEIA has been conducted and published for public comment, the public must be engaged, in good faith, on the content of the proposed policy and whether it should be policy at all.

In *eTV (Pty) Ltd and Others v Minister of Communications and Others* 2016 (6) SA 356 (SCA), the Supreme Court of Appeal held that when legislation is silent on public participation, the principle of legality (an element of the rule of law imperative in s 1(c) of the Constitution) requires such participation, at least with statutory bodies and industry stakeholders (at para 45). The court held that public participation was also required with determinations on policy and policy amendments (as opposed to laws or regulations).

Government is also required to approach public engagement with an open mind.

In the article 'Public Participation in South Africa's Policy Decision-Making Process: The Mass and the Elite choices' (2016) 14 *International Public Administration Review* 55, Professor Mokoko Piet Sebola Jr. of the University of Limpopo wrote that public participation does not simply entail passive involvement of stakeholders. Where the engagement does not influence the final decision in some way, it cannot be said that public participation has taken place. Public engagement must be undertaken in good faith.

Good faith is absent if government allows for participation on a policy, law or regulation which is a *fait accompli*. If government is set on a particular course, it follows that public participation would be without purpose. In *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) the Appellate Division regarded it as a 'well-approved canon of construction' to not regard words in statutory texts as redundant. It must be assumed, then, that the Constitution intends more than a mere, useless formality in its repeated provisions for public participation. In other words, public participation must have some perceptible influence on whatever policy decision has been taken.

Relevance to the attorneys' profession

If legislation, regulation, or policy decisions are not subject to the necessary public participation, or if the public participation is little more than a sham, the legislation, regulation, or policy deci-

sion would – in theory – be of no force or effect. The potentially disastrous consequences of a policy without adequate public participation is illustrated by the DTT's new liquor policy.

The liquor policy provides, *inter alia*, that liquor establishments must be located at least half a kilometre away from places such as residential areas, public institutions, schools, transport facilities, and recreational facilities. In practice, this means that alcohol would not be sold or served in any urban area anywhere in SA. Furthermore, assuming a road is a transport facility – these terms remain undefined – liquor would also not be sold within 500 metres of a road.

The liquor industry, directly and indirectly, provides employment to vast numbers of South Africans. Alcohol is sold and indirectly relevant in most service-based sectors, including tourism, catering, and cleaning. Shebeens, taverns, restaurants, and liquor stores around the country will be forced out of business as a result of this policy. It will be in the national interest to challenge

the ill-considered policy on the basis that the SEIA was defective for the reasons mentioned in this article.

The deficient liquor policy is a single example of improper public participation and incomplete or unreleased SEIAs. It is injustice – technical as it may be – of unimagined proportions.

Conclusion

By challenging law or policy on public participation grounds, lawyers not only assist clients to see justice done, but also contribute to a sorely needed and underemphasised aspect of public law and jurisprudence. Public participation, especially on government policy, as opposed to legislation or regulation, that is too often disregarded, can have a significant influence on governance in SA.

Martin van Staden LLB (UP) is a legal researcher at the Free Market Foundation in Johannesburg. □

By
Nicholas
Mgedeza

Pregnant and out of school contracts – untenable

It is well known that within both the public and private school system, there are schoolgirls that fall pregnant during their tenure as students. This has culminated in some schools seeking ways to curb this perilous trend by petitioning and compelling girls to undertake not to fall pregnant during their time as students. The contract generally includes a breach clause, which stipulates that in the event a girl falls pregnant, she agrees to automatic expulsion from the school. The objective of this article is to analyse and determine whether such contracts are tenable and justifiable.

Background and current position

With reference to the *Sowetan* newspaper article (Bongekile Macupe 'Pupils forced to promise they will not fall pregnant' www.sowetanlive.co.za, accessed 1-6-2017), it states: 'A Mpumalanga high school is forcing girl pupils to sign a form committing that they will not fall pregnant and if they do; they should be kicked out' bears concrete testimony. One of the grade 10 pupils at DM Motsoale Secondary School in KwaGugqa, Witbank told the *Sowetan* that: 'They said if we fall pregnant after signing the form we will be kicked out. I feel it's unfair because sometimes mistakes happen and you don't mean to fall pregnant. So

what am I supposed to do at home if I'm kicked out of school?' Moreover, *Business Day* (Michelle Gumede 'Motshekga addresses vandalism and student pregnancy' www.businesslive.co.za, accessed 1-6-2017) reported that according to the 2015 Annual School Survey, an estimated 15 470 students fell pregnant in that year, with some of the girls being in primary school. The majority of the girls who fell pregnant were between the ages of 14 and 18.

Contracts

Party autonomy is conferred on the general principle of contracts, which finds expression in the doctrine of *pacta sunt servanda*. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows the court to decline to enforce contractual terms that are in conflict with constitutional values, even though the parties may have consented to them. In the Zimbabwean High Court matter of *Mandizvidza v Chaduka NO and Others* (ZH) (unreported case no HH236-99, 24-11-1999) (Gwaunza J), the applicant was a woman enrolled for a three year teacher training course at a college run by a church. Part of her sponsorship came from the state. Before enrolling in the course, she signed a contract in which it was agreed that she would be withdrawn from the course if she became pregnant.

In her second year of the course she married a man according to customary law, and shortly thereafter she fell pregnant. The respondent, the principal of the college, required the applicant to withdraw from the college. The applicant sought a declaration that the policy of expelling or suspending pregnant students was unconstitutional and that she should be allowed to write her examinations. Ultimately, the court ruled that the clause of this nature is untenable and contrary to public policy.

Constitutional position

Section 29(1) of the Constitution tersely provides that: 'Everyone has the right –

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'

Section 9(3) of the Constitution prohibits the state from unfairly discriminating against anyone on one or more grounds that are specified in the subsection. The preamble of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act) stated, *inter alia*, that s 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. Section 1 of the

Act denotes 'equality' as the 'full and equal enjoyment of rights and freedoms as contemplated in the Constitution' and includes *de jure* and *de facto* equality and also equality in terms of outcomes. Furthermore, the Act unequivocally defines 'prohibited grounds' as –

'(a) race, gender, sex, *pregnancy*, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground –

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).'

Section 8 lucidly provides that 'no person may unfairly discriminate against any person on the ground of gender, including –

...

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including, the undermining of the dignity and well-being of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;

(f) discrimination on the ground of pregnancy;

(g) limiting women's access to social services or benefits, such as health, education and social security.'

Moreover, s 5(1) of the Schools Act 84 of 1996 states that '[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way'.

The right to education imposes on those bound by the right negative duties not to interfere with the educational processes in which bearers of the right are involved, but also, and in particular, positive duties to provide access to, means, facilities and support for basic and further education. Although the right to 'basic education, including adult basic education' is not qualified in the text of the provision, the right may be limited if the requirements of s 36 of the Constitution are complied with (IM Rautenbach 'Introduction to the Bill of Rights' *Bill of Rights Compendium* (Durban: Lexis Nexis 1996) at 1A76). Ngcobo J stated in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) '... the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.' In the matter of *Head of Department, Department of Education, Free State Province v*

Welkom High School and Others 2014 (2) SA 228 (CC), the governing bodies of the respondent schools adopted pregnancy policies for their respective schools providing for the automatic exclusion of any learner from school in the event of her falling pregnant. When each of the schools excluded a pregnant learner in terms of the policies, the applicant ordered the schools to readmit the learners who had been excluded. The schools successfully approached the High Court to interdict the applicant from interfering with the implementation of the policies. On appeal to the Supreme Court of Appeal (SCA), the award of the interdict was, in both cases, upheld by that court, subject to certain limitations not imposed by the High Court. The applicant sought to appeal to the Constitutional Court (CC). The CC held at paras 113-116 as follows: 'First, the policies differentiate between learners on the basis of pregnancy. Because the differentiation is made on the basis of a ground listed in s 9(3) of the Constitution, it is both discrimination and presumptively unfair. Furthermore, the policies differentiate between male learners and female learners. A male learner at Welkom may only be given a "leave of absence" for paternity purposes if the pregnant learner can prove that he is the father of the unborn baby. ... [T]herefore, the policies lead to presumptively unfair discrimination on the basis of sex.

Second, the policies limit pregnant learners' fundamental right to basic education in terms of s 29 of the Constitution, by requiring them to repeat up to an entire year of schooling. ...

Third, the policies *prima facie* violate learners' rights to human dignity, privacy and bodily and psychological integrity by obliging them to report to the school authorities when they believe they are pregnant. In addition, all other learners are required to report to school authorities when they suspect that a fellow learner is pregnant. The policies thus have the effect of stigmatising pregnant learners for being pregnant and creating an atmosphere in which pregnant learners feel the need to hide their pregnancies rather than seek help from school authorities for medical, emotional and other support.

Fourth, by operating inflexibly, the policies may violate s 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child. The policies require that pregnant learners must leave school for the remainder of the year in which they give birth, without regard to the health of the learner, the point in the school year at which she gives birth, arrangements she has made for appropriate care for her new-born, the wishes of the learner and her parents, or her capacity to remain in

school. The policies are designed in such a way as to give the school governing bodies and principals no opportunity to consider the best interests of pregnant learners.'

Clearly, the CC condemned the policies that expel a pregnant female pupil from the school. (See also *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)).

Applicable policy

The 2007 national policy on Measures for the Prevention and Management of Learner Pregnancy (the policy) provided that '[n]o learner should be re-admitted in the same year that they left school due to a pregnancy'. In a nutshell, this policy required the pupil who has conceived to take leave of absence. The policy asserts the Constitutional rights of pregnant learners to continue and complete their basic education without stigma or discrimination. Specifically, it confirms that there should be no exclusion of pregnant learners who must be allowed to remain in school during their pregnancies and return as soon as possible after giving birth as is appropriate for both the learner and her child. For its part, the school is required to accommodate the reasonable needs of the learner to ensure that her right to education is not disrupted or ended by pregnancy or birth.

Conclusion

The contract wherein the parties agree that, should the female pupil conceive the ultimate effect will be expulsion from the school for that particular year are, in principle, unlawful (as they are contrary to public policy) and do not pass constitutional muster. Furthermore, the policy gives the green light to the pregnant learners to continue and complete their basic education without stigma or discrimination. This policy is progressive in content in that it explicitly makes the provision for comprehensive sexuality education and it affirms that the adage 'if you educate a woman you educate a nation' holds true. Likewise, on balance of inconvenience, the repercussions of girls dropping out of school due to pregnancy cannot be underestimated. As the nation we must be concerned about improving the educational rights of girls who become pregnant in relative to the overflowing oppression, which will culminate in the dropouts being at the bottom of the economic level and faced with bleak futures.

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Mbatha v Road Accident Fund: A judgment in disarray

In *Mbatha v Road Accident Fund* 2017 (1) SA 442 (GJ), the court disallowed costs at the preliminary stage of the proceedings. The court refused to award costs at that stage and ordered that the costs be 'costs in the cause'. The court, per Satchwell J, gave four reasons for such a refusal:

(1) No examination, reports or opinions of any identified or unidentified "experts" are before court and have not been utilised to reach this preliminary agreement on merits. The legal representatives themselves have not utilised nor agreed on these reports and the experts. The court has no idea who may, or may not, ever be utilised as an "expert". Such "expert" has not yet contributed to any result – which result is currently only the issue of fault as to the accident.

(2) The judge presented with an agreement only on the merits has no idea ... of the injuries sustained or their *sequelae* or the financial consequences thereof and the likely quantum of damages. The focus has been on merits only. Perusal of pleadings is of no assistance. ... Absent any idea as to the quantum of damages which may be awarded (if any), a court is placed in a very difficult position as to the scale of costs which should be incorporated in such an order made by the court. I decline so to do where I have no idea at all as to the possibility of any quantum ever being determined.

(3) The section 17(4)(a) [of the Road Accident Fund Act 56 of 1996] undertaking only has financial value if and when healthcare treatment is required, the patient himself or herself pays for such treatment and thereafter claims a refund from the [Road Accident Fund] RAF. ...

(4) What is casually called a "road accident claim" or a "RAF claim" is a claim for damages. A decision as to the merits is merely a preliminary stage on the way to achieving the intended outcome – monies paid over as damages. When presented with an agreement that merits have been settled but nothing else, I would expect a court to have some concern why it is expected that fees and disbursements should be paid when there is no actual outcome, no identifiable result, and no money in the pocket of the road accident victim.'

The contents of the judgment

Firstly, I wish to deal with the para-

graphs in which the four reasons stated above were based.

As Satchwell J began her judgment, she, in a way, cautioned other judges at para 3 and stated that: 'This is an important issue and certainly operates to the great disadvantage of the legal representatives of the plaintiff road-accident victims whilst the defendant RAF legal representatives continue to be paid for all their services irrespective of their success or failure and whether or not only a preliminary stage of the litigation is reached. It may well be that other judges, thinking slowly and carefully and without the pressure of managing some 350 matters set down for the trial roll in one week, may come to a different opinion'.

At para 6 the court held: 'What I have found striking is the absence of any result of any significance whatsoever for the plaintiff road-accident victim. It is of no assistance to them that they have succeeded on the merits'. This cannot be, because, a RAF claim is a delictual claim and, as such it has to comply and be based on the law of delict. It is trite that the law of delict has five elements –

- the commission or omission of an act;
- which is unlawful or wrongful;
- committed negligently or intentionally;
- which results in or causes harm (causation); and
- the suffering of an injury, loss or damage.

In a RAF claim the legal practitioner has to allege and prove these elements. The first three elements relate to the merits of the case. Without alleging and proving these three elements there can never be a claim for damages, which means that there can never be a RAF claim. It was, therefore, incorrect for the court in the *Mbatha* matter to simply dismiss merits as an insignificant result and of no assistance to the plaintiff who is a road accident victim. The merits are infact as important as the quantum. One must prove the three elements, for there to be damages payable. In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A), dealing with a loss of support matter, Corbett JA, as he then was, stated that 'the basic ingredients of the plaintiff's cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) the concomitant *culpa* (or *dolus*) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior

to the death of the deceased, and (d) ... real deprivation of anticipated support.' The court went further and stated that the first three elements of the plaintiff's action fell to be determined as part of the merits, and the fourth element was an issue properly to be dealt with when quantum of plaintiff's damages was to be determined. Without the plaintiff having proved that there is fault or wrongfulness on the part of the defendant then there would be no claim and/or delict.

At para 10 of the *Mbatha* matter, Satchwell J stated that: 'I am being asked to make an order that the merits of the road accident are settled and the issue of quantum (if any) is postponed to another day. I am asked to award costs on the High Court scale to advocates and attorneys and the healthcare practitioners or actuaries who may perhaps be used as expert witnesses when it comes to the issue of quantum.' This is incorrect on the following basis:

- The plaintiff and not his or her legal representative, is entitled to costs. The legal representatives can only recover the disbursements.

- The relationship between client and his or her attorney(s) is regulated by the Contingency Fees Act 66 of 1997 (the Act). Section 2(2) and s 3(b)(ii) of the Act deals with the issue of costs. If the client, and not the attorney, paid the costs to the opponent, in the event of unsuccessful litigation, then concomitantly, should the client be successful, he or she is entitled to costs and not the attorney. *Graham and Another v Ronald Bobroff & Partners and Another* (GP) (unreported case no 5203/2015, 17-3-2015) (Matojane J), involved overreaching, where the respondent charged the 25% as per the contingency fee agreement and thereafter took the costs as well. This was held to be improper conduct on the part of the respondent and he was found to have overcharged the client.

At para 24 of the *Mbatha* judgment Satchwell J stated: 'In numerous matters I was asked to have regard to the so called "medico-legal" reports so that I could extract therefrom the opinions of potential but unheard witnesses as to what might be the cost of treatment in the future. The problems are obvious – I have not heard from such witnesses, I do not know whether their opinions should be accepted, ...'. In a typical RAF matter and during merits, in most instances the

plaintiff will furnish the defendant with an accident report, hospital records and s 19(f) affidavit and on those documents alone, the parties are able to reach an agreement on whether there should be apportionment or not, and if so, how much? A draft order is made. Now the court has no evidence in this regard, neither from the plaintiff, police officer, the paramedics, a mechanic, an accident reconstruction expert, an engineer nor the doctor who examined the plaintiff after the collision. The court does not know whether their evidence should be accepted or not. In this instance, the court is willing to make the draft order an order of the court without having regard to how much the quantum will be.

The court at para 25 of the *Mbatha* judgment stated that 'both parties did not simultaneously find the opinions compelling since they could not agree on quantum based on those reports'. Here the court is drawing inferences – Satchwell J does not know why the parties decided to separate issues. It might be that one of the parties did not file all the reports, it might be because there are no joint minutes, or it might be because no offer was forthcoming from a claims handler to proceed with quantum. Strangely in the Supreme Court of Appeal (SCA) in *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ), the same judge (Satchwell J) blasted the legal representatives for 'fab-

rications of a claim for "enrichment"'. Satchwell J went further and stated that the legal representatives should not recover any costs for reaching a settlement, when the claim had no legal or factual basis. The SCA overturned the judgment and found that her decision had been prepared on the basis of inferences drawn from the documents in the court file and from informal discussions with the parties' legal representatives. In the *Mbatha* matter, the judge committed the same error.

At para 28 of *Mbatha*, Satchwell J, stated: 'When presented with an agreement that merits have been settled but nothing else, I would expect a court to have some concern why it is expected that fees and disbursements should be paid when there is not actual outcome, no identifiable result, and no money in the pocket of the road-accident victim'. This finding is unfounded because, there is an outcome and there is an identifiable result. It has been determined who was at fault, alternatively, the element of wrongfulness and/or fault has been established. The costs to be awarded do not belong to the legal representatives, in that, in terms of the Act the client is entitled to the fees (*Bobroff (op cit)*). The disbursements are due to the attorney.

At para 31, the court held: 'After all, they have claimed to be and have been judicially certified as "trial ready" in

accordance with the new judicial case-management/certification procedure'. It cannot be that when the matter is certified trial ready it means ready to proceed on both issues, hence r 33(4). The matter can be trial ready on merits, the matter can be trial ready on quantum or the matter can be trial ready on both issues of quantum and merits. That is when the agreement between the parties becomes crucial. If the parties decide to proceed on merits only, it is not for the court to seek reasons for separation, the same way it is not for the court to decide on apportionment when the parties have agreed on apportionment. Surely it was not the intention of the Judge President, and the people who assisted him in drafting the practice manual, to interfere in the manner in which parties decide to litigate. By dictating whether a party is entitled to costs or not during the merits part, Satchwell J entered into the arena and dictated how parties should litigate and settle matters. She ought to have decided the matter as it was presented to her and not overreached and made unfounded inferences. On the evidence above, I submit that the decision in the *Mbatha* matter was incorrect.

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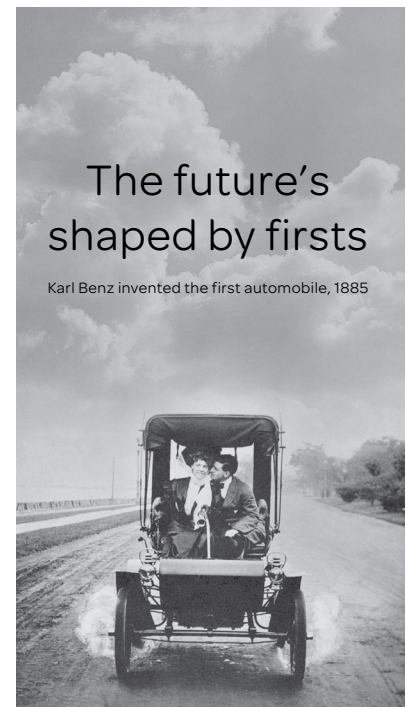
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Christie's Law of Contract in South Africa

Christie's Law of Contract in South Africa was first published in 1981. It remains to this day a well-established and leading authority on the law of contract. The seventh edition of the book provides a detailed and comprehensive exposition of the general principles of the law of contract as it has evolved, and been applied by the courts.

This book is divided into 14 chapters, which includes –

- a historical introduction;
- agreement;
- formalities;
- conditional contracts;
- terms of contract;
- parties to the contract;
- misrepresentation and fraud;
- duress and undue influence;
- mistake;
- illegality and unenforceability;
- performance;
- discharge and variation;
- *mora* and breach; and
- remedies for breach.

This well-structured logical approach to the layout of the book, allows the reader to quickly understand the general overview of the law of contract, while the subheadings, allows the reader to navigate to a specific area of the law of contract, which they wish to read.

In terms of the contents of the book, there is an excellent balance of texts and extracts from key cases, where the relevant principles have been applied. This edition of the book has been updated to include case law that has been decided in the past five years, and focuses on Supreme Court of Appeal (SCA) and Constitutional Court (CC) decisions, which have either settled or fundamentally changed the law.

There has been new case law on a variety of contract law issues, such as statutory requirements for: Formalities; electronic signatures; interpretation of contracts; agreements to negotiate; simulated contracts; economic duress and undue influence; interim interdicts and specific performance. The new case law in relation to these issues have been incorporated into the new edition, providing an up-to-date analysis of legal principles.

Of significance is an analysis in the book of a clear statement of the proper approach to the interpretation of con-

By Graham Bradfield
Durban: LexisNexis
(2016) 7th edition
Price R 1 200 (incl VAT)
809 pages (soft cover)

tracts, as well as the implications that this approach has with regard to the admissibility of evidence.

The book also tracks the tension between the SCA's and CC's different views on the role of 'good faith' in the law of contracts. The CC has not provided any clarity on what 'good faith' means. While the SCA has attempted to clarify the CC's views on good faith in the case of *Barkhuizen v Napier* 2007 (5) SA 323, the judgment still causes difficulties in High Court decisions. This has resulted in courts accepting different notions of good faith, and in some instances making contracts for the parties based on their notions of good faith. The differing views by the courts, and the confusion arising in recent case law, makes this a riveting read for practising attorneys, interested in the law of contract.

In this edition the sections on prescription and restraint of trade have also been rewritten. The section on prescription clarifies the application of the provisions of the Prescription Act 68 of 1969. Furthermore, the section on restraint of trade reflects more accurately how restraint of trade provisions can be partially enforced without severability.

A further commendable feature of the book is its reference to the impact of the Consumer Protection Act 68 of 2008 (CPA) in the context of unfair contracts. The book provides a brief but detailed account of the key points of reference of a broad application of the CPA to the law of contract in ch 1. It also makes reference specifically to the notions of unconscionable conduct, unfairness and unreasonableness with regard to conduct, contracts and the terms of contracts in ch 8 of the book.

Overall there has also been formatting changes in this edition of the book. This includes the use of section headings and cross referencing to the sections rather

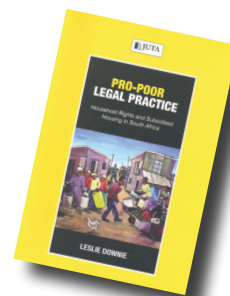


than to the pages, to improve ease of reference.

There is a need for a book that provides a comprehensive analysis of South African contract law for practitioners, and this book definitely satisfies that need.

Diann Bishunath is a candidate attorney at Webber Wentzel in Johannesburg. □

Book announcements



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RISKALERT

JULY 2017 NO 3/2017

IN THIS EDITION

EXPLANATORY NOTES ON:

- The AIIF's 2017 Professional Indemnity (PI) Master Policy 1
- The 2017 Executor Bond Policy 1

THE AIIF'S 2017 POLICIES

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DISCLAIMER

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



**Attorneys Insurance
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund



**Attorneys
Fidelity Fund**
South Africa

Your Champion in the Legal Profession Since 1941

EXPLANATORY NOTES

THE AIIF'S 2017/2018 SCHEME YEAR

The 2017/2018 scheme year commences on 1 July 2017. We have pleasure in bringing you the PI and Executor Policies for the new insurance year. Practitioners are urged to study the two policies carefully in order fully appreciate the terms and conditions of both documents.

The 2017/2018 PI Master Policy

It will be noted that PI Master Policy remains unchanged from that applicable to the 2016/2017 scheme year. However, we need to highlight the following:

- The limits of indemnity and deductibles remain unchanged (Schedules A and B, respectively)
- Insured firms must give immediate written notice to the AIIF of any circumstance, act, error or omission that may give rise to claim (clause 22(a))
- Written notice must be given to the AIIF by no later than one (1) week after receipt by the insured firm of a written demand, summons/counterclaim or application (clause 22(b)). In the event of a failure by the insured firm to comply with the obligation to give notification of a claim in this regard, the AIIF reserves the right not to indemnify the insured firm for costs and ancillary charges incurred prior to or as a result of such late notification
- The completion of the risk management questionnaire and claim form are obligatory (clause 23)
- Insured attorneys must give the AIIF or its appointed agents their cooperation (clauses 25, 27 and 29)
- The exclusion of cybercrime and certain bridging finance related claims (clauses 16(o) and 16(i), respectively)
- The higher excess applicable in



**Thomas Harban,
Editor**

respect of prescribed RAF claims, conveyancing claims as well as claims involving dishonesty (see Schedule B)

There are still have instances where, after receiving notification of a claim, the insured firms give the AIIF late notification (or do not notify at all!) in respect of the set down of matters for hearing or that a notice of bar has been issued against them. The effect of this is that the AIIF is severely prejudiced in the conduct of the insured's defence in the matter. Going forward, the AIIF will enforce its rights in so far as any prejudice is suffered in this regard.

The 2017/2018 Executor Bond policy

The R5 million limit in respect of a bond per estate and the cumulative amount of R20 million in exposure to any one firm remain unchanged (clause 4.1). Practitioners must report to the AIIF where the administration of the estate has been completed and a release issued by the Master of the High Court.

The AIIF will not issue bonds of security to attorneys seeking appointment in any capacity other than as executor (clause 2.1) - bonds of security will thus, for example, not be issued to attorneys acting as agents

EXPLANATORY NOTES continued...

for executors, trustees of insolvent estates or as representatives appointed in terms of section 18(3) of the Administration of Estates Act 66 of 1965.

The following changes have been made to the 2017/2018 Executor Bond Policy:

- the AIIF will have regard to the information supplied in the application and any other relevant information at its disposal in deciding whether or not to issue a bond to the applicant. The decision whether or not to issue a bond remains within the sole discretion of the AIIF (clause 1.2)
- no bonds will be issued, *inter alia*, where the applicant has either been found guilty by a court or a professional regulatory body of an offence or an act involving an element of dishonesty,

or by reason of a dishonest act or breach of a duty, been removed from a position of trust.

Copies of the application form and the resolution (annexures A and B to the policy- referred to in clauses 3.1 and 3.10, respectively) as well as the list of documents to be submitted in support of the application for a bond can be accessed on the website www.aiif.co.za.

The AIIF continues facing serious challenges in respect of the long tail nature of this line of business. The outstanding exposure is currently over R11 billion and some of the bonds making up this total were issued more than 16 years ago. Many practitioners in whose favour bonds have been issued simply do not inform the AIIF when the administration of the estate has been

finalised. A number of measures have been implemented in an attempt to reduce the outstanding liability, which include the dispatch of regular correspondence to those attorneys with long outstanding bonds as well reporting of the conduct of the affected attorneys to the respective law societies. Practitioners in whose favour bonds have been issued are urged to conduct an audit of their practices and to advise the AIIF on the status of the matters concerned, if they have not already done so.

The AIIF team will gladly answer any queries relating to the two policies.

We wish you all a claim free 2017/2018 scheme year!



**Attorneys Insurance
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund

THE FULL 2017/2018 PI MASTER POLICY

PREAMBLE

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

- a) protecting the integrity, esteem, status and assets of the **Insured** and the legal profession;
- b) protecting the public against indemnifiable and provable losses arising out of **Legal Services** provided by the **Insured**, on the basis set out in this policy.

DEFINITIONS:

- I. **Act:** The Attorneys Act 53 of 1979 (as amended or as replaced by the Legal Practice Act 28 of 2014);
- II. **Annual Amount of Cover:** The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims**, **Approved Costs**, and **Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;
- III. **Approved Costs:** Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount a **Claim**;
- IV. **Attorneys Fidelity Fund:** As referred to in Section 25 of the **Act**;
- V. **Bridging Finance:** The provision of short term finance to a party to a **Conveyancing Transaction** before it has been registered in the Deeds Registry;
- VI. **Claim:** A written demand for compensation from the **Insured**, which arises out of the **Insured's** provision of **Legal Services**;
(For the purposes of this definition, a written demand is any

written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an **Insured**);

- VII. **Claimant's Costs:** The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer**;
- VIII. **Conveyancing Transaction:** A transaction which:
 - a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
 - b) involves the registration or cancellation of any mortgage bond or real right over immovable property; and/or
 - c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;
- IX. **Cybercrime:** Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence);
- X. **Defence Costs:** The reasonable costs the **Insurer** (or **Insured** – with the **Insurer's** consent) incurs in investigating and defending a **Claim** against an **Insured**;
- XI. **Dishonest:** Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;
- XII. **Employee:** A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This

includes in-house legal consultants, associates, professional assistants, candidate attorneys, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**.);

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

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

XV. Innocent Principal: Each present or former **Principal** who:

- may be liable for the debts and liabilities of the **Legal Practice**;
- did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;

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

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

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

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

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

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

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

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

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

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

XXVI. Senior Practitioner: A **Practitioner** with no less than 15 years' standing in the legal profession;

XXVII. Trading Debt: A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:

- a refund of any fee or disbursement charged by the **Insured** to a client;
- damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;
- payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client;
- any labour dispute or act of an administrative nature in the **Insured's** practice;

For the purposes of this policy, "disbursement" does not include any amount paid to counsel or an expert.

WHAT COVER IS PROVIDED BY THIS POLICY?

- On the basis set out in this policy, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay compensation to any third party:
 - that arises out of the provision of **Legal Services** by the **Insured**; and
 - where the **Claim** is first made against the **Insured** during the current **Insurance Year**.
- The **Insurer** agrees to indemnify the **Insured** for **Claimants' Costs** and **Defence Costs** on the basis set out in this policy.
- The **Insurer** agrees to indemnify the **Insured** for **Approved Costs** in connection with any **Claim** referred to in clause 1.
- The **Insurer** will not indemnify the **Insured** in the current **Insurance Year**, if the circumstance giving rise to the **Claim** has previously been notified to the **Insurer** by the **Insured** in an earlier **Insurance Year**, on the basis set out in clause 38.

WHO IS INSURED?

- Provided that each **Principal** has, or is obliged to have, a current **Fidelity Fund Certificate** at the time the **Claim** is made, the **Insurer** insures all **Legal Practices** providing **Legal Services**, including:
 - a sole **Practitioner**;
 - a partnership of **Practitioners**;
 - an incorporated **Legal Practice**;
- The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
 - a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** has, or is obliged to have, a current **Fidelity Fund Certificate**;
 - a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had, or was obliged to have, a current **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
 - the estates or legal representatives of the people referred to in clauses 6(a) 6(b) and 6(c).

AMOUNT OF COVER

- The **Annual Amount of Cover**, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**.
- Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of compensation (capital and interest) as well as **Claimant's Costs** and **Approved Costs**.
- Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.

INSURED'S EXCESS PAYMENT

- The **Insured** must pay the **Excess** in respect of each **Claim**, directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable.
Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Excess** and to the extent that one or more **Claims** arise from the same circumstance, act, error or omission the **Insured** must pay the **Excess** in respect of each such **Claim**;
- The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**, and the type of matter giving rise to the **Claim**, as set out in Schedule B.
- The **Excess** set out in column A of Schedule B applies:

- a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used and complied with by the **Insured**, by timeous lodgement and service of summons in accordance with the reminders sent by **Prescription Alert**;
 - b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
- 13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
 - 14. No **Excess** applies to **Approved costs** or **Defence costs**.
 - 15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

WHAT IS EXCLUDED FROM COVER

- 16. This policy does not cover any liability for compensation:
 - a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**;
 - b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in Section 26 of the **Act**;
 - c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the **Insured**, covering a loss arising out of the normal course and conduct of the business. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cyber-crime insurance policies;
 - d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;
 - e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in:
 - (i) the Banks Act 94 of 1990;
 - (ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
 - (iii) the Agricultural Credit Act 28 of 1996 as amended or replaced;
 - (iv) any law administered by the Financial Services Board and/or the South African Reserve Bank and any regulations issued thereunder;
 - (v) the Medical Schemes Act 131 of 1998 as amended or replaced;
 - f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 78(2A) of the **Act**, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;
This exclusion does not apply to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;
 - g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*;
 - h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;
 - i) directly or indirectly arising from, or in connection with or as a consequence of the provision of **Bridging**

Finance in respect of a **Conveyancing Transaction**. This exclusion does not apply where **Bridging Finance** has been provided for the payment of:

- (i) transfer duty and costs;
 - (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred;
 - (iii) levies payable to the body corporate or homeowners association relating to the immovable property which is to be transferred;
- j) arising from the **Insured's** having given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;
 - k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;
 - l) arising where the **Insured** acts or acted as a liquidator or trustee in an insolvent estate, except in cases where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**;
 - m) arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence or about to come into existence, at the time of the receipt or payment and in respect of which the **Insured** has received a mandate;
 - n) arising out of a defamation **Claim** brought by one **Insured** against another;
 - o) arising out of **Cybercrime**;
 - p) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons* has/have a material interest and/or hold/s a position of influence or control**.
- * as defined in section 2(1) of the Companies Act 71 of 2008
- ** as defined in section 2(2) of the Companies Act 71 of 2008
- For the purposes of this paragraph, "material interest" means an interest of at least ten (10) percent in the entity;
- q) arising out of or in connection with a **Claim** resulting from:
 - (i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;
 - (ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;
 - (iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss;
 For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;
 - r) arising out of or in connection with any **Claim** resulting from:
 - (i) ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;
 - (ii) nuclear material, nuclear fission or fusion, nuclear radiation;
 - (iii) nuclear explosives or any nuclear weapon;
 - (iv) nuclear waste in whatever form; regardless of

- any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;
- s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity.

FRAUDULENT APPLICATIONS FOR INDEMNITY

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

CLAIMS ARISING OUT OF DISHONESTY OR FRAUD

18. Any **Insured** will not be indemnified for a **Claim** that arises:
- directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by that **Insured**;
 - directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission. Subject to clauses 19 and 20 below, this exclusion does not apply to an **Innocent Principal**.
19. In the event of a **Claim** to which clause 18 applies, the **Insurer** will have the discretion not to make any payment, before the **Innocent Principal** takes all reasonable action to:
- institute criminal proceedings against the alleged **Dishonest** party and present proof thereof to the **Insurer**; and/or
 - sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives; Any benefits due to the alleged **Dishonest** party held by the **Legal Practice**, must, to the extent allowable by law, be deducted from the **Legal Practice's** loss.
20. Where the **Dishonest** conduct includes:
- the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or
 - the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false; The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.
21. If the **Insurer** makes a payment of any nature under the policy in connection with a **Claim** and it later emerges that it wholly or partly arose from a **Dishonest**, fraudulent or other criminal act or omission of the **Insured**, the **Insurer** will have the right to recover full repayment from that **Insured** and any party knowingly connected with that **Dishonest**, fraudulent or criminal act or omission.

THE INSURED'S RIGHTS AND DUTIES

22. The **Insured** must;
- give immediate written notice to the **Insurer** of any circumstance, act, error or omission that may give rise to a **Claim**; and
 - notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification.
23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management**

Questionnaire have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.

24. The **Insured** agrees not to, without the **Insurer's** prior written consent:
- admit or deny liability for a **Claim**;
 - settle a **Claim**;
 - incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**; failing which, the **Insurer** will be entitled to reject the **Claim**, but will have sole discretion to agree to provide indemnity, wholly or partly.
25. The **Insured** agrees to give the **Insurer** and any of its appointed agents all information, documents, assistance and cooperation that may be reasonably required, at the **Insured's** own expense.
26. The **Insured** also gives the **Insurer** or its appointed agents the right of reasonable access to the **Insured's** premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any **Claim** where the **Insurer** believes such review or inspection is necessary.
27. Notwithstanding anything else contained in this policy, should the **Insured** fail or refuse to provide assistance or cooperation in terms of this policy, to the **Insurer** or its appointed agents and remain in breach for a period of ten (10) working days after receipt of written notice to remedy such breach (from the **Insurer** or its appointed agents) the **Insurer** has the right to:
- withdraw indemnity; and/or
 - report the **Insured's** conduct to the regulator; and/or
 - recover all payments and expenses incurred by it.
- For the purposes of this paragraph, written notice will be sent to the address last provided to the **Insurer** by the **Insured** and will be deemed to have been received five (5) working days after electronic transmission or posting by registered mail.
28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.
29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.
30. Written notice of any new **Claim** must be given to:
- Attorneys Insurance Indemnity Fund NPC**
1256 Heuwel Avenue|Centurion|0127
PO Box 12189|Die Hoewes|0163
Docex 24 | Centurion
Email: claims@aiif.co.za
Tel:+27(0)12 622 3900
- ## THE INSURER'S RIGHTS AND DUTIES
31. The **Insured** agrees that:
- the **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;
 - the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**; The exercise of the **Insurer's** discretion in terms of a) will not be unreasonable.

RISKALERT

32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:
- the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured**; and
 - the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).
33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.
34. Where the **Insurer** indemnifies the **Insured** in relation to only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.
35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to report the **Insured's** conduct to the regulator and to recover any amounts that it may have incurred as a result of the **Insured's** conduct.
36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**;
37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
- the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount Of Cover** provided by this policy;
 - the **Insurer** will then be reimbursed for the amount of its liability under this policy in respect of such **Claim**;
 - any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.
38. If the **Insured** gives notice during an **Insurance Year**, of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a **Claim** or **Claims**, then any **Claim** or **Claims** in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the **Insured**, will for the purposes of this policy be considered to fall within one **Insurance Year**, being the **Insurance Year** of the first notice.
39. This policy does not give third parties any rights against the **Insurer**.

HOW THE PARTIES WILL RESOLVE DISPUTES

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:
- written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at disputes@aiif.co.za or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
 - should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of

the submission referred to in a) then the parties must agree on an independent **Senior Practitioner**, to which the dispute can be referred for a determination. Failing an agreement, the choice of such **Senior Practitioner** must be referred to the President of the Law Society (or his/her successor in title) having jurisdiction over the **Insured**;

- the parties must make written submissions which will be referred for determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter and the costs of the **Senior Practitioner** will be borne by the unsuccessful party;
- the unsuccessful party must notify the successful party in writing, within thirty (30) days of the determination by the **Senior Practitioner**, if the determination is not accepted;

The procedures in a) b) c) and d) above must be completed before any legal action is undertaken by the parties.

Complaints may be lodged with the:

Short Term Insurance Ombudsman

Tel: 011 726-8900

Fax: 011 726-5501

Share call: 0860 726 980

E-mail info@osti.co.za

Web: <http://osti.co.za>

Physical Address: Sunnyside Office Park, 5th Floor, Building D, 32 Princess of Wales, Terrace, Parktown

Postal Address: PO Box 32334, Braamfontein, 2017

SCHEDULE A

Period of Insurance: 1st July 2017 to 30th June 2018 (both days inclusive)

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

SCHEDULE B

Period of Insurance: 1st July 2017 to 30th June 2018 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R321 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

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

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



**Attorneys Insurance
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund

THE 2017 EXECUTOR BOND POLICY

1. GENERAL PROVISIONS

- 1.1 The AIIF will provide a bond only to the executor of a deceased estate, the administration of which is subject to the provisions of South African Law, and who is an attorney practising in South Africa with a valid Fidelity Fund Certificate.
- 1.2 The AIIF will, in its sole discretion, assess the validity and risk associated with the information supplied in the application, and any other relevant information at its disposal, in deciding whether or not to issue a bond to an applicant.
 - 1.2.1 If the applicant disputes the AIIF's rejection of the application, such dispute will be dealt with in the following order:
 - 1.2.1.1 Written submissions by the applicant should be referred to the AIIF Executive Committee at disputes@aiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the communication from the AIIF rejecting the application;
 - 1.2.1.2 Should the dispute not have been resolved within thirty (30) days, then such dispute will be referred to the Sub-Committee appointed by the AIIF's board of directors for a final determination.

2. EXCLUSIONS

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

- 2.1 the applicant would be appointed in any capacity other than as the executor;
- 2.2 the day to day administration of the estate would not be executed by the applicant, partners or co-directors or members of staff under the applicant's, partners or co-directors' supervision, within the applicant's offices;
- 2.3 the administration of the estate would be executed by any entity other than the legal firm of which the applicant is part;
- 2.4 the co-executor is not a practising attorney;
- 2.5 any claim involving dishonesty has been made against the applicant or any member of his or her firm. We reserve the right not to issue any bonds to the applicant or any firm in which the applicant is/ was a partner or director or member of staff at the time of the alleged dishonesty or thereafter;
- 2.6 the applicant or his or her firm has not provided the AIIF with all updates or the required information in respect of previous bonds, or complied with the Terms and Conditions;
- 2.7 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;
- 2.8 the applicant is an unrehabilitated insolvent, suspended or interdicted from practice, or where proceedings have commenced to remove him or her from the roll of practising attorneys;
- 2.9 the applicant has either been found guilty by a court or a professional regulatory body of an offence or an act involving an element of dishonesty, or by reason of a dishonest act or breach of a duty, been removed from a position of trust.

3. TERMS AND CONDITIONS

- 3.1 An applicant must complete the prescribed application

form, and provide the AIIF with all the relevant supporting documents. A copy of the application form is attached as annexure "A".

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

- 3.3 The applicant undertakes:
 - 3.3.1 to finalise the administration of the estate for which the bond is requested, expeditiously in the prevailing circumstances;
 - 3.3.2 to provide the AIIF with information and access to records and correspondence relating to each estate for which the AIIF has issued a bond, as if the AIIF were in a similar position to the Master of the High Court or any beneficiary. In this regard:
 - 3.3.2.1 a copy of the letter of executorship must be provided to the AIIF within 30 days of being granted by the Master;
 - 3.3.2.2 a separate estate account must be opened as required in terms of Section 28 of the Administration of Estates Act 66 of 1965;
 - 3.3.2.3 copies of the provisional and final liquidation and distribution accounts must be provided to the AIIF, within six (6) months from the granting of the letter of executorship. Alternatively proof of an application for and the granting of an extension or condonation must be provided.
 - 3.3.2.4 if applicable, within 30 days of the final liquidation and distribution account having been approved, the executor must formally apply to the Master of the High Court for a reduction of the value of the bond and provide proof of such application to the AIIF within 30 days of doing so.
 - 3.3.2.5 the Master's filing slip or release must be provided to the AIIF within 30 days of issue by the Master.
 - 3.3.3 to ensure that all insurable assets in the estate are sufficiently and appropriately insured, within 24 hours of receipt of the letters of executorship, and to provide the AIIF with proof of such insurance within 30 days of such appointment. The insurance must remain in place for the duration of the administration of the estate, failing which the applicant and his firm will be personally liable for any loss or damage that may result from the absence of such insurance.
 - 3.3.4 to keep the AIIF fully informed about the progress of the administration of the estate - in the same way as he or she would inform the Master of the High Court or any beneficiary, of the progress of the administration;
 - 3.3.5 to inform the AIIF within 30 days of becoming aware of a change in his or her status as a practitioner or of any application for removal or suspension as attorney or executor or any similar office.

- 3.4 Once a bond has been issued, the applicant will not seek to

RISKALERT

reduce its value, unless the Master of the High Court is satisfied that the reduced security will sufficiently indemnify the beneficiaries and has given written confirmation of such reduction. A copy of such written confirmation must be provided to the AIIF within thirty (30) days of it being provided.

- 3.5 The applicant consents to the AIIF making enquiries about his or her credit record with any credit reference agency and any other party, for the purposes of risk management.
- 3.6 The applicant consents to the relevant law society or regulator giving the AIIF all information in respect of the applicant's disciplinary record and status of good standing or otherwise.
- 3.7 The applicant undertakes to give the AIIF all information, documents, assistance and co-operation that may be reasonably required, at the applicant's own expense. If the applicant fails or refuses to provide assistance or co-operation to the AIIF, and remains in breach for a period of thirty (30) days after receipt of written notice from the AIIF to remedy such breach, the AIIF reserves the right to :
- 3.7.1 report the applicant to the law society or regulator having jurisdiction over the executor; and/or;
- 3.7.2 request the Master to remove him or her as the executor.
- 3.8. The applicant accepts personal liability for all and any acts and/or omissions, including negligence, misappropriation or maladministration committed or incurred whether personally or by any agent, consultant, employee or representative appointed or used by the applicant in the administration of an estate.
- 3.9 In the event of the AIIF's having made a payment in respect of a claim arising out of a fraudulent act or misappropriation or maladministration, it reserves the right to take action to:
- 3.9.1 institute civil and/or criminal proceedings against the applicant; and/or
- 3.9.2 report the applicant to the law society or regulator having jurisdiction over the executor.
- 3.10 The other partners or directors of the firm must sign a resolution acknowledging and agreeing to the provisions set out in that resolution. A copy of such resolution is attached as annexure "B".
- 3.11 If there is any dispute between the AIIF and the executor as to the validity of a claim by the Master of the High Court, then such dispute will be dealt with in the following order:
- 3.11.1 written submissions by the executor should be referred to the AIIF's internal dispute team at dispute@aiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the written communication from the AIIF, which has given rise to the dispute;
- 3.11.2 should the dispute not have been resolved within thirty (30) days from the date of receipt by the AIIF of the submission referred to in 3.11.1, then the parties must agree on an independent senior estates practitioner with no less than 15 years standing in the legal profession, to which the dispute can be referred for a determination. Failing an agreement, the choice of such senior estates practitioner will be referred to the president of the law society (or his/her successor in title) having jurisdiction over the executor.
- 3.11.3 the parties must make written submissions which will be referred for a determination to the senior estates practitioner referred to in 3.11.2. The costs incurred in so referring the matter will be borne by the unsuccessful party;
- 3.12 A copy of the executor's current Fidelity Fund Certificate must be submitted annually within (thirty) 30 days of issue, but no later than the end of February each year.

4. LIMITS

- 4.1 The value of any bond is limited to R5 million per estate.

The cumulative total of all bonds issued to any one firm will not exceed R20 million at any given time.

- 4.2 If a practitioner is part of, or holds himself or herself out to be part of, more than one firm simultaneously, such practitioner and all the entities associated with that practitioner will hold a maximum cumulative total of R20 million in bonds at any given time.
- 4.3 In the case of co-executorship, each executor needs to meet the criteria as specified in this document. The limits will apply as mentioned in 4.1 and 4.2 above as if there were no co-executorship.
- ## 5. SOLE RECORD OF THE AGREEMENT
- 5.1 This document constitutes the sole record of the agreement between the AIIF, the firm and the applicant in relation to the bond to which this document applies.
- 5.2 This document supersedes and replaces all prior commitments, undertakings or representations, (whether oral or written) between the parties in respect of this application.
- 5.3 No addition to, variation, novation or agreed cancellation of any provision of this document shall be binding upon the AIIF unless reduced to writing and signed by or on behalf of both parties, by authorised persons.
- 5.4 If there are any material changes to the information contained in this application, the applicant undertakes to inform the AIIF in writing within fifteen (15) days of such change.

6. DOMICILIUM

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

- 6.1 **AIIF: 1256 Heuwel Avenue
Centurion
0157
Email: courtbonds@aiif.co.za**
- 6.2 **The Applicant: The address provided in the application form**
- 6.3 Notices or legal processes may be delivered by hand or sent by electronic mail to the above addresses. The date of receipt by the addressee will be the date of hand delivery or transmission.
- 6.4 Either party may change its *domicilium* by giving the other party written notice of such change.

7. DECLARATION

If the bond is granted, I agree:

- (i) to fully comply with the terms and conditions contained in clause 3;
- (ii) that all estate funds will be invested strictly in terms of the Administration of Estates Act 66 of 1965, the Attorneys Act 53 of 1979 or the Legal Practice Act 28 of 2014 and the rules and regulations as promulgated in respect thereof;
- (iii) to furnish the AIIF with the annual audit certificates completed by my or our external auditors, verifying the continued existence of the property or funds under my control as executor within thirty (30) days of such certificate being issued;

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

DATED AT ON THIS DAY OF 20.....

WITNESS (Full names & signature)

APPLICANT (Full names & signature)

WITNESS (Full names & signature)