

SIMULATED AGREEMENTS: DRESSING UP TRANSACTIONS

*Providing **legal aid** to indigent
mental health care users*

**Legal professional
privilege
and Internet
hacking**

**Managing
reputational
risk**

*Municipal account –
landlord **beware***

**Driver's licence: A
barrier preventing
entry into the
attorneys' profession**

**What does 'fair wear and tear'
mean in the context of a
lease agreement?**

**Are you ready to start
your own law firm?**

**New
mediation
centre
launched**

**ProBono.Org acknowledges legal
practitioners who do extra for the less fortunate**





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20 Simulated agreements: Dressing up transactions

The application of the National Credit Act 34 of 2005 (the NCA) can have onerous consequences for money lenders. It requires strict compliance with its provisions relating to registration of credit providers, reckless lending and notice. This has resulted in a number of money-lenders dressing up their transactions as something other than credit agreements, in order to circumvent the provisions of the NCA. Although it is trite that a court will have regard to the substance of an agreement, rather than its form, it is not always easy to determine when an agreement is such a simulated transaction. In this article, **Chantelle Humphries and Don Mahon** discuss simulated agreements and write that the test to determine simulation is two-fold.



22 Providing legal aid to indigent mental health care users

Section 15 of the Mental Health Care Act 17 of 2002 (MHCA) provides that a mental health care user is entitled to representation, including, a legal representative. Section 15 further provides that a user is entitled to the representation when submitting an application, lodging an appeal, or appearing in court or at the mental health review board. **Moffat Ndou** examines the provisions of s 15 of the MHCA in order to determine the content of the right of an indigent mental health care user, to legal aid at the expense of the state.



24 What does 'fair wear and tear' mean in the context of a lease agreement?

The phrase 'fair wear and tear excepted' is commonly used in lease agreements. It is, therefore, essential to understand what the phrase really means. In order to understand the meaning of 'fair wear and tear', it is helpful to distinguish 'fair wear and tear' from 'damage to the leased premises'. 'Fair wear and tear' refers to the deterioration in the condition of the leased premises, caused by normal, everyday usage during the period of the lease. This accepted norm will differ depending on the type of business the tenant conducts at the leased premises. **Madeleine Truter** discusses the court tests for 'fair wear and tear' and gives examples that would require the tenant to make good the situation, or forfeit a portion of the deposit, in order to return the leased premises to its original state.

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

De Rebus editorial staff use online products from:

• **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and

• **Juta.** Go to: www.jutalaw.co.za.

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

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

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

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

ATTORNEYS' MAILING LIST INQUIRIES: Gail Mason

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

SUBSCRIPTIONS:

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

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

Cover price: R 102 each

Subscribers from African Postal Union countries (surface mail):

R 1 538 (VAT excl)

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

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

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Are you a hack away from leaking clients' confidential information?

The recent biggest data breach in South Africa (SA) highlighted the importance of cyber security. Hackers/crackers are always on the lookout for any vulnerability in network systems and attorneys are not exempt from this threat particularly because they deal with confidential information that is subject to attorney-client privilege.

The data dump amounting to about 27GB contained a range of sensitive information on 30 million people's identity numbers, age, race group, marital status, income, company directorships, employment history, occupation, previous address, employer etcetera.

Being hacked is no longer something that just happens in movies and it is more prevalent as there are actually five different types of hackers that upload encryption ransomware on companies' network systems on a daily basis. In our Letters to the Editor section, attorney Jana Doussy writes:

'Unfortunately the current laws of SA, which include common law, the Protection of Personal Information Act 4 of 2013 and the Electronic Communications and Transactions Act 25 of 2002 do not give us the necessary tools to effectively act against cybercrimes at the moment.

We are currently awaiting the Cybercrimes and Cyber Security Bill B6 of 2017 (the Cyber Bill) to be passed, which will certainly bring some welcome changes in the country, and enable SA law enforcement to utilise the special procedures necessary to fight our own cyberwars. The Cyber Bill will create new offences and have many consequences enabling better policed cybercrimes' (see p 5).

In the Practice Note section, another article deals with the issue of legal professional privilege and hacking. Academic Daniël Eloff writes:

'Just as there is a reasonable duty placed on attorneys and law firms to protect physical documents from prying eyes, the same duty exists with regards to information that is stored digitally, regardless of whether or not the data is stored on a hard drive or through the use of cloud-based data storage services. Data breaches could include hacking of e-mails, computers or trojan horse programmes that allow unauthorised backdoor access to computers. These data breaches could threaten confidentiality or legal professional privilege if the information that is leaked is subject thereto.

Cloud-based data storage, is in most instances, effective in ensuring adequate protection of information (LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (www.lssa.org.za, accessed 27-9-2017)). When making use of cloud-based data storage services, attorneys and law firms must enter into a contract with the third party service providers, which obliges the third party to safeguard digital information. As attorneys and law firms also often have personal details of clients on record, law firms have to ensure that they are compliant with the Protection of Personal Information Act' (see p 17).

To mitigate the risk of being hacked attorneys need to ensure that they are up to date with developing technology and global challenges, which include cyber security threats. If the unthinkable happens and you are hacked, see p 18 for what to do.



Mapula Sedutla - Editor

Would you like to write for *De Rebus*?

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

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

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LETTERS

TO THE EDITOR

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

Professional indemnity

I noticed with interest that in the *Risk Alert Bulletin* (No.4/2017) (RAB) (see also www.aiif.co.za, accessed 14-9-2017), there is mention of professional indemnity claims and the legitimacy of some.

I have had the experience of more than 50 years that when an attorney is struck from the roll, former clients (some) are apt to submit claims, which are at times proven to be false, or the attorney had already accounted to that client. The client (at times) claims the full amount paid by the Road Accident Fund but the client fails to disclose the payments made by the attorney and, if these claims are proven to be false, no provision is made for the taxation of an attorney and client bill of costs.

In many instances the 'removed' attorney is unaware of these claims and the Attorneys Fidelity Fund (the Fund) expends money, which are not in truth owing to the client, or a greatly reduced amount only remains due.

In many instances, the attorney never received any prior notice of such claims and I would suggest that it be made obligatory that the 'removed' attorney be advised immediately when any claim is received so that he or she can assist the

curator in determining if such a claim is genuine or not and that the attorney be given at least 30 days to respond to any such claim.

This can bring about an immense saving to the Fund and will ensure that the claim is correctly dealt with and not merely on the unilateral version of the claimant.

KM Röntgen Snr, attorney,
Pretoria

Response to letter from Mr Röntgen

The letter sent in response to the *Risk Alert Bulletin* (No.4/2017) refers.

A distinction must be drawn between claims dealt with by the Attorneys Insurance Indemnity Fund NPC (the AIIF) and those dealt with by the Attorneys Fidelity Fund (the AFF). This distinction is important as the claims dealt with by each of these organisations are different and as will be the party submitting the application for indemnity to the respective organisation. The AIIF provides professional indemnity (PI) insurance cover to practicing attorneys, while the AFF refunds claimants who have suffered loss-

es as a result of the misappropriation of trust funds by attorneys or their staff.

The AIIF deals with PI claims notified to the company by insured attorneys. The third party (usually a former client) will have brought the claim against the attorney who, as insured, will then have notified the AIIF (as insurer) thereof and applied for indemnity. The AIIF policy does not give any rights to a third party to claim directly from the company (clause 39). The insured attorney is obliged to cooperate with and assist the AIIF in all aspects of the claim. Even where the claim is brought against an attorney who has been struck from the roll, left practice or is deceased, the AIIF will, subject to its policy conditions, indemnify the attorney if the cause of action arose when the practitioner was still on the practicing roll and thus either in possession of a valid Fidelity Fund Certificate or obliged to apply for such a certificate. All aspects of the claim (merits and quantum) are thoroughly investigated by the AIIF team, including the liability (if any) and the extent thereof (the quantum), by the attorney to the third party. Any funds previously received by the client will be deducted from any settlement/payment made to the claimant. A plaintiff would not have suffered dam-



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ages for funds previously received. The AIIF team will be in constant communication with the insured attorney throughout the lifecycle of the claim (unless the attorney is deceased, in which case the communication will be with the executor). All the insured attorney's records in respect of the matter will also be taken into account in the investigation of the claim. Attorneys (whether practicing or not), the curators of their practices and their executors (in the event of death) should thus report all actual or potential claims to the AIIF as soon as they become aware thereof and also provide the AIIF with a full background report and their full file of papers.

The AFF, on the other hand, deals with claims arising out of the misappropriation of trust funds (see ss 26 and 47 of the Attorneys Act 53 of 1979). The AFF is a fund of last resort and the claimant will have to exhaust all their legal remedies against the practitioner before instituting a claim against the AFF. Thus, any funds previously received by the claimant, and accounted for by the attorney, will also be subtracted before any damages are paid to the claimant (in the event that the AFF is liable).

We thus wish to assure the writer of the letter that processes are in place to ensure that claimants do not receive 'double compensation'.

Thomas Harban, General Manager of the Attorneys Insurance Indemnity Fund NPC, Centurion

Beware of pitfalls in our own cyberwars

There are different types of hackers/crackers:

- Script kiddies, these are hackers that have limited or no training and do not really understand what they are doing.
- White hat hackers, also known as ethical hackers.
- Gray-hat hackers, also known as hack-

ers who are between good and bad.

- Black hats, the bad guys.
- Suicide hackers, they are hackers proving a point.
- Hacktivist, a hacker promoting or pushing a political agenda.

Just recently the Department of Basic Education's website was hacked by an infamous group called Team System DZ. I spoke to a 'white hat' regarding this hack and he said he was not surprised when this happened, as South Africa (SA) is one of the most vulnerable countries to cybercrime in the world.

Hackers are uploading their encryption ransomware on companies' systems on a daily basis and by taking control of their systems they take them hostage, you might be familiar with the Petya or WannaCry attacks. Unfortunately the current laws of SA, which include common law, the Protection of Personal Information Act 4 of 2013 and the Electronic Communications and Transactions Act 25 of 2002 do not give us the necessary tools to effectively act against cybercrimes at the moment.

We are currently awaiting the Cybercrimes and Cyber Security Bill B6 of 2017 (the Cyber Bill) to be passed, which will certainly bring some welcome changes in the country, and enable SA law enforcement to utilise the special procedures necessary to fight our own cyberwars. The Cyber Bill will create new offences and have many consequences enabling better policed cybercrimes.

With cybercrimes forever on the rise worldwide, we, as legal practitioners and our client's need to – in the meantime and after the Cyber Bill has been passed – make sure that our intellectual property is properly protected. Luckily there are white hats to hire who can verify the integrity of our computer systems.

When contracting with a white hat to check that systems are properly protected against hackers, your clients need to protect their intellectual property even from the white hats, and you need to

keep the following in mind when drafting a white hat agreement, namely –

- reporting security vulnerabilities, which include timelines;
- proper non-disclosure clauses are important;
- permission to the ethical hacker to penetrate the system should be given; and
- confidentiality and privacy is key.

There are also a few things that legal practitioners should understand, namely, what 'penetration' or 'intrusion' testing is. This is ethical hacking, where a system is tested by an ethical hacker with the permission of the system owner.

In the world where accessing company software through ransomware is as easy as one of your employees clicking on a 'phishing e-mail', it is, therefore, important to make sure that you and your clients protect your intellectual property by means of contracting a white hat.

If you, as a legal practitioner, are acting for a client or even a white hat you should always make sure that they have a proper agreement in hand to protect themselves.

Jana Doussy, attorney, Pretoria

- See p 17. – **Editor**

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

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

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ProBono.Org acknowledges legal practitioners who do extra for the less fortunate

Chairperson of ProBono.Org, Mohamed Rander, said the intention of the organisation is to acknowledge legal practitioners who have done extra to help the less fortunate and to acknowledge the work that makes a legal practitioner stand out from the rest. Mr Rander was speaking at the fourth annual ProBono.Org awards ceremony held at Exclusive Books in Hyde Park in September.

Mr Rander said the work that legal practitioners do has given life to ProBono.Org and to the legal profession. He pointed out that the *pro bono* work that legal practitioners do is tremendous and needed to be acknowledged. He said legal practitioners who do *pro bono* work through the organisation, do it voluntarily and more often than not, they go beyond what is required of them, whether in terms of rules or laws. 'People give of themselves, much more than they should normally do,' Mr Rander said.

Mr Rander pointed out that whether legal practitioners who do *pro bono* work, come from a big law firm or are just individuals, what is important is that they all do *pro bono* work, be it a case they assisted on at the Constitutional Court or if they drafted a Will. He said *pro bono* work is important for every single person involved, including the person who the legal practitioner has done work for. However, he noted that more work still needs to be done and *pro bono* services will be needed even more as inequalities in the country grow and become more pronounced.

Mr Rander said that he hopes when the time for more *pro bono* services of legal practitioners is needed, legal practitioners will be able to meet the call. He noted that what is clear from the *pro*



Former Finance Minister, Pravin Gordhan, delivering the keynote address at the fourth annual ProBono.Org Awards Ceremony held on 7 September in Johannesburg.

bono work legal practitioners do is that it contributes towards those people who do not have access to justice.

Former Minister of Finance, Pravin Gordhan, said it was important that organisations such as ProBono.Org continue being built. He said society must not leave it to chance, as many in the country do and say 'we have a constitutional democracy or Bill of Rights.' Mr Gordhan pointed out that as much as South Africa (SA) has many institutions, those institutions do not thrive on their own, and he added it takes good leaders, good people with the right kind of social values, ethics and professional integrity, to make sure that the institution moves in the right direction.

Mr Gordhan pointed out that people like him and other democratic activists have gotten themselves into difficult

situations for the wrong reasons. However, Mr Gordhan noted that there are legal practitioners who are courageous enough and who are willing to offer their services, even when there is no substantial bank balance to support the kind of fees that might be required. Mr Gordhan said that a new generation of democratic activists are people orientated, whose first concern is whether somebody has a Will, or access to property that is rightfully theirs or whether somebody has access to be defended against blatant injustice.

Mr Gordhan praised the legal practitioners who do *pro bono* work. He said



Chairperson of ProBono.Org, Mohamed Rander, speaking at the fourth annual ProBono.Org Awards Ceremony.

what they carry with them was the spirit of activism, the spirit of sharing, the spirit of human solidarity and the spirit of serving the public. He pointed out that it was important for people to match the times that they live in and the kind of duties they should perform. Mr Gordhan acknowledged the presence of young legal practitioners who want to see their careers develop. However, he said careers are not just developed through a normal pathway in the profession, but through the balanced development of professionals who do community work.

Mr Gordhan said that *pro bono* work gives opportunities to legal practitioners to balance the attractiveness of quick money, the attractiveness of shortcuts and the attractiveness of doing something that would enrich one to a particular constituent versus taking a harder road and taking a more principal road, that in fact gives joy and satisfaction. He noted that seeing there is joy for ordinary people who are the majority of SA,



Recipients of the ProBono.Org awards with the National Director of the ProBono.Org, Erica Emdon (standing far left) and former Minister of Finance, Pravin Gordhan (seated third from left in the front row) and the chairperson of the ProBono.Org, Mohamed Rander (standing back row far right).

when they get the little that they can from legal practitioners.

Winners were announced in the following categories –

- **Refugee law:** Cliffe Dekker Hofmeyr.
- **Housing law:** Sonkozi Ngalonkulu Inc.
- **Estate law:** Mojela Hlazo Attorneys.
- **Community Advice Office:** Ntsu Community Advice Office.
- **Family law:** Riva Lange Attorneys.
- **Labour law:** Werksmans.
- **Wills:** Norton Rose Fulbright.
- **Police brutality:** Hogan Lovells.
- **Child law:** Ramsden Small Attorneys.
- **Advocate award:** Thulamela Group.
- **Large law firm:** Fasken Martineau.
- **Medium law firm:** Schindlers.
- **Small law firm:** Boela van der Merwe.
- **Law student at a University Law Clinic:** Lutho Klass of the University of Fort Hare Law Clinic.

• **Law Society of the Northern Province Award:** Serialong Lebasa.

• **Legal Aid South Africa Award:** Khanyisa Ngobeni.

• **Special mentions –**

- Reg Joubert;
- Susan Harris;
- Klopper Jonker Attorneys;
- Patrick Bracher – Norton Rose Fulbright;
- Hoossen Sader;
- Clarks Attorneys;
- Alfred Wolpe;
- Fatima Laher – Bowmans;
- Baker and McKenzie Attorneys; and
- Robin Twaddle.

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Slow progress to Legal Practice Act dispensation

The National Forum on the Legal Profession (NF) met on Saturday, 14 October for its tenth plenary meeting. It resolved to deliver its recommendations to Justice Minister, Michael Masutha, before the end of October on the following issues, in terms of s 97(1)(a) of the Legal Practice Act 28 of 2014 (LPA) –

- election of councillors for the Legal Practice Council (LPC);
- areas of jurisdiction of provincial councils (PCs);
- the composition, powers and functions of PCs;
- right of appearance of candidate legal practitioners;
- mechanisms to wind-up the NF; and
- the costing and funding of the LPC.

These aspects have been agreed and finalised.

The NF will hand the minister four sets of recommendations relating to practical vocational training (PVT): One by the Law Society of South Africa (LSSA) on behalf of the attorneys' profession, a second by the General Council of the Bar and Advocates for Transformation, a third by the National Forum of Advocates, and a fourth, which is a compromise proposal. In the meantime the NF stakeholders have undertaken to consider the compromise proposal, and if substantial consensus was reached, they would inform the minister of the agreement.

Within six months of receiving the above recommendations, as well as the draft regulations based thereon, the minister must take these to Parliament. If he wishes to amend the draft regulations, he must consult the NF.

The NF also has to make some of the

rules of the future LPC in terms of s 109(2) by publishing them in the *Government Gazette* by 31 October, for comment by interested parties. The rules relate to examinations or assessments for admission, conveyancing and notarial practice; PVT, procedures for disciplinary bodies and issues relating to complaints against legal practitioners. These have been finalised by the NF, except for the aspects relating to PVT.

One of the outstanding issues is the transfer of staff and assets from the provincial law societies to the LPC. The law societies wish to retain a portion of their cash assets to transfer to the LSSA or its successor in title in order to fund activities to represent and support legal practitioners. It is envisaged that the LPC will perform purely regulatory functions.

In the meantime, approval by Parliament of the Legal Practice Amendment Bill was awaited at the time of writing. The Bill will amend the implementation timeframes in the Act to allow the four statutory law societies to continue to regulate the attorneys' profession for a six-month period while the LPC comes into operation, but without jurisdiction. This will allow for a proper and orderly handover. The Justice Portfolio Committee was scheduled to meet with the NF on the Amendment Bill on 24 October.

• The latest developments on the Legal Practice Act can be found on the LSSA website at www.LSSA.org.za under the 'Legal Practice Act' tab.

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

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Legal practitioners taught risk management at SAWLA's exhibition and seminar

The South African Women in Law Association (SAWLA) in partnership with Nedbank, Old Mutual and the Attorneys Development Fund held an exhibition and seminar for female legal practitioners in September. Executor Bonds Executive at the Attorneys Insurance Indemnity Fund NPC (AIIF), Zodwa Mbatha said the AIIF issues security bonds to practising legal practitioners with a valid Fidelity Fund Certificate, who are appointed as executors, in a deceased estate. She said the legal practitioner has to administer the estate in terms of South African law and within the timelines that the Master of the High Court requires them to.

Ms Mbatha pointed out that the AIIF mostly receive claims of estate theft. She added that this was as a result of executors failing to supervise employees who deal with estates in their offices, which lead to employees stealing from the estates. She pointed out that if the Master of the High Court approached the AIIF for a claim on the misappropriation of acts on estates, this would result in further consequences for the legal practitioner. The AIIF will meet the liability because we have stood surety for that, but and that is done, we will institute criminal proceedings and charges will be brought against the legal practitioner and we will report the legal practitioner to the provincial law society, Ms Mbatha said.

Ms Mbatha added that if the AIIF institutes a recovery action against a legal



Executor Bonds Executive at the Attorneys Insurance Indemnity Fund NPC, Zodwa Mbatha, spoke at an exhibition by the South African Women in Law Association (SAWLA) in partnership with Nedbank, Old Mutual and the Attorneys Fidelity Fund in September.

practitioner, as the executor, that will result in the legal practitioner not being able to get any further bonds from the AIIF. Ms Mbatha said that legal practitioners have to finalise and inform the AIIF, when they finalise an estate.

A representative from the AIIF claims department, Joseph Kunene, spoke about risk management. Mr Kunene noted the AIIF strives to protect the legal profession, while at the same time they are looking at the interest of the public at large. He said it gives assurance to the public to know that the legal practitioner they are dealing with has cover in the event of something happening during the client's matter.

Mr Kunene pointed out that the AIIF insures legal practices, which includes -

- sole practitioners;
- partnership of practitioners; and
- incorporated legal practices.

He said that the cover extends to principals and former principals as long as the issue at hand that they are dealing with arose at the time the legal practitioner was still in practice and had a Fidelity Fund Certificate. He noted that the cover also extends to all employees at the legal practice such as -

- paralegals;
- candidate attorneys;
- bookkeepers and so forth.

Mr Kunene said this would cover the

firm if anything were to happen to a matter that a legal practitioner was dealing with, which would result in legal liability and as a result of which a legal practitioner had to pay compensation to a third party because of an action of one of the employees in the practice. Mr Kunene noted that the AIIF covers legal practitioners against a professional legal liability, to pay compensation to any third party arising from the provision of legal service, as long as the issue can be classified as a legal service.

Mr Kunene added that the AIIF receive many claims, mostly in conveyancing and litigation matters in general and that is a concerning matter to the AIIF. He noted that the insurance by the AIIF to legal practitioners is free of charge, however, he said that this will change in the future and legal practitioners will have to start contributing towards the premium.

Legal Practice Act

National Forum on the Legal Profession-member and attorney, Jan Stemmett said the main emphasis of the Legal Practice Act 28 Of 2014 (LPA) is on public interest. He referred to s 35 of the LPA, which concerns legal practitioner's fees. Mr Stemmett added that there will have to be discussions between legal practitioners and clients about fees and a written agreement before the legal practitioner takes on the client's matter.

Mr Stemmett pointed out that attorneys will still be admitted by the High



A representative from the claims department at the Attorneys Insurance Indemnity Fund NPC, Joseph Kunene, spoke about risk management.



Member of the National Forum on the Legal Profession and attorney, Jan Stemmett spoke about the Legal Practice Act at the exhibition in Johannesburg.

Court and enrolled by the Legal Practice Council (LPC). He added that there will be an easy conversion with the LPA if an attorney wants to be an advocate, and vice versa. He said for an attorney to appear in the High Court, Supreme Court of Appeal or the Constitutional Court, the attorney will need a certificate from the Registrar of the court where they were admitted. However, he noted that the attorneys who represent the attorney's profession in the National Forum have rejected that part of the legislation and said it was discriminatory to attorneys.

Mr Stemmett noted that the new governing structure of the legal profession will be as follows: At the top it will be the LPC at national level, followed by the nine provincial councils, in each of the

nine provinces in the country. He added that there will also be an Ombud who will have the role of overseeing the disciplinary section of the whole structure. He pointed out that instructions and power will be at the national level and will then be delegated downwards to the nine provincial councils.

Mr Stemmett said the new structure is more of a regulatory structure, and will not look after the interest of legal practitioners. The life of the Law Society of South Africa has been extended and ways to fund it are being investigated.

*Kgomotso Ramotsho,
Kgomotso@derebus.org.za*

Child Welfare Tshwane launches Mediation Centre

Child Welfare Tshwane launched its new Mediation Centre in Pretoria on 27 September. Director of Child Welfare Tshwane, Linda Nell, welcomed guests to the event and gave a brief introduction as to why the Mediation Centre was started. Ms Nell told guests that Child Welfare is a very old organisation that will be celebrating its 100th birthday next year. She said that the public perception of Child Welfare is: 'Here comes the welfare, then they take the children and then there is a farewell'. Ms Nell added that it is a perception that they are trying to change as that is not what welfare organisations are doing these days. She said that a huge part of the work that Child Welfare does is family preservation. 'There are all kinds of diversity in families, but as long as we can keep a child - as long as you can - within a family and within a community it is actually the best place for him or her to be,' Ms Nell said.

Ms Nell said that there is a lot of preventative work that is done in the family preservation programme and the Mediation Centre will be a part thereof. Ms Nell went on to say that according to the Children's Act 38 of 2005 (the Children's Act), the interest of the child is paramount. 'When you speak about the interest of children then you speak about the interest of their fathers and mothers as well,' she added.

The mediation services that will be offered at the centre are:

- Family and divorce mediation, which includes -
 - minimising conflict and trauma;
 - conflict resolution strategies;
 - developing a financial plan;

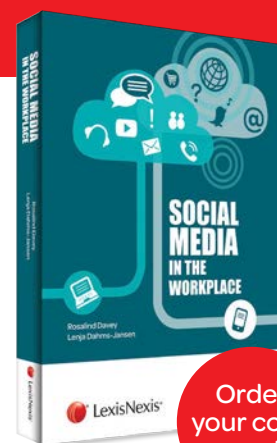


Director of Child Welfare Tshwane, Linda Nell, at the launch of its new Mediation Centre in Pretoria.

- developing a working parenting plan;
- family mediation; and
- post-divorce mediation.
- Parenting plans, which include -
 - living arrangements;
 - maintenance of the child;
 - contact between the other parent;
 - schooling;
 - religious upbringing;
 - emergency protocol; and
 - discipline.
- Voice of the child, which includes listening to the child's perspective and experience.

Ms Nell said that Child Welfare Tshwane focuses on the children and healthy families and that is why the centre was started, so that people who cannot afford a mediator will have access

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to one. Mediators will be able to provide services in all languages at the centre and the option of mediation will be available at all the Child Welfare Tshwane offices. 'We want to have a centre that is all inclusive,' she said.

The keynote speaker of the evening was Senior Family Advocate from the Department of Justice and Constitutional Development, Chris Maree. Mr Maree said it was a step in the right direction for other organisations to get involved in what was being done and what will be achieved in the future of mediation.

Mr Maree said that South Africa (SA) had one of the highest divorce figures in the world and added that it was claimed that 3,2 out of every five first marriages in SA would fail and that some of the people involved in divorce would end up at the Office of the Family Advocate.

Mr Maree said that in the Mediation in Certain Divorce Matters Act 24 of 1987 (the Act), there was no definition of the word 'mediation' in the Act, he added that the Act was outdated. 'It is time that we get together and write something new as far as mediation is concerned. I do not have a definition for mediation. ... What I can tell you is that the Act obviously allows and gives the mandate for mediation to the Family Advocate's Office,' Mr Maree said.

Mr Maree referred to the Children's Act and said that reference is made to the Family Advocate's Office therein. 'Is that not wonderful that we have put all these things in the [Children's] Act, but we have not provided for the machinery to work and that is why what is happening here tonight is so wonderful, because the Family Advocate's Office ... is an institution that works ... because of its success that office is busy imploding ... because of the amount of work referred to the office. Every second matter that lands, for instance, in the Children's Court can be referred to the Family Advocate's Office. It is possible. But, I just do not have the people to accommodate you,' Mr Maree said.

Mr Maree said that statistics show that



Keynote speaker Senior Family Advocate, Chris Maree, said: 'It is time that we get together and write something new as far as mediation is concerned.'

in 2013, approximately 23 000 divorce cases (that were reported) were handled by the courts and added that if every average divorce couple had two children, that would be an enormous amount of children that would be affected by the Office of the Family Advocate every year. 'We need organisations to assist us and the Children's Act makes provision for this, to have assistance in the sense that it gives the Family Advocate the duty to register the parenting plan that is created after a mediation session,' Mr Maree said.

Mr Maree reminded the attendees that mediation cannot be rushed and that it consists of a considerable amount of emotion from the parties involved. 'Remember when people come to the Family Advocate's Office, very often it is the first time that those two people are together in the same office or room after they have separated and then real emotions come out. ... You have a Family Advocate who is trying to be as professional as possible and you have people fighting. ... I am trying at best to alleviate an unbearable situation between two

people who just do not love one another anymore. ... That is where an organisation, such as the one that we are creating tonight can assist as it takes some of the frustration away from what the Family Advocate faces on a daily basis,' Mr Maree said.

Mr Maree said the object of s 2 in the Children's Act is to preserve the family. Mr Maree added: 'We create the mediation in the legal process, we make provision for parenting plans, parental responsibilities and rights agreements, but no one talks about s 157 permanency plans. ... Mediation goes hand in hand with a lot of obvious training, it goes with a lot of patience.'

Mr Maree discussed the future of family law in litigation and said he was in favour of mediation and added that SA should follow the English Model and make it compulsory in SA. 'Let's give people a mediation certificate. You cannot get divorced if you have not attempted to mediate. ... Everyone says we do not have compulsory mediation. I say we have, because we have been given presiding officers and s 48 additional powers. You can be forced to come to my office, the Family Advocate does not have powers of subpoena, but additional powers, which is given to the courts can assist me to at least get those people back in my office. ... With NGOs [non-governmental organisations], with people who give their help to assist the Family Advocate's Office ... and bring the final product to me ... and we can then make a court order. We will be able to bring court rolls down sufficiently to deal with more serious matters,' Mr Maree said.

To be added to the panel of mediators and experts, contact Caren at (012) 460 9236 or e-mail: Caren@childwelfare.co.za or info@childwelfare.co.za

Kathleen Kriel
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Compiled by Nomfundo Manyathi-Jele, Communication Officer,
Law Society of South Africa, nomfundom@LSSA.org.za

Updates from the LSSA

No restraint of trade clauses in contracts of articles

The Council of the Law Society of South Africa (LSSA) has resolved that the inclusion of a restraint of trade clause to apply to candidate attorneys in contracts of articles of clerkship by principal attorneys who engage the services of candidate attorneys, is unacceptable and that these type of contracts should not be registered by the provincial law societies.

LSSA thanks attorneys for participating in Wills Week

The LSSA would like to thank all the attorneys who participated in National Wills Week, which took place from 11 to 15 September. There was a total of 1 251 attorneys' firms that participated this year, the number grows substantially year-on-year.

The National Wills Week has become a major campaign by the attorneys' profession that is recognised and acknowledged by all major stakeholders, the media and the public.

LSSA information brochures: Small claims court

The LSSA's Small Claims Court Com-

mittee has prepared an information brochure on the small claims courts. The brochure is available in multiple languages, namely, English, isiZulu, Afrikaans, Sesotho, Sepedi and isiXhosa.

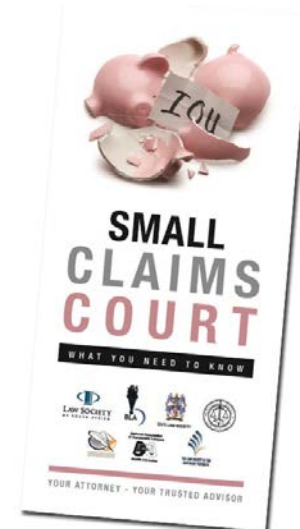
The small claims court brochure is an addition to the other brochures available, which are –

- Labour law: Protect yourself;
- Marriage: The legal aspects;
- Deceased estates;
- Claiming from the Road Accident Fund: Why you must use an attorney;
- Applying for a temporary or permanent residence visa;
- Buying and selling a house; and
- The Consumer Protection Act.

All LSSA information brochures are available on the LSSA website and can be utilised by attorneys' firms for information purposes. The brochure templates, which have a space for the firm's own contact details, can be requested from the LSSA at: LSSA@LSSA.org.za or from (012) 366 8800.

LSSA comments on Draft Taxation Laws Amendment Bill

The LSSA submitted comments on the draft Taxation Laws Amendment Bill, 2017. In its submission the LSSA welcomed some of the amendments and also suggested different wording to



some of the proposed amendments. In its conclusion it said: '[I]n our view, as a firm principle, the legislature should steer clear of retrospective legislation, as such creates additional uncertainty in an already uncertain tax system with the result that taxpayers are not able to properly plan their affairs for fear of retrospective amendments altering the anticipated tax position. An uncertain tax system is detrimental to investment in an economy.' This submission and other LSSA submissions can be viewed at www.LSSA.org.za under the 'Our initiatives – Advocacy – Comments on legislation' tab.



PEOPLE & PRACTICES

People and practices

Compiled by Shireen Mahomed

Jason Michael Smith Inc in Johannesburg has four new appointments.



Sherise Render has been appointed as a chief operating officer.



Kerry Burg has been appointed as a director in the banking litigation department.



Michelle Da Costa has been appointed as a director in the conveyancing and notarial department.



Melinda Gous has been appointed as an associate in the banking and litigation department.



Strauss Scher Attorneys in Johannesburg has appointed Nandini Naidoo as a director in the property law department.

All People and practices submissions are converted to the *De Rebus* house style. Advertise for free in the People and practices column. E-mail: shireen@derebus.org.za



By the
Practitioner
Support Unit of
the Attorneys
Fidelity Fund

Managing reputational risk

Why should legal practitioners be bothered about reputation? Ever heard of the saying ‘what other people think of you is none of your business?’ This saying may not always hold true.

While reputation has a lot to do with what others think of you and/or your business, it may be all that you have, especially during difficult times. Your reputation and that of your business can make or break you.

There are many definitions as to what reputation is. The business dictionary defines ‘reputation’ as the ‘[o]verall estimation of the character or quality of a person generally held by those who know him or her’ (www.businessdictionary.com, accessed 27-9-2017).

From the foregoing definition, one can see that reputation has a lot to do with how others perceive one or a business. A number of factors such as – experience, values, assumptions and expectations, character and behavioural traits, education, faith, culture, circumstances, etcetera – influence perception. The business dictionary goes on to define ‘perception’ as ‘[t]he process by which people translate sensory impressions into a coherent and unified view of the world around them. Though necessarily based on incomplete and unverified (or unreliable) information, perception is equated with reality for most practical purposes and guides human behaviour in general’ (www.businessdictionary.com, accessed 27-9-2017).

Flowing from the fact that others will always have a perception about someone or something, it then becomes important to manage one’s, or business, reputation. This is done through ‘reputation management’, which the business dictionary defines as: ‘Activities performed by individual or organisation which attempt to maintain or create a certain frame of mind regarding themselves in the public eye. Reputation management is the process of identifying what other people are saying or feeling about you or your business; taking steps to ensure that the general consensus is in line with your goals’ (www.businessdictionary.com, accessed 27-9-2017).

Do you or your business need a reputation?

Practitioners should be alive to the fact

that people need information in order to form opinions, and in turn, use those opinions to decide on how to relate and/or interact with the business, if at all. Reputation is a starting point for people to interact or to abstain from interacting with the practitioner and/or his or her business. The importance of reputation stems from the fact that it is not just one aspect of you or your business, but permeates and influences you and or your business as a whole. The perception that others have of you and/or your business is an interconnected system that fuels itself and a good one is necessary for a practitioner and/or his or her business in order to grow and flourish.

While the services a practitioner provides could be within his or her control, it could be difficult, if not impossible, to control the minds of the outsiders and potential clients. However, a good reputation can add advantage to how potential clients view the practitioner and the business, even without having interacted with either before. It is important that as a practitioner, and as a business, you continuously have your reputation on guard; as it is not a once-off activity, but an all-the-time activity. It is extremely expensive to turn around a tarnished reputation, you may find yourself having to put all your effort into it, and sometimes try too hard, resulting in even more damage.

While people have the last say in what they do and think, a good business reputation is a major factor in their decision-making on whether or not to engage with the business. So, a practitioner who intends to grow his or her business should make a good business reputation his or her priority.

Reputational risk

This is one of the most crucial risks that every practitioner and business should always identify and continuously manage. If a practitioner or business does not identify this risk as their risk, and document it in their risk register, the practitioner may as well give up on the business.

There are many causes to this risk, and these may vary from business to business, but there should be a concerted effort to respond to these causes. Importantly, when a practitioner identifies the risk, the practitioner should also attempt to identify the causes for the risk.

In responding to the identified risk, the practitioner should always respond to the causes and not the symptoms. Symptoms are just lying at the tip of the problem, but the real problem, if not properly and appropriately responded to, may manifest itself in the future and can be very costly.

In considering the reputational risk, practitioners should strive to not only portray that which they know their stakeholders want to hear and see, but rather do that which they know their stakeholders want to hear and see. This taps into the ethical space of a practitioner and business. Businesses would generally put a Code of Ethics, to which the business subscribes, in place. This code – which should be documented and known to all stakeholders, including staff – if properly crafted, would earn the favour of the stakeholders. However, this is a document, monitoring how people in the firm respond to what the code seeks to achieve is even more important.

Here are some scenarios on reputational risk and possible responses:

Scenario 1

In a legal firm with more than one partner, one of the professional assistants (PA) ran his own practice in the past, and recently joined the firm. The disclosed reason for discontinuance of his firm was ‘unfavourable market conditions’. Months down the line, the firm started to experience a decline in clients, which ultimately began to manifest itself in the bottom line of the firm. The firm took an uninformed decision to increase their marketing and advertising budget, in order to pay more attention to that area of business. The only thing that went through the minds of the partners or directors was that the firm was losing market share due to poor visibility, marketing strategy, etcetera.

The firm vigorously engaged in an advertising and marketing strategy for some time, but realised that this was not the turnaround they expected. They decided to organise a session to ultimately sit around the table and discuss the position. They then came across the rumour that the Regulator received complaints against the PA from his previous firm. This happened amidst the recruitment of a new bookkeeper by the firm, who happened to have been the bookkeeper at the PA’s previous firm. These rumours

changed the way the firm looked at the sudden drop in clients, and the firm decided to dig further into the rumours, and indeed confirmed the rumours to be true. They further discovered that the Attorneys Fidelity Fund (the AFF) had also received claims against the PA and his previous firm.

• *What exactly happened here?*

The clients to the previous firm had been speaking among themselves and to other people about their ordeal, from the time that the PA still ran his own practice and contacted the PA on several occasions. They later learnt that they could lodge complaints and claims with the Regulator and the AFF. During the period when the clients were talking, even potential clients to the firm that the PA joined as PA (who held the firm at high esteem based on previous dealings and reputation) abstained from engaging with the firm, fearing that the PA would get them into trouble with their trust money. Some clients even began to doubt the partners at the firm, despite having trusted them for all those years, and despite the fact that no complaints were lodged against the partners and/or the firm. The firm decided against the appointment of the bookkeeper and decided to release the PA pending investigations by both the Regulator and the AFF.

This action by the firm is reactionary, and addresses the immediate challenge.

• *Could the firm have avoided this?*

Should the firm have identified reputational risk as a risk for the firm, and done a risk assessment for the firm, identifying the causes thereto, and developed responses to the risk, the firm could potentially have realised that recruitment and appointment of staff lies at the centre of this risk. The firm could have come up with recruitment and selection processes to ensure thorough scrutiny and vetting of potential recruits for all positions as a standing requirement. The firm could have spared itself of reputational damage, wasteful expenditure, etcetera, and having to rebuild its good reputation, which by the way is costly, as they may need to issue public statements.

Scenario 2

A sole practitioner, with vast experience in various fields, with a relatively good professional reputation and clientele database, suddenly experienced a decline in clientele. On investigation into the sudden decline, the practitioner discovered that the word had gone out that he was cheating on his spouse. Surprised at the discovery, as this has nothing to do with his profession, nor his love for his profession and dedication to his cli-

ents, the practitioner decided not to do anything about it, and relied on his capabilities for providing legal services to his clients. The decline continued, and the practitioner ultimately closed shop.

• *Did the public judge the practitioner fairly?*

There is probably no correct or incorrect answer. However, one cannot control what goes on in the minds of the public. The measuring stick that the public holds differs from person to person. To some members of the public, being faithful to your spouse could make or break a deal, purely based on the values of those you serve. Some people hold the view that if a person can cheat on his spouse, nothing would stop the person from cheating on or stealing from them. In this case, the public did not judge the practitioner on his capabilities, or those of the firm, but rather looked at the practitioner holistically and held the view that the reputation is not just one aspect of a person or a person's business, but permeates and influences a person and or a person's business as a whole.

• *The lesson*

In order to maintain a good reputation, practitioners should not only focus on their professional capabilities, but also consider their overall reputation that can be influenced by people's perceptions, which in turn are influenced by factors such as values, expectations, assumptions, etcetera.

Scenario 3

A seasoned sole practitioner who had successfully represented clients and businesses across various spectrums suddenly faced a reduction in client base. This is after the practitioner appointed two professional assistants (PAs), and three candidate attorneys (CAs). Having gone through the Curriculum Vitae of the PAs, the practitioner was convinced of their capabilities, and took them on-board, and relied on their assistance to help develop the CAs. Indeed the PA's were capable of developing these CA's, showed them everything they needed to show them, exposed them to the actual work experience. This was exciting to the CAs, perhaps overwhelmingly so, as some of their counter parts were complaining of lack of exposure by their principals, but were made to perform administrative duties.

The excitement got the better of the CAs, and they found themselves talking to their counterparts about specifics of a matter in which they were involved. The Code of Ethics at the firm clearly stated that the attorneys 'protect the confidentiality of their clients' information ...'. Jealousy got the better of the disgrun-

tled CAs, and the information shared with them went out into the public domain. The public did not take kindly to this, word of mouth spread like wild fire, and the firm lost a lot of potential clients, and even existing client.

• *What happened?*

Although the exposure of the CAs was a good gesture by the firm, and what the firms with CAs are expected to do, the firm could have failed to share and embed the values of the firm, as crafted in the Code of Ethics, to the CAs. This led to a reputational damage for the firm, which could be irreparable.

Conclusion

Practitioners should always be on guard for their and the business' reputation.

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By
Emmie
de Kock

Are you ready to start your own law firm?

So you are a well-rounded attorney, running your own matters, managing your own support staff and clients. Perhaps you are waiting to be promoted, but it seems too long to wait, or you are uncertain that it will ever happen. Perhaps it frustrates you to exceed your budget and work for a fixed salary. Perhaps you always had an entrepreneurial side that you wanted to explore. Or maybe you just feel stuck where you are and want a new challenge. There may be many reasons why attorneys decide to go solo or start a new law firm. But how will you know if it is the right decision for you?

To be a successful law firm entrepreneur, it is essential to have confidence. It is true what they say: 'If you do not think the world of yourself, who will?' For a person starting and standing alone, you must have confidence that you will be able to make it by yourself. You must know yourself. You must trust your abilities and your judgment. You must be your own best friend. You must be able to forgive yourself for failures. You must be able to award yourself for achievements. You must be able to trust others and earn the trust of others. You must be a consistent hard worker.

Another important quality for law firm entrepreneurs is the taste for adventure. Perhaps not everyone will refer to 'financial risk' as adventure. Unless you can negotiate to move your client matters with you, you will start from zero and must learn to be a good business owner, on top of being a great attorney. In this regard, if you are a person who requires the certainty of a monthly salary, you are likely to find starting your own law firm from scratch very daunting. Generally, especially start-up entrepreneurs see opportunities to serve others, contribute something new to society, make their own mark, or make a living from something they feel passionate about. I think this is what is meant by referring to an 'entrepreneurial spirit'. It is contagious and requires only one person.

Other aspects to consider include:

• **Knowledge and experience:** You must assess, and be honest about your abilities, knowledge and experience. To start

a law firm, is to set a standard for others to follow. If you lack knowledge or experience in any legal area, be open with your clients, and involve or refer instructions to other expert attorneys on an *ad hoc* basis to grow and diversify your practice.

• **Finances:** Finances are also a reality and must always be approached rationally. While busy developing your law firm, your income may not be guaranteed and you must continue to provide for normal living expenses. Responsible start-up law firm owners try to limit personal expenses, and even downsize, if the firm may take a substantial time to develop before profitability is likely to follow.

• **Support:** Starting your own law firm, may put you solely in charge of your firm's business, but you will nevertheless not be alone in the world. Even if you are the champion of your own team, you will appreciate a cheerleader to help you win. Your life partner's support for your career path is very important. If you are married, your spouse is your partner in life, and this includes your business life. Family can be a very good support system. The right friends and colleagues can also be good cheerleaders. Support could also be gained from business networks, professional societies, or other business owners in the same sector. The social platform LinkedIn also provides many helpful online interest groups.

• **Coaching:** Especially when starting a law firm as a sole proprietor, it will be helpful to contract a lawyer coach to assist you in this journey and changes. Coaching can assist to develop you on a personal and professional level to be the best leader and manager for your law firm. A coach can help improve your competence, help set goals, build confidence, and be a thinking partner and support.

• **Mentorship:** If you are a young attorney starting-up a law firm for the first time, it will also be helpful to seek a mentor with more attorney experience, who can guide and support you through challenges. In this regard, apart from the prescribed practice management training, the Mentorship Programme of the Law Society may be helpful. More infor-

mation is available at www.lssalead.org.za.

• **Planning:** It is always good to have a plan. It is further crucial to have this in writing, as a business plan can serve as a good road map to keep you on course.

If you are a sole proprietor, it may take extra effort to do a written business plan, as you may feel that you have it all organised in your head. If you are married, it is a good idea to share your business plan with your life partner for input.

However, regardless of the size of your law firm, or the extent of your future plans, a written business plan forces you to go through a checklist to make sure you thought of everything, and develop your dream and goal to grow.

Sometimes the problem is not that we do not plan, but that we omit to refine and define our plans, to make them understandable to others, as well as practical. Forcing yourself to write your business plan, before being too eager to start with your exciting ideas, will force you to evaluate and reflect, and give you something to measure your progress against.

When leaving an established firm to start a new small law firm, there may be many adjustments. One aspect which may be new, but absolutely crucial for your success, is marketing. You must be able to network and market yourself to get clients and work. Due to the ethical rules of our profession, marketing a law firm is different to marketing any other type of commercial business. Aim for excellent client relations, as this will afford you recurring business and referrals from clients.

Starting a new law firm can be very exciting, but you must be sure that you are ready. Not every attorney should start their own law firm. If you are committed to this journey, make sure that you plan ahead and have some support, especially financially.

Emmie de Kock BLC LLB (*cum laude*) (UP) is a coach and attorney at Emmie de Kock Coaching and Consulting in Centurion.



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By Jason
Olifant
and Odwa
Golela

The dilemma of appropriation of payment: Drawing the line between the common law and the law of contract

A company is faced with quite a dilemma in a scenario where payment has been tendered by a debtor, but the debtor, however, has multiple debts with the company. When faced with this situation the company has to consider how it appropriates this payment to the various debts owed by the debtor and whether there are any rules or laws that apply in taking this decision.

This article, will take a closer look at how the law of contract dictates that payments made by a debtor be appropriated, particularly when the creditor (without prior consent from the debtor) appropriates the payment to a debt in relation to which the payment would have been appropriated to by operation of law.

A careful look at this situation is important in order to align what may possibly be a moot question in practice, with what may possibly undermine the element of consent in contractual relations in academics.

When a debtor has multiple debt obligations owed to a creditor, and makes a payment that does not cover the aggregate amount of the debt the rules of appropriation of payment are triggered.

The common law position relating to the appropriation of payments was set out in *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd and Others* 2008 (4) SA 325 (SCA) at para 46, where the Supreme Court of Appeal (SCA) held that where the parties did not appropriate the payment, the payment should be appropriated to the most burdensome debt and when the debts are equally burdensome, the payment should be allocated to the debt payment of which is in the debtor's best interest.

When deciding on the appropriation of these debts we have to consider the difference between a debt, which is in the best interest of the debtor, versus one that is considered the most burdensome.

A debt that is in the best interest of the debtor would be the one that would facilitate in releasing the debtor from his or her indebtedness, while the most burdensome debt would be the one that would place the debtor further into debt

such as a debt in relation to which interest has started building up.

Debts that are equal in all respects should be discharged in 'chronological order' (Van Huyssteen, Lubbe, Reinecke *Contract General Principles* 5ed (Cape Town: Juta 2016) at 495). When the debts do not fall within any of these rules they should be discharged 'proportionally' (Van Huyssteen *et al* (op cit) at 496).

The parties may also dictate how the payment should be appropriated under the rules of contract law, which are largely premised on the element of consent.

The debtor may also 'indicate' to the creditor the debt in relation to which the payment is made (Van Huyssteen *et al* (op cit) at 495). This indication must be made to the creditor before appropriation occurs under the rules of the common law (Van Huyssteen *et al* (op cit) and see also Christie and Bradfield *Christie's The Law of Contract in South Africa* 6ed (Durban: LexisNexis 2011) at 444). Should the creditor agree to such appropriation, it may accept the payment and that particular debt will be discharged to the extent of the payment or wholly (Christie and Bradfield (op cit)). Should the creditor not accept such appropriation in circumstance where the creditor had a duty to co-operate with the debtor in ensuring that payment is made, the creditor may be in *mora creditoris* in relation to that debt (the requirements of *mora creditoris* should be met) (Christie and Bradfield (op cit) and for further details see *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1994 (1) SA 153 (A)). The creditor may also reject the appropriation indicated by the debtor and regard it as positive malperformance (the requirements of positive malperformance must be met).

Traditionally a view was held that when a debtor did not indicate how its payment should be appropriated, the creditor could appropriate the payment when it received such payment or within an acceptable period after receipt of such payment (Van Huyssteen *et al* (op cit) at 495-496; Christie and Bradfield (op cit) at 444). However, an unreasonable appropriation was incapable of binding the debtor (Van der Merwe, Van Huys-

teen, Reinecke, Lubbe *Contract: General Principles* 4ed (Cape Town: Juta 2012) at 445). It is for this reason that academics hold the view that the creditor has no 'capacity' to appropriate the debtor's payment, it can only 'propose' a particular appropriation (Van Huyssteen *et al* (op cit) at 495). The latter seems to be the more desirable view as it clears the uncertainty brought about by subjecting the creditor's appropriation to a test of reasonableness, as this may differ from case-to-case leading to palm-tree justice. Further, the latter view is premised on the principle of consent, should the parties not reach consensus then the payment is appropriated in terms of the rules of common law.

In setting out the law relating to appropriation of payments above, it is apparent that a situation may arise where the parties did not provide for appropriation of payment in their contract and the proper appropriation would then be determined by the rules of common law. However, the creditor may have appropriated the payment (on receipt) to the debt in relation to which the common law rules would have appropriated the payment to anyway. In this situation, the creditor has in theory appropriated the payment without leaving room for the debtor to refuse such appropriation (which we have already explained is undesirable, as such appropriation is later subjected to the reasonableness test). While practically, it can be said that the appropriation has occurred under the rules of common law, appropriation of payment in this case would also have occurred by operation of law. This situation renders itself open to abuse, as either the creditor or the debtor may choose to rely on the rules of contract law or common law (depending on which one best give either of them the result they desire).

To adequately address this situation, it is advisable that the creditor should not have the capacity to appropriate payment unless the parties have agreed to this in terms of a contract, which provides the creditor with the right to appropriate payment as it deems fit. Alternatively, payment should be appropriated in terms of common law rules

(except where the debtor indicates how the payment should be appropriated and the creditor accepts such appropriation). The parties may then rely on remedies available to them under common law or as provided for in their contract.

In dealing with appropriation of payments it is desirable to distinguish between the rules of appropriation within contract law (when appropriation was provided for in the contract) and appropriation within the broader common

law (when it was not provided for in the contract). The former is largely based on consent between the parties and appropriation is made in line with their intention, whereas the latter is not based on consent, but occurs by operation of law. As such it is more debtor-oriented (as the debtor is considered the weaker party between the two). It is, therefore, important to draw the distinction between the two sets of rules when dealing with appropriation of payment and

to ensure that both parties are confined to one set of rules to reduce the risk of remedy shopping.

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By
Daniël
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Legal professional privilege and Internet hacking

During the past ten years, the world has seen an increase in the number of high profile data hacks. The Panama Papers clearly show the far reaching effects of hacking in the legal environment. These hacking attempts move between target industries and law firms and remain attractive targets for hackers to gain sensitive information. As with physical files, virtual files also need due safeguards and measures to be adequately protected.

Information that is stored by attorneys and law firms is often subject to confidentiality and attorney-client privilege. A quick distinction between these two concepts needs to be made. Firstly, confidentiality refers to the duty that is placed on attorneys to ensure that all communications between their clients and themselves remain confidential. Confidentiality is deemed to be far broader than legal professional privilege (Kristen Wagner and Claire Brett 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' 2016 (Sept) *DR* 22).

In terms of legal professional privilege, all communications or advice given by an attorney, while he or she was acting in a professional capacity is subject to the legal doctrine (*Van der Heever v Die Meester en Andere* 1997 (3) SA 93 (T)). These communications have to be made in confidence by the client and for the purpose of attaining legal advice but not necessarily to litigate (*S v Safatsa and Others* 1988 (1) SA 868 (A)). Legal professional privilege may only be claimed by the client. Communications as a concept extend to online communications that fulfil the requirements mentioned above. Therefore, if communications were made in confidence by a client to an attorney and the attorney was acting in his or her professional capacity, the

communications are subject to the protection of legal professional privilege.

When confidential information has been leaked, the extent of the protection of legal professional privilege depends on the facts of the matter, as well as the context of public interest with regards to the leaked information (*South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ)).

Reasonable duty of competence

Just as there is a reasonable duty placed on attorneys and law firms to protect physical documents from prying eyes, the same duty exists with regards to information that is stored digitally, regardless of whether or not the data is stored on a hard drive or through the use of cloud-based data storage services. Data breaches could include hacking of e-mails, computers or trojan horse programmes that allow unauthorised backdoor access to computers. These data breaches could threaten confidentiality or legal professional privilege if the information that is leaked is subject thereto.

Cloud-based data storage, is in most instances, effective in ensuring adequate protection of information (LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (www.lssa.org.za, accessed 27-9-2017)). When making use of cloud-based data storage services, attorneys and law firms must enter into a contract with the third party service providers, which obliges the third party to safeguard digital information. As attorneys and law firms also often have personal details of clients on record, law firms have to ensure that they are compliant with the Protection of Personal Information Act 4 of 2013 (POPI).

Although the methods of protecting

digital information are vastly different compared to the historical protection of hard copy, the basics still remain the same for both. The onus rests on law firms to evaluate their security measures, just as is the case with hard copies of documents and to ensure that the necessary safeguards are in place. As attorneys are 'required to act reasonably and diligently in fulfilling their professional obligations' this logically includes the use of modern technology and its associated risks (Information Security Guidelines for Law Firms (www.lssa.org.za, accessed 27-9-2017)).

As e-mails have become the main method of communication between attorneys and their clients, often confidential information is communicated by way of e-mail. As confidentiality is of the utmost importance in ensuring the independence and effective running of the legal profession specific steps need to be taken to secure e-mail services. One possible due diligence solution is that attachments in e-mails are password protected. When using password protected attachments, it obviously remains important not to communicate the password via e-mail, as this would defeat the purpose of password protecting the document.

A second method is to make use of encryption technology to ensure that e-mails are only viewable by the intended recipient of the e-mail. This, however, requires certain training of staff to properly make use of the security measure.

The advantages of sound information security protocol and appropriate technological security measures mean that attorneys and law firms are able to enjoy the full potential of the Internet, new software and technology while acting reasonably and diligently. This avoids negligence on the part of attorneys and law firms when data breaches

occur. Not only are adequate information security protocols good for protecting clients' interests, but by proactively taking steps to defend against hacks and data breaches law firms avoid unnecessary computer network down time. The loss of files that then need to be replaced also doubles the time spent on the same work, and can be prevented.

What to do after a hack?

Despite taking all required and necessary steps to ensure good practice with regards to information security, serious hacking efforts could still take place and succeed. The above-mentioned steps merely ensure that attorneys and law firms do their part in providing protection to their clients.

If a hack or data breach does occur, attorneys and law firms would be wise to immediately establish the scope of the hack or breach. By determining what information has been leaked, decisions regarding the next steps could be taken. To make this determination independent and expert, outside assistance is needed as it is too tall a task for in-house IT teams. After clearly noting the scope of the hack or breach a damage assessment could be done which is then used to limit client reputational harm and legal liability.

Directly after an attack, the source of the attack must also be confirmed to defend against ongoing breaches. Often

data hacks still lurk in the computer systems of law firms and the ransomware might continue to spread. Turn off all networks and instruct employees not to open any attachments that might contain ransomware that could further spread.

If the leaked information is confidential in nature or subject to legal professional privilege, legal steps to stop the dissemination of the information could be taken. To establish who the hackers involved were, might prove to be quite difficult, but as the information is known and identifiable it could be stopped from being published. In this regard, cyber security experts might be crucial in protected clients in the aftermath of a hacking breach.

In accordance with POPI, if personal information has been lost, attorneys and law firms have to notify affected parties and the Information Regulator about the attack. Thereafter, steps need to be taken to ensure that a similar attack does not repeat itself, which could potentially harm clients and the attorney's or law firm's reputation. By conducting a review of the hack or breaches, weaknesses and poor procedures need to be identified and addressed.

Conclusion

Attorneys need to keep up to date with developing technology and global challenges, which include cyber security threats. As the great potential of the In-

ternet, new software and technology get unlocked, so too does the risk of breaches grow.

As the legal profession delves ever deeper into new technology, measures such as cyber security insurance could also be considered to limit the risk to firms. Most general liability and malpractice policies would not cover cyber security breaches. The need for supplementary coverage becomes increasingly important.

Data breaches could come as a result of sophisticated hacking attempts, and law firms, big and small, are at risk. Although attorneys and law firms might feel that they are unlikely to be attacked, as with most crimes, criminals look for easy targets. The ease of automating hacking attacks makes all systems vulnerable.

Just as paper files were susceptible to physical theft or loss, digital information now adds a new dimension to legal practice. Attorneys and law firms should not, however, see this threat as a clear sign of turning back the hands of time to stick with or go back to purely paper-based communication, but rather as a reminder of the reality of our modern times.

• See p 5.

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By
Heather
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Municipal account – landlord beware

As a landlord, are you keeping track of your tenant's municipal accounts? Do you know if they are in arrears? Do you know how many municipal accounts your tenant may have open with the municipality? You could be in for a surprise when the municipality looks to you to settle these outstanding accounts.

On 29 May, the Supreme Court of Appeal (SCA) confirmed certain municipal powers when it comes to collecting outstanding municipal debts. In the case of *Pearson (Pty) Ltd v eThekweni Municipality* (SCA) (unreported case no 241/2016, 29-5-2017) the court confirmed the power of a municipality to transfer credits between two different municipal accounts.

The case dealt with two sections of the Local Government Municipal Systems Act 32 of 2000 (the Act), namely –

- s 102(1)(b) – 'A municipality may – ... (b) credit a payment by such a person against any account of that person'; and
- s 118(3) – 'An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property'.

The facts of the case

A tenant occupied two different properties owned by different property owners. The tenant opened a municipal account for each property for the supply of utilities and municipal services to the respective properties. The tenant was subsequently placed in voluntary liquidation with outstanding amounts owing

to the municipality in respect of each municipal account.

At one point, prior to liquidation, the tenant made payments to the municipal account associated with the appellant's property (the first property). The municipality, acting in terms of s 102(1)(b) of the Act, elected to credit the payments made in respect of the first property to that of the tenant's other municipal account held in respect of another property (the second property). As a result, the amount owed by the tenant for its account in respect of the second property was regarded as paid in full, while the amount owing for the account for the first property (owned by the appellant) did not record the payment which had been made by the tenant, leaving the appellant liable for a municipal account of approximately R 3,1 million. The municipality subsequently terminated the services supplied to the appellant's prop-

erty due to non-payment. In the end, the appellant paid an amount to the municipality, under protest, in order to restore the service supply to its property. Included in this payment was the sum of approximately R 1,4 million, which the appellant claimed it should not be held liable for as this amount was unlawfully credited by the municipality to the municipal account of the second property instead of the appellant's property.

While the appellant acknowledged the municipality's right in terms of s 102(1)(b) of the Act, it argued that the exercise of this right by the municipality meant that the municipality should not then be entitled to invoke s 118(3) of the Act to hold the appellant liable to discharge the tenant's debt, which was related to another property not owned by the appellant.

The inquiry before the SCA was whether the conduct of the municipality in holding the appellant responsible for the full outstanding balance on the municipal account related to its property was rendered unlawful by the municipality's prior exercise of its right in terms of s 102(1)(b) of the Act to transfer credits between accounts, which had the effect of increasing the amount owing on the account related to the appellant's property.

The court noted that s 229 of the Constitution vests a local authority with the power to impose 'rates on property and surcharges on fees for services provided by or on behalf of the municipality', which power is further regulated by national legislation in the form of the Act. The Act refers to the responsibility of municipalities to collect its debts and to adopt a credit control and debt collection policy for this purpose. The court turned to the municipality's credit control and debt collection policy and found the following:

'7.1 In terms of Section 118(3) of the

Act an amount due for municipal service fees, surcharge on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

7.1.1 Accordingly, all such Municipal debts shall be payable by the owner of such property without prejudice to any claim which the Municipality may have against any other person.

7.1.2 The Municipality reserves the right to cancel a contract with the customer in default and register the owner only for services on the property.

...

7.3 Except for property rates, owners shall be held jointly and severally liable, the one paying the other to be absolved, with their tenants who are registered as customers, for debts on their property.

...

10.1 For consolidated accounts the Municipality may in accordance with section 102 of the Act credit any payment by a customer against any account of that customer.

...

10.4 The Municipality's allocation of payment is not negotiable and the customer may not choose which services to pay.'

The court held that the municipality had acted in accordance with s 102(1)(b) of the Act, which it was entitled to do. In addition, its conduct matched that which is set out in its credit control and collection policy adopted in terms of the Act.

The appellant had only been asked to make payment for municipal services supplied to its property. The fact that the amount owed on its property account would have been reduced had the municipality not exercised its power to transfer payments from one account to another in terms of s 102(1)(b), did not

have any bearing on the municipality's right to collect the full amount owing in relation to the appellant's property.

While the municipality's actions may have had an unfair result on the appellant, the court found that they were not unlawful. The court noted that the municipality's actions were tempered by the fact that the municipality had only transferred payments made by the tenant to the second property account and in that way had not used any of the appellant's funds. In addition, the appellant was only being asked to settle the account for municipal services provided to its property and not that of the second property.

This case confirms a municipality's power -

- to transfer credits between accounts held by a single account holder but in respect of two different properties with two different owners; and
- to claim from the owner of a property, any unpaid amounts due by the account holder based on the municipality's right to hold the property as security for charges levied.

Since a property is regarded as security for any unpaid municipal charges, transferring credits between municipal accounts has the effect of increasing the contingent liability of one property owner, while the contingent liability of the other property owner is decreased. Property owners are cautioned to monitor their tenant's municipal accounts in order to manage any contingent liability in relation to their property.

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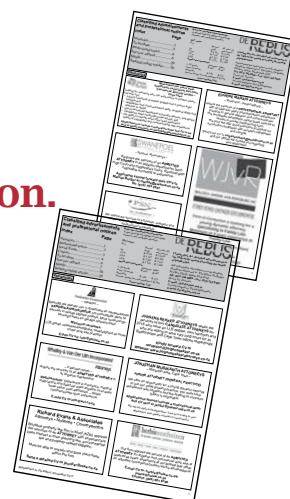
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Simulated agreements: Dressing up transactions



Picture source: Gallo Images/Stock

By
Chantelle
Humphries
and Don
Mahon

The application of the National Credit Act 34 of 2005 (the NCA) can have onerous consequences for money lenders. It requires strict compliance with its provisions relating to registration of credit providers, reckless lending and notice.

This has resulted in a number of money-lenders dressing up their transactions as something other than credit agreements, in order to circumvent the provisions of the NCA. Although it is trite that a court will have regard to the substance of an agreement, rather than its form, it is not always easy to determine when an agreement is such a simulated transaction.

The legal position

The test to determine simulation is two-fold. As stated by Lewis JA in *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) at para 55:

'In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: Of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: The charade of performance is generally meant to give credence to their simulation.'

There are two forms of simulated transactions. Firstly, if parties make an agreement as a sham or pretence (eg, to mislead the fiscus), then they do not intend to create obligations and their simulated agreement is invalid (see *Long Oak Ltd v Edworks (Pty) Ltd* 1994 (3) SA 370 (SE) at 375-379). If the simulated agreement is a disguise for some other type of transaction, the court will strip off the form of the simulated agreement and reveal its true nature, so that the law may operate.

Secondly, where parties enter into an agreement and act in accordance with the agreement but for a different purpose than that which the agreement contemplates for.

If a transaction or agreement is genuine a court would give effect to it and, if not, the court would give effect to the underlying transaction that it concealed (see *Zandberg v Van Zyl* 1910 AD 302, *Vasco Dry Cleaners v Tycross* 1979 (1) SA 603 (A) and *Michau v Maize Board* 2003 (6) SA 459 (SCA)).

Whether an agreement is genuine depends on a consideration of all the facts and circumstances surrounding the transaction. A court will examine the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intended to implement it, before determining in any particular case whether the agreement was simulated (see *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA) at paras 27, 32 and 37).

In the matter of *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) the

court looked at the form of a transaction and concluded that the parties genuinely intended to give effect to that which they had apparently agreed. In *Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd* 1999 (4) SA 1149 (SCA) Hefer JA found that sale and leaseback agreements, which had unusual terms but which made good business sense, were honestly intended to have the effect contended for by the parties.

In the *Hippo Quarries* case, the court drew a distinction between motive and purpose, on the one hand, and intention on the other, in trying to determine the genuineness of a contract, and of the underlying intention to transfer a right, where the transfer was not an end in itself. Nienaber JA said:

'Motive and purpose differ from intention. If the purpose of the parties is unlawful, immoral or against public policy, the transaction will be ineffectual even if the intention to cede is genuine. That is a principle of law. Conversely, if their intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be ineffectual. That is because the law disregards simulation. But where, as here, the purpose is legitimate and the intention is genuine, such intention, all other things being equal, will be implemented.'

In *S v H Friedman Motors (Pty) Ltd and Another* 1972 (3) SA 421 (A) the contracts in question were designed to avoid legislation regulating moneylending transactions. In order to obtain funds to acquire a motorcar, an individual would sell his car to a bank. The bank would immediately resell the car to the individual for a higher price, but would reserve ownership in the car until the full purchase price was paid – a hire-purchase contract. The individual would pay a cash deposit and monthly instalments and on payment of the full purchase price ownership of the car would revert to him. The same object would usually be achieved through a loan of the price by the bank to the individual, repayable with interest. Colman J, in *S v Friedman Motors (Pty) Ltd and Another* 1972 (1) SA 76 (T), considered that the transactions might be loans, disguised as sales, or genuine sales, depending on the parties' intention. He said at 80 G – H:

'If two people, instead of making a contract for a loan of money by one of them to the other, genuinely agree to achieve a similar result through the sale and repurchase of a chattel, there is no room for an application of the *maxim plus valet quod agitur quam quod simulate concipitur*. The transaction is intended to be one of sale and repurchase, and that, at common law, is what it is.'

In the *Friedman* and *Conhage* cases, where the courts held that the parties intended their contracts to be performed in

Although it may not always be easy to determine whether an agreement is simulated or not, the authorities quoted provide some useful guidelines in determining this question.

accordance with their tenor, there were sound reasons for structuring the transactions as they did. The purchaser of the car in the *Friedman* case was required to give security in return for the funds advanced by the bank. A pledge would have deprived him of the car and its use. Hence the sale and resale: It allowed the purchaser to keep and use the car. In the *Conhage* case the sale and leaseback of manufacturing equipment permitted the manufacturer to retain possession of the equipment. There was a commercial reason or purpose for the transactions to be structured as they were. In both instances there was a genuine transfer of ownership. Had the purchaser failed to pay the seller he would have lost the right to become the owner in due course.

Conclusion

Although it may not always be easy to determine whether an agreement is simulated or not, the authorities quoted above provide some useful guidelines in determining this question. Whether an agreement is genuine depends on a consideration of all the facts and circumstances surrounding the transaction. A court will examine the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intended to implement it, before determining in any particular case whether the agreement was simulated.

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Providing legal aid to indigent mental health care users

By
Moffat
Ndou



Picture source: Gallo Images/Stock

Section 15 of the Mental Health Care Act 17 of 2002 (MHCA) provides that a mental health care user is entitled to representation, including a legal representative. Section 15 further provides that a user is entitled to the representation when submitting an application, lodging an appeal, or appearing in court or at the mental health review board (the review board). 'Mental health care user' (user) refers to 'a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, state patient and mentally ill prisoner and where the person concerned is below the age of 18 years or is incapable of taking decisions, and in certain circumstances may include –

- (i) prospective user;
- (ii) the person's next of kin;
- (iii) a person authorised by any other law or court order to act on that person's behalf;
- (iv) an administrator appointed in terms of this Act; and
- (v) an executor of that deceased person's estate.'

'Representative' is not defined in the MHCA. The dictionary defines 'representative' as 'a person chosen or ap-

pointed to act or speak for another or others' (see Concise Oxford English Dictionary (New York: Oxford University Press 2011)).

Principle 18 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (the principles) provides that:

'The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.'

The Principles define a 'counsel' as a 'legal or other qualified representative'. The Principles do not provide the definition of a 'qualified representative'. I submit that it may mean any person who acts on behalf of another and is officially recognised as a practitioner of a profession (see Concise Oxford Dictionary (*op cit*)). If the user is an indigent person, legal aid must be provided by the state.

This article examines the provisions of s 15 of the MHCA in order to determine the content of the right of an indigent mental health care user, to legal aid at the expense of the state.

An indigent user

Section 15(2) provides that an indigent user is entitled to legal aid provided by the state in respect of any proceeding instituted or conducted in terms of the MHCA. The right to legal aid is subject to any condition fixed in terms of s 4(1)(e) of the Legal Aid South Africa Act 39 of 2014 (the Act). Section 4(1)(e), provides that the Legal Aid Board South Africa (Legal Aid SA) has the power to fix conditions subject to which legal aid is to be rendered. The power includes fixing conditions in accordance with which any rights in respect of costs recovered in any legal proceedings or any dispute in respect of which the aid is rendered, are ceded to Legal Aid SA; and the payment of contributions to Legal Aid SA by persons to whom legal aid is rendered.

Section 23(1)(b) of the Act provides that the minister must make regulations relating to the requirements or criteria that an applicant must comply with in order to qualify for legal aid, as well as the terms and conditions on which such legal aid is made available to the applicant (s 4(1)(e)(i) – (ii) of the Act).

The Act commenced on 1 March 2015 and there are no regulations made by the minister on the requirements or criteria

that an applicant must comply with. However, s 26(6) provides that the Legal Aid Guide in force on the date of commencement of the Act remains in force until it is withdrawn and replaced by regulation by the minister and the Legal Aid Manual. The Legal Aid Guide 2014 provides requirements or criteria that an applicant must comply with in order to qualify for legal aid.

'Indigent person' is defined in the Legal Aid Guide as '[a] person who qualifies for legal aid under Legal Aid South Africa's means test'. Chapter 5 of the Legal Aid Guide has laid down a means test in order to determine if a person qualifies for legal aid or not. The following guidelines are prescribed for determining if the person has passed the means test:

- In the first stage, it must be determined if the person is employed. If the person is not employed, it is the end of the inquiry, the applicant qualifies for legal aid. If the person is employed, the second stage inquiry is required.
- In the second stage, the person receiving the legal aid application determines whether the legal aid applicant is single or a member of a household or a child. A single applicant who has a nett monthly income after deduction of income tax of R 5 500 a month or less will qualify for completely subsidised legal aid. An applicant, who is a member of a household and whose household has a nett monthly income after deduction of income tax of R 6 000 a month or less, will qualify for completely subsidised legal aid. The Legal Aid Guide further provides that a legal aid applicant or household who do not own immovable property will be permitted to have nett movable assets (including physical and/or intellectual rights to property) of up to R 100 000 without being disqualified under the means test. A legal aid applicant or household who own immovable property will be permitted to have nett immovable assets and movable assets (including physical and/or intellectual rights to property) of up to R 500 000, but the applicant/household must physically reside in the immovable property or at least one of the immovable properties (where more than one) unless the Regional Office Executive authorises to the contrary. The guide further provides tables of qualifying applicant and the provision of partially subsidised legal aid.

Chapter 4 of the Legal Aid Guide provides an exception to the application for legal aid by a user. The following exceptions apply:

- Where the user is not assisted, then the means of the user will be considered.
- Where the user is assisted by their parents, guardian, spouse, life partner or child, then their means will be considered.
- If the user is assisted by his or her parents, guardian, spouse, life partner

or child, who exceed the means test and can afford to provide legal representation for the user, yet fail, refuse and or neglect to do this, then legal aid will be provided to the user if substantial injustice would otherwise result. If Legal Aid SA provides legal aid to a user assisted by a parent, guardian, spouse, life partner or child with the means; it may institute proceedings against the parents, guardian, spouse, life partner or child to recover these costs if: The parents, guardian, spouse, life partner or child could afford to provide legal representation for the user as a part of their duty of support, and they neglected, failed or refused to provide legal representation for the user.

Legal Aid SA will only provide legal aid to the user where substantial injustice would otherwise result (see ch 4 of the Legal Aid Guide). Substantial injustice occurs when –

- a person cannot afford legal representation, and without legal representation would be imprisoned, or has the possibility of being sentenced, to direct imprisonment of more than three months or if given the option of a fine, the fine is or would remain unpaid for two weeks after the date of sentence.
- the seriousness of the issue, the complexity of the relevant law and procedure, the ability of the person to represent himself or herself effectively without a lawyer; the financial situation of the person, the chances of success in the case justifies the granting of legal aid and Legal Aid SA fails to grant such legal aid (see ch 4 of the Legal Aid Guide at paras 4.1, 4.9 and 4.18.1 for a detailed discussion of what would amount to substantial injustice).

In *S v Khanyile and Another* 1988 (3) SA 795 (N) at 815, the court introduced the guidelines on what would amount to substantial injustice (the guidelines were later endorsed in *S v Vermass; S v Du Plessis* 1995 (3) SA 292 (CC)). The following principles were introduced at p 815 of the judgment:

- Legal Aid SA must consider the inherent simplicity or complexity of the case, as far as both the law and the facts go.
- Legal Aid SA must consider general ability of the person to fend for themselves in a case.
- Legal Aid SA must consider the gravity of the case.

Right to representation and the right to legal representation

Section 15 of the MHCA is clear that a person has a broader right to representation, which includes the right to legal representation. The MHCA does not define representation, however, I submit that, it means any person chosen or appointed to act or speak for another

person. I further submit that the person need not be qualified. Any person that the user appoints will qualify as a representative. It is clear what s 15 means by representation. It should be emphasised that s 15 does not provide the right to be represented by any party in a court of law, because s 15 provides that representation in the court of law must be subject to the laws governing right of appearance at a court of law (see s 15(2) of the MHCA).

Section 15 further states that the right to representation, includes legal representation. The right is not limited to appearance in a court of law, I submit that it would also be applicable when a user appears in the review board (see s 15 of the MHCA).

The right to representation, only applies in three instances. First, in submitting an application. The MHCA does not specify what application would be covered in terms of s 15. However, I submit that a user has the right to representation in the submission of the following applications:

- Application for assisted care, treatment and rehabilitation services (see s 27 of the MHCA).
- Application to obtain involuntary care, treatment and rehabilitation (see s 33 of the MHCA).
- Application for discharge of state patients (see s 47 of the MHCA).

It should be noted that the definition of a user is wide enough to include next of kin, which means that even in cases where the application is made by a next of kin, the provisions of s 15 would still apply.

Secondly, lodging an appeal. The user may lodge the following appeal:

- Appeal against decision of head of health establishment to approve application for assisted care, treatment and rehabilitation (see s 29 of the MHCA).
- Appeals against decision of head of health establishment on involuntary care, treatment and rehabilitation (see s 35 of the MHCA).

Thirdly, appearing before a magistrate, judge or a review board, subject to the laws governing rights of appearances at a court of law.

Conclusion

I submit that a user will be entitled to legal aid in terms of s 15 of the MHCA, if it is clear that the person is an indigent person and if substantial injustice would occur if the legal aid is not provided.

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LEASE AGREEMENT

What does 'fair wear and tear' mean in the context of a lease agreement?

By
Madeleine
Truter

The phrase 'fair wear and tear excepted' is commonly used in lease agreements. It is, therefore, essential to understand what the phrase really means. In order to understand the meaning of 'fair wear and tear', it is helpful to distinguish 'fair wear and tear' from 'damage to the leased premises'. 'Fair wear and tear' refers to the deterioration in the condition of the leased premises, caused by normal, everyday usage during the period of the lease. This accepted norm will differ depending on the type of business the tenant conducts at the leased premises. For example, an office employing a small staff compliment will have less impact on the flooring, than a retail business with hundreds of customers walking through the leased premises. Weathering caused by natural elements would also be considered as 'fair wear and tear'. Any leased premises, which is not newly built or recently refurbished, will have some level of deterioration of condition when leased, thus requiring both the landlord and the tenant to agree at the time of concluding the lease, on the current state of the leased premises, thus providing a reference point from which future 'fair wear and tear' may be assessed. In contrast to 'fair wear and tear', 'damage to leased premises' is any deterioration outside the accepted norm, and can also be defined as negligent or accidental destruction and/or damage to the leased premises. Possible examples are a carpet being ripped while desks are moved, stains which cannot be removed despite professional cleaning, nails hammered into walls in order to hang pictures, or painting the walls a different colour without the landlord's consent. All of these examples would require the tenant to make good the situation, or forfeit a

portion of the deposit, in order to return the leased premises to its original state. At the end of the lease period, the tenant must hand over the leased premises in the same state in which it was received, with the exception of 'fair wear and tear'.

Court tests for 'fair wear and tear'

'Fair wear and tear' as taken from the old case of *Radloff v Kaplan* 1914 EDL 357 refers to the 'dilapidation or depreciation which comes by reason of lapse of time, action of weather etc, and normal [use]'. The aforementioned phrase is still used as the authoritative definition for 'fair wear and tear'.

The phrases 'fair wear and tear' and 'reasonable wear and tear' are interchangeable.

The phrase 'fair wear and tear' does not mean that a tenant who undertakes to maintain the leased premises in good repair is obliged to put the leased premises into such good condition when the lease begins – this is the duty of the landlord at the commencement of the lease, as per *Sarkin v Koren* 1949 (3) SA 545 (C). The *Sarkin* case might be an old case, but is still used as one of the foremost authorities, in relation to lease agreements.

The tenant is also not under any obligation to repair structural defects, or to put the leased premises in a better overall condition than it was on the date when the tenant took occupation. The tenant must only make such repairs as are ordinarily required. In the *Sarkin* case, the court stated that the tenant was not obliged to attend to mending a thatch roof that had deteriorated. The court stated that in order to establish a breach by a tenant of his duty to repair any part of the leased premises in terms of a lease agreement, the condition of the leased premises at the commencement of the lease is of primary importance. The court further stated that if the landlord failed to put the leased premises in a proper state of repair before handover, there is authority for the proposition that there was no duty on the tenant to put the leased premises in a better condition, than that in which he found them.

The tenant is also not under an obligation to rebuild a structure that has been totally destroyed (see *Commercial Union Assurance Co of South Africa Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd* 1998 (2) SA 718 (B)). The courts have noted, however, that a tenant may be under an obligation to repair parts of the leased premises, which entails replacing worn out parts with new ones. In the *Radloff* case, the court clarified the phrase 'fair wear and tear' by stating that 'if the person who is under the duty to repair lets time run on

unduly without doing anything towards the upkeep and keeping in order of the place, he cannot rely on the exception of wear and tear.'

In the *Sarkin* case, the court *a quo* looked at what might need to be repaired by a tenant that would not fall under the exception of 'fair wear and tear' (*Sarkin v Koen* 1948 (4) SA 438 (C)). Fixing of lights and fixing broken tiles on roofs were among examples mentioned by the court. The court noted that the items need not be replaced, but just repaired. Per the court's wording: 'Time must be taken into account; an old article is not to be made new; but so far as repair can be made good or protect against the ravages of time and the elements it must be taken.'

In the case of *Cash Wholesalers (Pty) Ltd v Marcuse* 1961 (2) SA 347 (SR), the court decided that: 'Where it has been established that a floor has worn thin over the years and is no longer capable of taking the load required for use by the lessee for the purposes of the lease and is therefore no longer reasonably fit for the purposes of the business of the lessee, the lessee is entitled to look to the lessor to have the matter remedied, even if this involves a new and better floor.' However, the court noted that: 'Replacing a floor is not a structural alteration, and it is not necessarily outside the tenant's obligations under a repair clause, even if it involves new and modern material' – it will be necessary to determine in each case where the responsibility for repair lies, namely, either with the tenant or the landlord, depending on the court's interpretation of what falls into the exception of 'fair wear and tear'. The court stated that the tenant must, having regard to the age, the condition of the building at the time of letting, and the length of the lease, keep the interior reasonably fit for occupation by a wholesaler, ordinary wear and tear excepted.

In the case of *Arendse v Badroodien* 1971 (2) SA 16 (C), the court also had regard to the state of wooden floors in the leased premises subject to a certain lease agreement. The court stated that the tenants had stayed in the house for six years before the rot in the floors became evident, and that it was just as likely as not that the rot had set in as a result of 'fair wear and tear'. Accordingly, the tenant was not liable for the repair of the floor.

In the case of *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E), the condition of leased premises, leased for use as a storage warehouse, was under question by the court. The court cited the case of *Sarkin* in noting that the obligation of the tenant to maintain the leased premises, must be interpreted in the light of the condition of the leased premises as at the date when the lease became operative. The

court stated that if the tenant registered a complaint regarding the condition of the leased premises at the commencement of the lease and the landlord did not attend thereto, the landlord's duty of maintenance would remain operative. The landlord is also obliged to repair any damage to the leased premises caused by 'fair wear and tear'.

In the case of *Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 (ZH), the court agreed with the decision of the court in an earlier case of *Green v Heyman* 1963 (3) SA 390 (T), in which the court stated that 'the lessee shall, on assuming occupation of the premises, satisfy himself that the premises are in a good state of repair. Thereafter the lessee shall be responsible for the maintenance of the interior of the premises in good order and condition, and shall return the premises to the lessor on the expiration of the lease in the same good order and condition, fair wear and tear excepted. This ... imports an obligation on the lessee to repair the plate-glass windows should they become damaged.'

Conclusion

The bottom line is that, unfortunately, there is no fixed test for what may fall under the exception of 'fair wear and tear' in lease agreements – it depends on the court's interpretation of the facts and circumstances of each case. However, there are some indicators as per the case law outlined above.

From a practical perspective, in order to avoid possible disputes between the landlord and the tenant, it is essential that an in-going inspection of the leased premises is performed, so as to ensure that both parties are fully aware of the condition of the leased premises. It is also advisable to take photographs of any area, which may later come into dispute, as these pictures may be the clinching proof in settling a dispute at a later date. The landlord and tenant should agree on the primary use for which the leased premises is required, as well as the most likely wear and tear, which may be anticipated, before concluding the lease. The lease should stipulate which party will be responsible for which specific maintenance or repair items. Similarly, an out-going inspection will provide both the landlord and the tenant with complete assurance that the condition of the leased premises is of an acceptable standard.

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THE LAW REPORTS

September 2017 (5) South African Law Reports (pp 1 – 354);
[2017] 2 All South African Law Reports June (pp 677– 996);
[2017] 3 All South African Law Reports July (pp 1– 364);
[2017] 2 All South African Law Reports August (pp 365 – 737);
2017 (7) Butterworths Constitutional Law Reports – July (pp 815 – 948)

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

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Company law

Minority shareholder's claim not a 'debt' for purposes of the Prescription Act: In *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* 2017 (5) SA 9 (CC); 2017 (7) BCLR 916 (CC) the facts were as follows: The respondent, Sanbonani, (the Shareblock) operated a shareblock scheme in Hazyview in Mpumalanga. The shareblock scheme was developed by Sanbonani Development Limited (the Development). The third respondent, one Harri, owned 80% of the Development's shares personally or through the Duleda Family Trust, of which he was the trustee, and 46,7% of the shares in the Shareblock. The applicants held or control 29,14% of the shares in the Shareblock.

In 1988 the Shareblock amended its articles of association to give the Development a continuous right to use property demarcated for common facilities and an unlimited discretion to develop a timeshare resort, which included the right to allocate

different numbers of shares to different share blocks.

In the period 1999 to 2004 several disputes arose between the applicants and Harri as the controlling mind of the Shareblock and the Development. Among other things, Harri instructed that a VAT refund must be paid to the Development although the South African Revenue Service had indicated that the refund was due to the Shareblock; he called a shareholders' meeting to remove the directors representing the applicants; and he engineered the appropriation of land earmarked for the common use of all the Shareblock shareholders for himself, the Development and the Duleda Trust.

In 2008 the applicants launched proceedings in the GP based on s 252 and s 266 respectively of the Companies Act 61 of 1973 to address the problems above. The court agreed with the respondents that the claims had prescribed after three years in terms of s 11(d) of the Prescription Act 68 of 1969. On appeal, the SCA used the wide interpretation of 'debt' that was used before the decision in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) and ruled that the s 266 claim had not prescribed because prescription only started to run after appointment of the *curator bonis*. It further held, however, that the s 252 claim had prescribed.

Since the SCA had issued the judgment before the CC

decision in *Makate* and it concerned the proper interpretation of their definition of 'debt', an appeal to the CC was allowed in respect of the question whether a s 252 claim was a debt that could prescribe.

In a majority judgment, Mhlantla J confirmed that the narrow interpretation as enunciated in the *Makate* case had to be applied. It was, therefore, held that a s 252 claim was not a 'debt' that could prescribe because the applicants' claim was for declaratory relief, not an alteration of the terms of a contract or a money award. The court first had to decide whether it would be just and equitable to grant relief before there was an actual claim and thus a 'debt'. However, although there was also no time limit in the 1973 Companies Act itself for instituting a s 252 action, a court could take into account the length of time that had elapsed between the commission of the actions and the date on which the court proceedings were instituted when deciding whether it was just and equitable to grant relief.

The appeal was accordingly successful and the case was returned to the High Court to decide on the merits of the s 252 application for relief.

Voting in of business rescue proceedings: The crisp facts in *FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA); [2017] 3 All SA 1 (SCA) were as follows: The business

of the respondent, KJ Foods, was the production and supply of bread. In 2012, after being in business for 20 years, it started experiencing financial problems. One of the reasons advanced for its financial distress was that it was in arrears with its payments towards its flour supplier, Pioneer. KJ Foods applied to be placed under business rescue proceedings.

The appellant, FirstRand, which was a creditor of KJ Foods, objected to the voting process in the approval of the business rescue plan, and it lodged an application in the GP.

In passing, s 152(2) of the Companies Act 71 of 2008 (the Act) sets the required minimum votes for the approval of a business rescue plan on a preliminary basis; s 152(3) provides that, if not so approved, the plan may only be dealt with in terms of s 153. Section 153 contains detailed provisions regarding the voting and setting aside of the voting process.

The High Court set aside, in terms of s 153(7) of the Act, a vote of FirstRand against the adoption of the proposed revised business rescue plan. The court held that FirstRand's vote was inappropriate and consequently granted an order in terms of which the voting result of rejection was set aside. The High Court further ordered that the proposed revised business rescue plan be adopted by the affected parties in terms of the Act.

On appeal to the SCA, Seriti

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JA pointed out that the principle issue at stake was whether s 153(1)(a)(ii) or s 153(1)(b)(i) (bb), read with s 153(7) of the Act, entailed that the court must first establish whether the vote was inappropriate before invoking its discretion under s 153(7) to set it aside. A second issue, closely linked to the principle issue, was the effect of a court setting aside a vote under s 153(7), that is, whether the business rescue plan must again be put to the vote after a court set it aside.

The court held that s 153(1)(a)(ii) and s 153(1)(b)(i)(bb) were inextricably linked to s 153(7). On an application to set aside the result of a vote in terms of any of these subsections, the court was prescribed by s 153(7) to determine only whether it was reasonable and just to set aside the particular vote, taking into account the factors set out in s 153(7)(a) – (c) and all circumstances relevant to the case, including the purpose of business rescue in terms of the Act. Put differently, in an application on the grounds that its result was inappropriate, the vote would be set aside if it were reasonable and just to do so in terms of s 153(7). This entailed a single inquiry and value judgment.

If a business rescue plan were again put to the vote at the resumption of the postponed meeting, it would enable a creditor (such as FirstRand) who voted against the adoption of the business rescue plan to vote against it once more, starting the whole process all over again. The Act clearly did not envisage another round of voting. It followed that on setting aside of the vote rejecting the business rescue plan, the business rescue plan would be considered to have been adopted by operation of law.

The order of the court *a quo*, that the revised business rescue plan be adopted by the affected parties was, therefore, superfluous. Its adoption was a natural consequence of the setting aside of the result of FirstRand's inappropriate vote.

The appeal was thus dismissed with costs.

Contempt of court

Circumvention of court order constitutes contempt of court: In *Readam SA (Pty) Ltd v BSB International Link CC and Others* 2017 (5) SA 184 (GJ); [2017] 2 All SA 902 (GJ) the SCA in an earlier judgment, ordered the defendant, BSB, to partially demolish a building it had commenced erecting on an erf in Parkmore, Johannesburg, which it owned. The SCA held that the construction was in violation of the applicable town planning scheme because, among others, its footprint covered more than the prescribed maximum of 60% of the erf's surface area and it exceeded the three-storey height limit.

It was common cause that BSB failed to partially demolish the building. Instead, and in order to circumvent the need for compliance with the SCA's order, BSB purchased an erf neighbouring the one on which the non-complying building was erected. BSB consolidated those erven, and applied to the appropriate town planning tribunal for the rezoning of that consolidated erf to allow for a greater building height, and a greater floor area coverage.

The applicant, Readam, was the owner of a neighbouring property. Readam instituted action to commit BSB for contempt of court.

Sutherland J identified two critical issues for consideration in the application for contempt of court. First, did the SCA order, properly interpreted, allow for such a course of conduct? Secondly, as a matter of principle and public policy, could a litigant be allowed to unilaterally choose not to comply with a direct order of court, thereby undermining the authority of the court and *de facto* achieving the objective of the unlawful enterprise?

The court held that the strategy pursued by BSB was inconsistent with any proper meaning to be given to the SCA order to demolish the unlawfully erected building. The SCA's order was not an injunction to engage in a process of obtaining authorisation, permissions and

consents to keep a building, which was an unlawful enterprise from the very inception of the project.

The court further held that as a matter of principle BSB's evasive conduct could not be accepted. To do so would be to allow, in conflict with earlier case law, BSB to present to the court an unlawful exercise as a *fait accompli*, thereby undermining the principle of legality.

The application was accordingly allowed with costs. BSB was ordered to pay the cost of the application on the attorney and client scale.

Constitutional law

Considerations: A matter which is moot: In *Afriforum NPC and Others v Eskom Holdings Soc Ltd and Others* [2017] 3 All SA 663 (GP) four separate applications against the respondent, Eskom, which all concerned the same legal issue, were lodged for adjudication.

Section 27 of the Electricity Regulation Act 4 of 2006 (ERA) provides that, in relation to the exercise of its powers in respect of the supply of electricity, a municipality must, *inter alia*, provide basic reticulation services free of charge, or at a minimum cost, to certain classes of end-users. Eskom supplies municipalities in bulk at a pre-determined tariff, and the municipalities then re-sell electricity to end-users within their municipal borders at a mark-up.

At stake was Eskom's decision to implement scheduled interruptions of the supply of electricity to three municipalities. The scheduled interruptions in certain municipalities were an attempt to collect arrear debts owed to Eskom for the supply of electricity. The applicants sought the review and setting aside of that decision on the grounds that it was unconstitutional, unlawful and unreasonable.

The applicants sought various declaratory orders. Suffice it to mention here that the applicants sought to establish that Eskom is not permitted to interrupt the supply of electricity to any local au-

thority as a means to collect acknowledged debts owed to it; and orders reviewing and setting aside Eskom's decisions to interrupt electricity to the municipalities on constitutional and administrative law grounds.

Eskom raised several defences and challenged the competency of the relief sought by the various applicants in all the applications. For space considerations the present discussion will be restricted to Eskom's plea of mootness as a preliminary issue based on the fact that after reaching agreement with two of the municipalities on payment proposals, there was no longer a live controversy.

As regards Eskom's plea of mootness, Murphy J held that a case is moot and generally not justiciable if it no longer presents an existing or live controversy, which should exist if the court is to avoid giving advisory opinions on abstract propositions of law. For any claim to be justiciable, it must present a real and substantial controversy which unequivocally calls for the adjudication of the rights asserted. A prerequisite for deciding an issue despite the fact that it is moot is that any order the court may make must have some practical effect on the parties or someone else. Relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties. Where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied.

The essential question for decision in relation to the justiciability of the issues and the relief sought in these applications, therefore, was whether the voluntary cessation of Eskom's alleged wrongful conduct has rendered the applications moot. The court found that the prayers of all the applicants seeking declaratory, interdictory and review relief in relation to the

impugned decisions on the grounds of constitutionality, illegality and unreasonableness fell to be dismissed.

The claims were moot and there were no exceptional circumstances requiring their decision. The applications were thus dismissed.

Procedural fairness of Minister's determinations: In *Earthlife Africa and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC); [2017] 3 All SA 187 (WCC) the court was asked to consider the respondent Minister's (the minister) s 34 determinations in terms of the Electricity Regulation Act 4 of 2006 (ERA).

On 17 December 2013 the minister, acting in terms of s 34 of the ERA, determined that South Africa required 9,6 gigawatts of nuclear power and that this should be procured by the Department of Energy. This determination, however, was only gazetted on 21 December 2015.

On 10 June 2015 the minister tabled three intergovernmental agreements (IGA) with

Russia, the United States (US) and Korea, regarding cooperation in the field of nuclear energy.

On 8 December 2016 the minister issued a second s 34 determination, but with Eskom as the procurer of nuclear plants. This second determination was gazetted on 14 December 2016.

The applicant, Earthlife, applied to have these determinations and IGAs declared unconstitutional and unlawful. Earthlife based its application on various procedural challenges, as well as non-compliance with the provisions in ss 231(2) and 231(3) of the Constitution. The minister, in turn, contended that the determinations were not required to be made in accordance with a procedurally fair process in which the public participated.

Bozalek J decided as follows: First, with regard to the procedural fairness of the s 34 ERA determinations, the court held that s 34(1) of the ERA constitutes the legislative framework within which nei-

ther a decision that new electricity generation capacity is required, nor a determination by the minister in that regard, has force and effect unless the National Energy Regulator (NERSA) confirms the minister's decision. Because a determination in terms of s 34(1) has far-reaching consequences for all concerned, the s 34 determinations constituted an administrative action. Section 33 of the Constitution provides that administrative action must be lawful, reasonable and procedurally fair. Section 10 of the National Energy Regulator Act 40 of 2004 (NERA) provides that any decision taken by NERSA must be taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to NERSA. A rational and fair process would have allowed for public input in terms of s 10 of the NERA. NERSA's decision to concur with the s 34 determinations failed to satisfy the test for

rationality because it failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party.

Secondly, the minister's failure to gazette or otherwise make the determination public for two years not only breached the minister's own decision, thus rendering it irrational and unlawful, but violated the requirements of open, transparent and accountable government.

Thirdly, the Russian IGA's detail and ramifications were such that it clearly required scrutiny and debate by the legislature in terms of s 231(2) of the Constitution. The minister either failed to apply her mind to the requirements of s 231(3), or at worst to have deliberately bypassed s 231(2) for an ulterior and unlawful purpose.

Fourthly, the USA IGA had been signed in 1995, but it was only tabled two decades later; and the Korean IGA was tabled more than four years after it had been signed. In

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both instances the minister failed to comply with the requirement of s 231(3) of the Constitution. The tabling of both IGAs had thus to be set aside.

Both the s 34 determinations thus fell to be set aside and the minister had to start with a clean slate.

Delict

'Foreseeability': In *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA); [2017] 3 All SA 502 (SCA) the appellant, MTO, was the owner of a plantation in the district of Humansdorp. It suffered huge damage when a fire burned through the plantation. The fire had started on the respondent's (the defendant's) immediately adjacent farm, in an area on the defendant's farm with dense thickets of highly flammable alien plants ('warbos'). The fire spread rapidly as a result of a strong wind.

MTO claimed damages of more than R 23 million. Its claim was rejected in the court *a quo*.

On appeal to the SCA the court pointed out that although the matter primarily turned on the alleged negligence of the defendant, it was nevertheless necessary to decide on the relevance of the aspect of 'foreseeability'.

In this regard Leach JA held that one should not take foreseeability into account as a

factor common to the inquiry in regard to the presence of both wrongfulness and negligence. It would cause confusion and conflate the elements of negligence and wrongfulness. As a result, so the court reasoned, foreseeability of harm should not be taken into account when determining wrongfulness, and its role should be confined to the rubrics of negligence and causation.

With regard to the element of negligence the court considered the firefighting facilities of the defendant, as well as the presumption created in s 34(1) of the National Veld and Forest Fire Act 101 of 1998. Section 34(1) placed an onus on the defendant to show that the fire spread to MTO's plantation without negligence in its (the defendant's) part.

The court decided that a reasonable landowner in the defendant's position was not obliged to ensure that in all circumstances a fire on its property would not spread beyond its boundaries. In the present case the defendant had shown that he had taken such steps that were reasonable in the circumstances to guard against the fire spreading beyond its property. It employed, among others, an independent and professional fire fighter to make his services available if need be.

Finally, the defendant was not negligent in failing to

remove the 'warbos', which was a natural resource on his property, as opposed to a 'man-made tinderbox'.

The appeal was dismissed with costs.

Test for wrongfulness: The dispute in *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] 3 All SA 382 (SCA) turned on a land swap transaction in terms of which a land developer, Booysen, the controlling mind of the three appellants (the plaintiffs), and the respondent, the municipality, each transferred land respectively owned by them to the other. The land was earmarked to be developed as a nature area. In April 2005, the Corporate Affairs Committee (CAC) of the municipality resolved to approve the land swap. However, the municipality was subsequently advised it did not have the power to delegate its function under s 14(2) of the Local Government, Municipal Finance Management Act 56 of 2003 to its CAC, and that such delegation, and subsequent approvals by the CAC, were unauthorised and thus invalid.

By the end of 2007, Booysen believed that all of the required services had been completed and that he was entitled to a certificate (the s 82 certificate) in terms of s 82 of the Town-Planning and Township Ordinance 15 of 1986 (the Ordinance). As the s 82 certificate was still not issued, the plaintiffs applied to the High Court for relief. The thrust of the plaintiff's application turned on the fact that the relevant municipal manager (one Flusk) had allegedly acted *mala fide* in withholding the issuance of the s 82 certificate.

The municipality's pleaded that the Ordinance did not allow for compensation or damages where the municipality delayed or failed in issuing the s 82 certificate.

Ponnan JA, in terms of a majority decision, pointed out that while the plaintiffs were entitled to proper administrative legal proceedings, that did not mean that the breach of the administrative duties (ie, the failure to issue the s 82 certificate) necessarily trans-

lated into private law duties giving rise to delictual claims. An incorrect administrative decision is not *per se* wrongful, and the breach of every legal duty, especially one imposed by administrative law, does not necessarily translate into the breach of a delictual duty. Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation, including the object of the legislation. This, in turn involves a consideration of policy factors.

Conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful.

The court referred to earlier case law in which it was held that public policy considerations dictate that adjudicators of disputes are immune to damages claims in respect of their incorrect and negligent decisions.

The plaintiffs failed to adduce evidence that Flusk had acted *mala fide* and/or with a *mala fide* ulterior purpose.

The court accordingly held that the municipality did not act wrongfully in the delictual sense and was not in breach of any legal duty owed by it to the plaintiffs, because the municipality enjoyed immunity against liability for damages resulting from the negligent conduct complained of.

The appeal was, therefore, dismissed with costs.

Execution

Jurisdiction: Emolument attachment: At stake in *Smith NO v Clerk Pietermaritzburg Magistrates Court* 2017 (5) SA 289 (KZP) was the question which court has jurisdiction to issue an emoluments order where two different courts have jurisdiction over, the debtor, on the one hand, and the employer which pays the debtor's salary, on the other hand.

In May 2015 the Pietermaritzburg Magistrate's Court granted an administration

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order against a debtor, and authorised the issue of an allied emoluments attachment order in terms of which the debtor's employer (the garnishee) was obliged (on a continuing basis, and until such time as the judgment debt has been paid in full) to pay a certain portion of the judgment debtor's salary to the judgment creditor.

The debtor under administration resided in the district of Pietermaritzburg while his employer's head offices were in Durban. In short, the debtor and the garnishee resided in two different jurisdictions.

The administrator then asked the clerk of the Pietermaritzburg court to issue the emoluments order. The clerk refused and the administrator sought review of the clerk's decision. The court dismissed the review, and the administrator appealed to the KZP.

The principle question was which of the Pietermaritzburg or Durban courts could issue the emoluments order?

Madondo DJP held that

only the court with jurisdiction over the employer could do so. In this regard the court relied on s 65J(1)(a) of the Magistrates' Court Act 32 of 1944 (the Act).

The appeal was accordingly dismissed with costs.

Insolvency law

Circumstances under which insolvent may be represent the estate in litigation:

The facts in *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others; National Directors of Public Prosecutions and Another v Mulaudzi* [2017] 3 All SA 510 (SCA) were as follows: In May 2009, the appellant (the insolvent) invested R 33,5 million in a policy underwritten by the first respondent, Old Mutual. In March 2011, he concluded a written deed of cession with a third party, Nedbank, in terms of which he ceded all rights in the insurance policy. Nedbank subsequently notified Old Mutual of the cession and requested confirmation that the policy had been en-

dorsed with the cession in its favour. Due to an error, Old Mutual did not substitute Nedbank as the owner of the policy in the place of the insolvent on its computer system, and the insolvent continued to be reflected as the owner of the policy. On 2 June 2014, the insolvent submitted a disinvestment application form to Old Mutual in respect of the policy in terms of which he sought payment of the full disinvestment value of the policy. Old Mutual paid the full maturity value of the policy, namely R 48 163 098,55, into a bank account nominated by the insolvent, in the mistaken belief that the insolvent was still the owner of the policy. It only realised its error when Nedbank sought payment in terms of the cession. It paid Nedbank the full maturity value of the policy as it was obliged to in terms of the cession.

Old Mutual thereafter unsuccessfully sought repayment from the insolvent. Old Mutual consequently reported the matter to the South Af-

rican Police Services pursuant to the provisions of s 34(1)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

Suffice it to mention here that after the insolvent's estate was sequestrated and trustees appointed the question was raised in subsequent litigation involving two appeals, whether the insolvent had jurisdiction to represent his insolvent estate.

Ponnan JA held that in terms of s 20(1) of the Insolvency Act 24 of 1936, the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, on the appointment of a trustee, to vest the estate in the trustee. It is then the trustee, and not the insolvent who acts in litigation concerning the estate.

The main issue, therefore was, whether the insolvent should also be entitled to participate in the proceedings in this court (which would be the case if the trustees

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were to have been joined) or whether he first had to seek and obtain the court's leave to participate (something he would have to do if the proper course was for the trustees to be substituted for him). The court held that on the sequestration, the trustees had to take the place of the insolvent in the litigation; and that the insolvent could take steps only if the trustees decided not to take steps in the litigation. As the trustees had indicated that they would abide the decision of the court in both matters, the insolvent was entitled to take steps which, if successful, would enhance the value of the estate, in the second appeal or reduce the liabilities in the estate in the first appeal. The insolvent was thus entitled to intervene in both matters.

Intellectual property

Power of Registrar to extend duration of patent: The facts in *Trustco Group International (Pty) Ltd v Vodacom (Pty) Ltd and Another* 2017 (5) SA 283 (SCA) were that the appellant, Trustco, which was a patent-holder, failed to pay the patent's renewal, and the patent lapsed. (The reported version of the court's decision does not specify the nature of the patent in question.)

Trustco then applied to the Registrar of Patents for its restoration. After the Registrar had advertised the application for restoration, the respondent, Vodacom, filed a notice of opposition. From the date of Vodacom's notice of opposition, Trustco had two months to file a counter-statement, failing which, reg 83 of the Patent Regulations provides its application for restoration would be deemed abandoned.

The two months passed without Trustco filing a counter-statement, but shortly thereafter it applied for an

extension of time in which to do so. The Registrar granted the extension in terms of s 16(2) of the Patents Act 57 of 1978. Vodacom successfully appealed this grant of an extension to the Commissioner of Patents.

On appeal to the SCA, Navsa ADP, held that the key issue was whether reg 83 limited the Registrar's discretion under s 16(2) to extend times of doing of anything. The court decided that it did not. It held that a remedial power, such as the power to extend time periods aimed at avoiding harsh results, should be extended as far as the wording of a statutory provision admits. It referred with approval to the decision in *Slims (Pty) Ltd and Another v Morris NO* 1988 (1) SA 715 (A).

The appeal was accordingly allowed with costs. The Commissioner's decision was set aside, and substituted so as to dismiss Vodacom's appeal.

Law of succession

Powers of a Master's representative compared to the powers of the executor: The facts in *Kenene NO v Invela Financial Corporation (Pty) Ltd and Others* [2017] 3 All SA 725 (ECG) were as follows: The executor was the granddaughter of the deceased who died intestate on 7 December 2004. The second respondent was one of the deceased's daughters and the mother of the executor. The second respondent was appointed as the Master's representative.

In October 2008, the second respondent concluded an agreement of sale of the property. The transfer of the property was to be effected by the seventh respondent. The second respondent wished to carry out certain renovations to the property, which still formed part of the deceased's estate. To that end the second respondent, in her capacity as the Master's rep-

resentative borrowed money from Invela, in the form of bridging finance in the sum of R 30 000. The loan was arranged through the seventh respondent, as agent. The buyers cancelled the agreement of sale, but the bridging finance advanced by Invela, remained due and payable to it. Invela issued summons in the magistrates' court against the second respondent claiming repayment of the amount lent, and obtained default judgment against the second respondent in her representative capacity. When Invela applied to have the property declared executable, the second respondent and Invela concluded a settlement agreement in terms whereof the second respondent, still in her representative capacity, agreed to repay the loan by way of monthly instalments. By then, the Master had substituted his representative with the appellant, as executor of the deceased's estate. Therefore, according to the appellant, when the second respondent concluded the settlement agreement, she had no authority to bind the deceased's estate.

Since no payments were made in terms of the agreement of settlement, Invela successfully applied in the magistrates' court for default judgment and later for the property to be declared executable. A warrant of execution was subsequently issued and the property was sold on auction.

On appeal to the ECG, the executor argued, *inter alia*, that the magistrate ought to have found that good cause was shown for rescinding the judgments in question; the second respondent, who was not issued with letters of authority or executorship from the Master, did not have the necessary authority in terms of s 18(3) of the Administration of Estates Act 66 of 1965 (the Act) to burden the estate

in question with debt or to dispose of property and accordingly, any sale in contravention thereof was a nullity and the order thus erroneously made.

Revelas J held that an executor (who is charged with the liquidation of a deceased's estate) has powers distinct from a Master's representative, appointed by the Master in terms of s 18(3) of the Act. A Master's representative is appointed merely to 'distribute the assets' of the estate where the value is below R 125 000. Therefore, a Master's representative has limited powers.

Section 30 of the Act imposes restrictions on the sale in execution of property in deceased estates. Non-compliance with the prescripts of the Act will result in a nullity. Since the property was attached while it still formed part of the deceased's estate, the ninth respondent was required by s 30 of the Act, to first obtain an order from the High Court directing him to execute. In the absence of such an order the ninth respondent did not have the necessary authority to transfer the property.

It was concluded that the magistrate erred in her application of the relevant legal principles and her judgment was set aside.

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 justice, agricultural land, civil procedure, electricity, environmental law, freedom of the press, international law, land and land reform, minerals and petroleum, motion of no-confidence in State President, privilege of legal professional and revenue.

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Employee's liability for recruitment costs: **Premature termination of a fixed term contract**

Metal Industries Benefit Funds Administrator v Myburgh (LC)
(unreported case no JS854/13, 29-8-2017) (Lagrange J)

In the case *Air Traffic and Navigation Services Company v Esterhuizen* (SCA) (unreported case no 668/2013, 25-9-2014) (Theron JA) at para 17, the court held:

'A contract of employment is generally entered into for a fixed period or for an indefinite period. Where no date has been fixed upon which the contract will terminate, it will continue indefinitely until terminated or will be terminable by either party on the giving of notice.'

In the case of *Lottering and Others v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC) at paras 14 and 20, the court held:

'If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.

...
In a fixed term contract, a notice to bring the contract to an early end is a repudiation because it does not in itself constitute a contractually permissible act of termination. Being a repudiation, the employer has an election to hold the employee to the contract or to accept the repudiation and cancel the contract.'

In the case of *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 18 the court held a premature termination of a fixed term contract of employment results in a claim for damages for breach of contract.

Facts

The respondent was employed by way of a contract dated 1 March 2013 as a fixed term employee, to assist the applicant with distributing the pension and provident fund surplus in terms of the Pension Funds Act 24 of 1956. The term of the contract was to be determined by the occurrence of an event as opposed to a set date. The contract provided that once the surplus had been distributed (the event) the employment contract with the applicant would automatically terminate.

Prior to the work provided for in the contract of employment been finished and, as such before the event, which would have ended the contract occurring, the respondent resigned on 1 July

2013 in a letter dated 26 June 2013, which was only handed to the applicant on 28 June 2013.

The respondent had been recruited by the applicant through a recruitment agency, which charged the applicant an agency fee of R 15 916,57. After the abrupt resignation of the respondent, the applicant then employed a replacement utilising the services of the same recruitment agency on or about 17 July 2013 and again paid a fee for their services in the sum of R 15 914,40.

The applicant accepted the respondent's breach of contract and required payment for damages it suffered due to the respondent's failure to fulfil his obligation to continue working until the fund surplus had been distributed. The applicant identified these damages to be the original agency fee incurred in recruiting the respondent and the additional fee incurred in obtaining a replacement when he resigned on short notice. Initially the applicant appeared to concede that the initial recruitment fee was incurred before the breach and only the second recruitment fee was incurred as an additional cost. However, in the applicant's later heads of arguments, the contention that the respondent was also liable to it for the original recruitment costs was continued.

Issue

The main issue before the Labour Court (LC) was whether the respondent was liable for the initial recruitment fee, as well as the second recruitment fee incurred by the applicant.

LC's judgment

The court noted that where no provisions were made for notice of termination, the respondent's resignation before the happening of the resolutive event that would have ended the contract amounted to a breach. Under a fixed term contract, an employee could be held liable for the value of the outstanding services he failed to perform, subject to the employer's duty to mitigate the damage caused by employing somebody else, as the applicant had done. As the only damages the applicant claimed was recruitment fees, it was not required to consider if the respondent was responsible for other damages.

The court noted further there was a direct link between the respondent terminating his employment and the applicant having to replace him. It would have been reasonably within the thought of both parties that the applicant would have sought his replacement in the same way he was hired and this would have required an additional recruitment fee. As such, this was a cost the respondent ought to have realised the applicant would bear in replacing him.

The court held the original fee was one, which the applicant had already suffered as an expense on the premise that it would secure an employee for the term of contract. It was not a liability which it sought to claim from the respondent, or which the respondent agreed to reimburse the applicant if he breached the contract. Even if the respondent had agreed to repay it if he prematurely terminated his employment, it would have been difficult for the applicant to convince a court that it suffered a loss when it had to spend the amount refunded, in recruiting a replacement. The amount which the respondent would have been undertaken to reimburse would have placed the applicant in the same position it would have been had the respondent not prematurely terminated his employment, leaving aside the issue of other damages it may have suffered by work interruption due to his termination.

The court accordingly concluded it was solely the second recruitment fee, which was an expense that could reasonably be attributed to the respondent's breach.

Conclusion

This judgment is important as it highlights that where an employee who is recruited via an agency terminates a fixed term contract of employment prematurely, said employee is liable for damages in terms of outstanding services, which he or she failed to perform, as well as the recruitment fee incurred by the employer in finding a suitable replacement.

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

Bills

Critical Infrastructure Protection Bill B22 of 2017.

Commencement of Acts

Higher Education Amendment Act 9 of 2016. *Commencement:* 22 September 2017 (except for s 33, which will come into operation on a date to be proclaimed). GN1012 GG41132/22-9-2017.

Selected list of delegated legislation

Child Justice Act 75 of 2008

Amendment of allowances and remuneration of persons competent to conduct the evaluation of criminal capacity of a child. GN R968 GG41096/6-9-2017 (also available in Setswana).

Competition Act 89 of 1998

Amendment of filing fees for intermediate and large mergers. GN1005 GG41124/15-9-2017.

Criminal Procedure Act 51 of 1977

Amendment of the regulations prescribing the tariff of allowances payable to witnesses in criminal proceedings. GN R967 GG41096/6-9-2017 (also available in Afrikaans).

Tariff payable to psychiatrists or clinical psychologists for inquiries into mental condition of an accused. GN R964 GG41096/6-9-2017 (also available in Afrikaans).

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Regulations relating to fertilizers. GN972 GG41100/8-9-2017.

Financial Intelligence Centre Act 38 of 2001

Amendment of the Money Laundering and Terrorist Financing Control Regulations. GN R1062 GG41154/29-9-2017.

Health Professions Act 56 of 1974

Regulation defining the scope of the pro-

fession of psychology: List of classified and certified psychological tests. BN155 GG41100/8-9-2017.

Income Tax Act 58 of 1962

Agreement between South Africa and Cameroon for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. GN936 GG41082/1-9-2017 (also available in Afrikaans).

Labour Relations Act 66 of 1995

Bargaining councils accredited by Commission for Conciliation, Mediation and Arbitration to conciliate and/or arbitrate from 1 June 2017 to 31 May 2020. GenN732 GG41132/22-9-2017.

Land Survey Act 8 of 1997

Offices of the Chief Surveyor-General and the Surveyors-General: Fees to be charged for products and services. GN933 GG41082/1-9-2017.

Magistrates' Courts Act 32 of 1944

Tariff payable to witnesses in civil cases. GN R965 GG41096/6-9-2017.

Maintenance Act 99 of 1998

Amendment of regulations. GN R966 GG41096/6-9-2017 (also available in Afrikaans).

Merchant Shipping Act 57 of 1951

Merchant Shipping (Seafarer Recruitment and Placement) Regulations, 2017. GN R986 GG41108/11-9-2017.

Military Pensions Act 84 of 1976

Determination of amounts. GN1016 GG41132/22-9-2017.

National Forests Act 84 of 1998

List of protected tree species. GenN690 GG41100/8-9-2017.

National Water Act 36 of 1998

National norms and standards for domestic water and sanitation services. GN982 GG41100/8-9-2017.

Plant Improvement Act 53 of 1976

Amendment of regulations relating to establishments, varieties, plants and propagating material. GN970 GG41100/8-9-2017.

Rules Board for Courts of Law Act 107 of 1985

Amendment of rules regulating the conduct of the Supreme Court of Appeal, High Court and magistrates' courts of South Africa (fees) with effect from 1 November 2017. GN R1055 GG41142/29-9-2017 (also available in Afrikaans and isiXhosa).

Sheriffs Act 90 of 1986

Description: Areas of jurisdiction of of-

fices in the lower and superior courts. GN959 GG41092/4-9-2017.

Social Service Professions Act 110 of 1978

Regulations relating to the registration of a specialisation in clinical social work. GN913 GG41082/1-9-2017.

Determination of the persons or category or class of persons competent to be appointed as intermediaries. GN R1040 GG41133/22-9-2017 (also available in Afrikaans).

Superior Courts Act 10 of 2013

Gauteng Division of the High Court functioning as the Mpumalanga Division of the High Court: Jurisdictional boundaries of the Circuit Courts of the Mpumalanga Division. GN956 GG41090/1-9-2017.

Practice directive for the Gauteng Division of the High Court Functioning as the Mpumalanga Division of the High Court. GN955 GG41090/1-9-2017.

Draft Bills

Draft Transport Appeal Tribunal Amendment Bill. GN947 GG41082/1-9-2017.

Draft National Research Foundation Amendment Bill. GN980 GG41100/8-9-2017.

Draft Political Party Funding Bill. GenN726 GG41125/19-9-2017.

Draft delegated legislation

Draft policy on the quality assurance of school based assessment (SBA) for grade 10 - 12 in terms of the National Education Policy Act 27 of 1996. GN911 GG41082/1-9-2017.

Intention to appoint the Environmental Assessment Practitioners Association of South Africa as the single registration authority in terms of the National Environmental Management Act 107 of 1998 for comment. GN953 GG41084/1-9-2017.

Proposed replacement of the policyholder protection rules in terms of the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. BN153 GG41089/1-9-2017.

Regulations regarding the rendering of forensic pathology services in terms of the National Health Act 61 of 2003 for

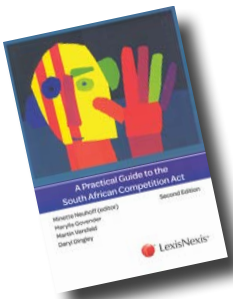
comment. GN916 GG41082/1-9-2017. Proposed levy on the piped-gas and petroleum pipeline industries for 2018/19 in terms of the Gas Regulator Levies Act 75 of 2002. GN957 GG41091/4-9-2017. Designation of the Atlantis Special Economic Zone in terms of the Special Economic Zones Act 16 of 2014 for comment. GN981 GG41100/8-9-2017. Debt counselling fee structure in terms of the National Credit Act 34 of 2005 for

comment. GenN705 GG41100/8-9-2017. Alignment of the codes of good practice of the Petroleum and Liquid Fuels Sector Transformation Charter to the Broad-based Black Economic Empowerment Act 53 of 2003 for comment. Proc31 GG41110/13-9-2017. Draft norms and standards for levels of water and sanitation services in terms of the Water Services Act 108 of 1997. GN1001 GG41121/15-9-2017.

Amendments to the method of calculation set out in GenN216 of 2009 in terms of the Competition Act 89 of 1998 for comment. GN1004 GG41124/15-9-2017. Draft regulations laying down the procedure to be followed for adoption of environmental management instruments in terms of the National Environmental Management Act 107 of 1998. GN987 GG41114/15-9-2017. □

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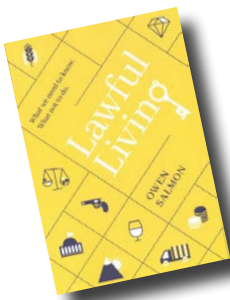
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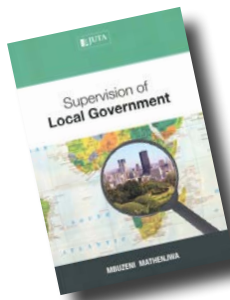
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Employer's liability for sexual harassment in the workplace

In *Liberty Group Ltd v M* (2017) 38 ILJ 1318 (LAC), an employee resigned from her employment and stated in her resignation letter that her employment had become intolerable due to ongoing and continued sexual harassment by her manager. The employee then instituted an unfair discrimination claim against her employer in terms of s 60 of the Employment Equity Act 55 of 1998 (the EEA).

The employee alleged that she was sexually harassed on four occasions. On the first occasion she confronted her manager directly and considered the matter to be resolved. On the second occasion the manager requested her to attend training, but when she arrived at the training she discovered that she was the only staff member attending. Her manager then made unwarranted comments to her, touched her body, massaged her shoulders and stood too close to her. She asked him to stop but he did not. On the third occasion he again asked her to attend training and assured her that they would not be alone. However, when she arrived at the training she found that she was alone again. He inappropriately touched her body and rubbed his body against hers and forced his tongue into her mouth. A further incident occurred when she was working late and he placed his hand on her leg moving it steadily up her leg. When she told him to stop, he laughed.

Initially the employee did not report the incidents of sexual harassment as she feared that she might lose her job or that the manager would take it out on her when appraising her performance. A few months later she escalated the issue to one of her other managers when having a discussion about her salary. She was advised to consult the employer's sexual harassment policy and to lodge a complaint in accordance with the policy if she felt that the conduct warranted this. The manager also reported the incident

to another person in human resources who tried to contact the employee and set up a meeting with her but this meeting never took place. Before submitting the complaint, her manager advised that he was aware that she had been in contact with human resources. She assumed that he was aware that she reported the sexual harassment and contacted the employee wellness call centre to ask for information regarding the submission of the complaint. She was told to refer the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). The employer denied that this call took place as there was no call centre record of the call.

The employee then resigned. Her team leader contacted her and she told her team leader about the sexual harassment. She was urged not to resign so that the employer could deal with the matter and the employee consequently withdrew her resignation. However, in the two weeks that followed no steps were taken to investigate the complaint and the employee then resigned for the second time on 13 October 2009. Her manager was eventually suspended but this suspension was lifted as the employee refused to take part in the investigation as she was no longer an employee and had lost confidence in her former employer.

The Labour Court (LC) found the employer liable under s 60 of the EEA for failing to take reasonable steps to protect the employee from sexual harassment. In this regard, the employer should have taken steps at the earliest opportunity when the sexual harassment was brought to its attention. Instead, steps were only taken after the employee had resigned for the second time. The employer was ordered to pay the employee R 250 000 as damages. The employer appealed to the Labour Appeal Court (LAC).

The LAC referred to *Potgieter v National Commissioner of the SA Police Service and Another* (2009) 30 ILJ 1322 (LC) in which it set out the following requirements for an employer to be liable under s 60 of the EEA –

- the sexual harassment complained of must have been committed by another employee;
- the sexual harassment must constitute unfair discrimination;
- the sexual harassment must have taken place at the workplace;

- the alleged sexual harassment must have immediately been brought to the attention of the employer;
- the employer must be aware of the incident of sexual harassment;
- the employer must have failed to consult all relevant parties or take the necessary steps to eliminate the conduct;
- the employer must have failed to take all reasonable and practicable measures to ensure that its employees did not act in contravention of the EEA.

As regards the requirement to report the sexual harassment immediately, the LAC found that this must be given a sensible meaning and must be determined with reference to the facts of each matter. In this case, the LAC was satisfied that the employee reported the incident within sufficient time albeit that it was not brought to the attention of the employer immediately.

The LAC found that from the time that the employee reported the matter to one of her managers and was referred to the policy, the employer should have ensured that the matter was investigated appropriately. It was found that the LC correctly found that the steps required by s 60(2) to consult with the relevant parties and to take necessary steps to eliminate the alleged conduct were not complied with by the employer. Furthermore, no investigation was carried out until the second resignation letter.

The LAC per Waglay JP, Savage AJA and Phatshoane AJA found that the employer had failed to take all the necessary steps to eliminate the conduct complained of and failed to do all that was reasonably practicable under s 60(4) of the EEA. The appeal was accordingly dismissed.

Can an employer dispense with procedural fairness requirements in instances of serious misconduct?

In *South African Medical Association obo Pietz v Department of Health – Gauteng and Others* [2017] 9 BLLR 923 (LAC), the employee who was practising as a gynaecologist and obstetrician was summarily dismissed for insolvency, insubordination and gross negligence after carrying out a caesarean section in an unprofessional manner, which allegedly led to the death of an unborn child. The employee was requested to give a full report of what had

happened within 24 hours. He was dismissed the next day without a fair hearing and before providing the report. The employee accordingly referred an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that the employee had been grossly negligent, which warranted the dismissal. The CCMA commissioner found that the dismissal had been procedurally unfair as the employee was not given an opportunity to state his case but did not grant the employee compensation on the basis that the misconduct was serious, his actions had violated the patient's Constitutional rights, the employee had failed to show any remorse, and he had been given an opportunity to explain his actions in a report but failed to do so.

The employee then approached the Labour Court (LC) to review the arbitration award on the basis, *inter alia*, that

no compensation had been awarded for the procedural unfairness, the commissioner failed to properly consider the evidence and reached a decision that no reasonable commissioner could have reached. The LC found that it was a decision that a reasonable decision maker could make and dismissed the review application.

On appeal, the Labour Appeal Court (LAC) found that the dismissal was substantively fair due to the severe nature of the misconduct. As regards procedural fairness, the employer argued that the conduct warranted summary dismissal and that holding a drawn out disciplinary hearing in such circumstances would be a waste of taxpayers' money.

The LAC held that the dismissal had been procedurally unfair and that the commissioner must exercise a value judgment when determining whether to grant compensation. It was held that

compensation for a procedurally unfair dismissal is a *solatium* and given the employer's unfair conduct and the fact that the *audi alteram partem* rule was not give effect to, the employee should have been granted some compensation. While the employer was given an opportunity to submit a report, he was dismissed before this report was provided. The LAC found that the commissioner's discretion in deciding not to grant compensation was based on issues of substantive fairness without having any regard to the fact that due process was not followed. The LAC was of the view that that this was the incorrect approach as denying an employee the right to due process is a breach of the Constitutional right to fair labour practices. The employer was accordingly ordered to pay compensation equal to three months' salary.



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What constitutes a transfer of a business?

Imvula Quality Protection and Others v UNISA (unreported case no J435/17, 31-8-2017) (Van Niekerk J)

Pursuant to the 'Fees Must Fall' campaign the University of South Africa (Unisa) entered into an agreement with certain stakeholders wherein it agreed to terminate its contract with its security service provider and directly employ the majority of security guards needed. The implementation of the agreement would see 910 out of the 1 413 outsourced security staff being directly employed by Unisa.

Unisa informed both the applicant, Imvula Quality Protection and the intervening applicant, Red Alert TSS, that it would be cancelling its service level agreement with both entities. It was common cause that Unisa, having notified the applicants of its intention, approached the employees of the applicants and invited them to apply for posts of security guards.

The applicants approached the Labour

Court (LC) seeking a declarator that the insourcing agreement triggered the provisions of s 197 and as a result thereof, its employees employed to service the respective contracts with Unisa would automatically be transferred to Unisa.

Unisa argued that in the absence of a 'transfer of a business', s 197 did not find application in these circumstances.

The court affirmed that the test into whether a transaction falls within the ambit of s 197, involves an inquiry into; whether firstly there was a transfer, if so found, whether the transfer was of a business; if found that there was a business that was transferred, the third leg of the inquiry is whether the business was transferred as a going concern. The test is an objective one, which is limited to the facts of the case, and was not guided or influenced by the labels the parties assigned the transaction, such as outsourcing/ insourcing agreements or second or third generation transfers.

While the applicants acknowledged that Unisa would not acquire any of its assets, business infrastructure, technology or operating model, post cancellation of their respective contracts, it argued that providing security guards is a service and thus a business for purposes of s 197 – the insourcing agreement would see a continuation of the same service and hence a business has been transferred.

With reference to the Constitutional Court (CC) decision in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* [2012] 3 BLLR 211 (CC), Van Niekerk J held:

'The Constitutional Court has identified two situations within the realm of outsourcing and insourcing with a clear distinction between the two. In the first, where s 197 does not apply, the outgo-

ing service provider forfeits the right to provide services, whether by way of the cancellation of a contract or otherwise, but does not transfer its business. In this instance, the right to provide the outsourced service may transfer, but no business is transferred as a going concern.

...

The second situation arises when on the termination of a service contract, when the service is either insourced or a different service provider is appointed, the business that supplies the service, including its business infrastructure, is transferred from the outgoing service provider either back to its erstwhile client or to the new service provider, as a going concern. In these circumstances, a transfer occurs as contemplated by s 197.

The distinction is one that has its roots in the definition of a "business" in s 197(1). While that definition includes a service, it should be emphasised that it is the business that supplies the service that is capable of being transferred, not the business itself.'

On the facts, Unisa's decision to terminate its contract with the applicants and, thereafter, offer the applicants' employees employment, did not yield a transfer of any assets or business infrastructure from the applicants to Unisa. Therefore, even if the court were to accept that the requirements of a transfer had been met, it was not persuaded that such a transfer was of a business.

The applicants' respective businesses comprised of various components such as assets, business infrastructure, operational resources, industry know-how, management and staff. The termination of the service level agreements would result in only some staff members working

directly for Unisa while both applicants retain the components, which make up their respective businesses, leaving them free to offer their services to other clients. In finding the termination of the service level agreement fell within the second scenario described by the CC, the court held:

‘The true position therefore is that the contracts for the provision of services concluded between Unisa and iMvula and Red Alert respectively have come to an end, and that no part of the infrastructure for the conducting of the business of providing a security service is to be transferred to Unisa. In those circum-

stances, Unisa’s decision to insource in terms of the shared services model and the offers of employment consequently made to some of iMvula and Red Alert’s staff does not trigger s 197. The application falls to be dismissed.’

The application was dismissed with costs.



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Abbreviation	Title	Publisher	Volume/issue
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<i>PLD</i>	Property Law Digest	LexisNexis	(2017) 21.3
<i>SAJHR</i>	South African Journal on Human Rights	Taylor and Francis	(2017) 33.2
<i>SALJ</i>	South African Law Journal	Juta	(2017) 134.3
<i>SJ</i>	Speculum Juris	University of Fort Hare	(2015) 29.2
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By
Clement
Marumoagae

Driver's licence: A barrier preventing entry into the attorneys' profession

The South African government, South African universities, the legal profession, as well as various sectors of our society continuously engage the debate relating to the transformation of the judiciary generally and practice of law to some extent. While the face of the judiciary has changed to such an extent that it is now viewed as broadly representative of the demographics of the country, transformation of the practice of law remains a point of contention. Various factors relating to briefing patterns, conflict of interest, racism, sexism, perceptions of competency or lack thereof, barriers to entry and other factors have been outlined as the major bar towards the transformation of the legal profession in particular. In this article, I do not intend to discuss the transformation of the legal profession generally, but rather to look at one of the most ignored barriers of entry to the profession, which ultimately defeats the purpose of transforming the legal profession. In recent times, some law firms in their recruitment drives to attract candidate attorneys (CAs), use seemingly objective criteria, which when looked at closely is both exclusionary and discriminatory. It is even more disturbing when such tactics are used by public interest law firms. In this article, I will be arguing that the requirement that CAs should possess a driver's licence and in some instances, a car, is both exclusionary and unconstitutional and thus against the ideals of social justice.

Transformation of the legal profession

I agree with Judge Mojapelo that '[a]n independent legal profession is essential for an independent judiciary – just as a transformed legal profession is a *sine qua non* for a transformed judiciary' (Judge Phineas Mojapelo 'Transformation, independence and poor "products" of the LLB' 2012 (Dec) *DR* 54). In order to transform both the judiciary and the legal practice, there is a need for honest reflection on how those within the profession behave and for the government and the provincial law societies to intervene.

In its discussion paper, Transformation of the Legal Profession: Discussion Paper, the South African government has recognised that:

'The legal profession does not represent the diversity of South African society. The number of black lawyers in private practice and in the public service sector is comparatively low, as is the number of women. Black people and women are almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar' (Transformation of the Legal Profession: Discussion Paper (www.gov.za, accessed 28-9-2017)).

Most importantly, government observed that:

'Each year the law graduates being produced by the universities become more representative of South African society, but many of these graduates are unable to gain access to the profession, or to their chosen branch of the profession. If they do gain access, many find themselves practising in circumstances which set them up for failure. This applies particularly to graduates from disadvantaged groups and, more particularly, to graduates of the historically black universities (HBUs), which were a product of the apartheid regime' (*op cit*).

While I concede that there has been much improvement in ensuring access for black graduates into the law profession, I am nonetheless, convinced that the government's admission that black law graduates are unable to gain access to the legal profession merits attention. Hugh Corder has also correctly observed that '[a]lthough there has never been a formal exclusion of black South Africans from legal professional or educational ranks, and although there have been prominent examples of black lawyers who have assumed a leading role in professional and political circles, access to professional qualification for black South Africans has always been much harder than for whites' (Hugh Corder 'Establishing Legitimacy for the Administration of Justice in South Africa' (1995) 6 *Stellenbosch Law Review* 202 at 206). On the basis of this observation, there is a need to access seemingly objective criteria, which is used to recruit CAs and evaluate its hidden exclusionary and dis-

criminatory character. This is important because such criteria make it difficult for black law graduates, in particular, to attain articles.

Barriers to entry

Private attorneys' have a right to conduct their businesses in a manner that will render such businesses successful. This includes assembling a team, which will enable them to render effective services to their clients. As such, they have a right to develop criteria, which is designed specifically for their firms in so far as the recruitment of CAs is concerned. For instance, they may desire to attract the so called 'best students' from universities, which according to them produce such students. They may look at the overall academic performance of such students and also evaluate them on extra curricula activities, which these students were involved in at university or their respective communities, in order to assess whether these students are 'well rounded' candidates. While an argument can be made that there is no empirical evidence that directly links academic performance or involvement in extra curricula activities to excellence in the practice of law, nonetheless, it is a common criterion to some extent. It is a pity that over and above the 'artificial criteria', there is an emergence of law firms that require CAs to also possess driver's licences and in certain instances also a car. On the face of it, this strengthens a perception that certain law firms hire candidate attorneys solely to advance their administrative work. I have argued before that –

'even though administrative work is part of the candidate attorney's learning process, it should nonetheless not be seen as the most decisive part of it. This perpetuates a stereotype that there are law firms that are not particularly interested in adequately training candidate attorneys, but rather use them as part of their administration work system. Candidate attorneys at these law firms become masters of photocopying machines. They run around serving and collecting documents without any real practical legal training. Further, these candidate attorneys are employed to boost these law firms' BEE ratings' (Clement Marumoag-

ae 'The role of candidate attorneys in the legal profession' 2014 (July) *DR* 54).

Requiring a driver's licence from a law graduate indicates a total ignorance of the socio-economic climate of South Africa (SA). Indeed, there are law students from different backgrounds who are able to attain their driver's licences while pursuing their LLB degree, but such graduates are those who are not confronted with a decision between paying for their fees or accommodation and doing their driver's licences. Most of the graduates who complete an LLB without a drivers' licence are hoping to secure employment in order to be able to pay for lessons, which will enable them to attain drivers' licences. However, these graduates find themselves unable to secure articles because they do not have a driver's licence. This practice is unfortunate and the provincial law societies have a moral and legal duty to bring it to an end. In my view, this practice violates these law graduates' right to freedom of trade, occupation and profession. In terms of s 22 of the Constitution any law graduate who is a citizen of SA 'has the right to choose their trade, occupation or profession freely'. Some of these graduates are unable to be admitted as attorneys and thus choose their profession because they are not able to secure articles only and merely on the basis that they do not have a drivers' licence. This

practice further offends against these graduates right to be treated equally as provided for in s 9 of the Constitution, in the sense that they are being discriminated against on the basis that they do not possess a driver's licence, which in itself is unconstitutional.

It is even more unfortunate, if not disappointing that some University Law Clinics are also specifying drivers' licences as a requirement for CA positions (see <https://irec.wits.ac.za>, accessed 5-10-2017). This, in my view, cannot be justified on the basis of the inherent requirements of the job. Some of these University Law Clinics are located in urban areas in walking distances of the courts, and on appointment CAs will not be delivering documents either at the sheriff's office or corresponding attorneys on a daily basis.

Conclusion

It is important that all attorneys who are recruiting CAs should be reminded of one of the purposes of our trade, which is captured in s 3 of the Legal Practice Act 28 of 2014, which provides among others that the purpose of this Act is –

'(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;

...

(b) ...

(iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic; [and]

...

(g) create a framework for the –

(iii) development of adequate training programmes for legal practitioners and candidate legal practitioners'.

Candidate attorneys are not employed in the true sense of the word, but they are part of practical training, which should be aimed at capacitating them with the necessary skills that will enable them to become competent attorneys. The provincial law societies should intervene in the process of training of CAs and assess progress (if any) that various firms are making in capacitating CAs. If CAs are hired because of their ability to drive without being provided the substantive legal training, the profession will inherit half cooked professionals who cannot effectively practice law.

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By
Nkateko
Nkhwashi

Is a legal opinion an objective analysis (and an interpretation) of a legal position or praise-worship song?

We live in an era of media sensationalism and televised court cases. With all this comes a need for people, as well as institutions (private and public) to always try to ascertain their legal positions in varying circumstances. It is difficult to read a newspaper from start to finish without coming across statements like 'we welcome the judgment, but we are still awaiting a legal opinion from our legal team before we can proceed' or 'we note the passing of the Bill into law, however, we still have reservations about it and we are in the process of seeking a legal opinion from counsel'. There seems to be too much appetite for consumption of this particular (offering of) legal services. This can be said to be good for those with the legal and technical know-how. However, recent experiences have showed that even those with no 'legal and technical know-how' want a piece of the pie in this respect.

One case in point is the recent referral of the Financial Intelligence Centre Amendment Bill B33C of 2015 (the Bill) back to Parliament due to certain perceived or potential unconstitutional grounds. Not to get into much detail, but this issue centred around a certain provision dealing with warrantless searches by inspectors in the employ of the Financial Intelligence Centre in their day-to-day duties of trying to ascertain proper compliance with the provisions of the relevant law, namely, the Financial Intelligence Centre Act 38 of 2001.

As a way of trying to deal with these reservations, Parliament then called on all the relevant stakeholders to make representations on the impugned provision (only). In this process Parliament also asked stakeholders to go seek and present legal opinions. Stakeholders then did as they were told and presented same to Parliament. During the process it was alleged that one of the key stakeholders of the Bill did not source their legal opinion from a legal practitioner and the content of such an opinion was not based on legal authority and thus very biased. This then raised the questions of what exactly is considered as a legal opinion and how objective should it

be, also taking into account the duty of always trying to secure the best interest of one's client?

What should a legal opinion entail?

Not to be pedagogic, but this reminded me of some of the remarks of CG Marnewick SC around the same issue. For instance, 'when advising a client a lawyer should act as an objective investigator' and 'considers the pros and cons carefully and give the client objective advice on the options'. Legal opinions are supposed to be 'objective to the point of being dispassionate' and 'are not designed for the process of counselling the client'. Again a legal practitioner should 'guard against the subconscious desire to provide the client with the advice he or she would like to hear. Be objective and if you have to be ruthless in your objectivity in order to advise the client properly then so be it'.

In essence then a legal opinion 'is an objective investigation into law. It does not choose a side but analyses the position on both sides and then renders an option which is likely to succeed'. Traditionally, legal opinions are drafted by advocates on briefed facts and directed to attorneys. The receiving attorney will then study the opinion and advise his or her client accordingly.

Considering the above authoritative remarks then that it is justifiable to submit that only those with a legal education, background, expertise and relevant legal experience can then draft a sound legal opinion. This is not something which can be said to be within the realm of 'arm-chair critics' or 'political analysts', for instance. It should also be noted that within the space of legal writing we have what is called 'predictive legal writing' and 'persuasive legal writing'. It is important to be able to distinguish between the two as legal opinion (or office memoranda) fall under the former and not the latter.

Furthermore, it is important to have skills in legal research and fact analysis. What this entails is that you have to be well versed in whatever subject matter you are analysing or trying to give an

opinion on. Recently and following some of government's issued notices in an attempt to implement the Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act), there have been some threats of taking the Amendment Act back to court. One key opponent of the Act (through their spokesperson) remarked as follows:

'[T]he organisation still stood by its previous pronouncement that the Financial Intelligence Centre Advisory Council would give the Financial Intelligence Centre director and banks unfettered and arbitrary unconstitutional powers' (Lesetja Malope 'PPF vows to head to court to challenge FICA' *City Press* 18-6-2017).

One quick glance at the Amendment Act, one can see that there is no such thing as a 'Financial Intelligence Centre Advisory Council'. As one example, this then goes on to demonstrate the importance of legal research and fact analysis.

For completeness sake, a legal opinion should set out the following:

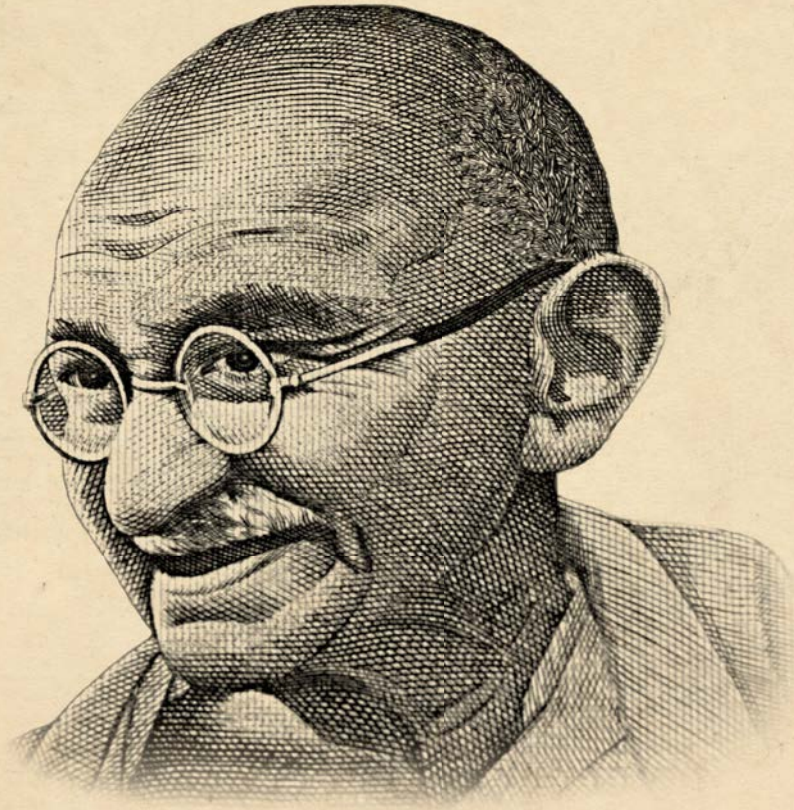
- The background.
- The cause (or what led to the opinion being sought).
- Mandate or instruction (and what do you aim to analyse).
- Methodology (for your analysis).
- Analysis (cross referencing to legal precedent and/or authority).
- And a summarised version of your conclusion and recommendations.

Conclusion

In a nutshell, a legal opinion is an objective interpretation of a legal position by a professional legal adviser and not a praise (worship) song or a tool of endearment with one's client.

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

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RISK ALERT

NOVEMBER 2017 NO 5/2017

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RISK MANAGEMENT COLUMN

A NOTE FROM THE EDITOR

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

PRACTITIONERS REGISTERED WITH THE PRESCRIPTION ALERT UNIT MUST PLEASE READ THE IMPORTANT COMMUNICATION FROM THAT UNIT BELOW

The value of the outstanding claims notified to the AIIF was actuarially assessed at an amount in excess of R475 million as at the end of March 2017. As new claims are notified to the AIIF on a daily basis, that amount increases and a further actual assessment will be conducted as at the end of December 2017. As previously noted, many claims could have been avoided by practitioners applying basic risk management measures in their firms. The reality is that the annual growth in claims poses a threat to the long-term sustainability of the AIIF. Practitioners need to do an introspection in order to assess whether some aspects of the underlying behaviour on their part (and also on the part of their staff) needs to be corrected in order to avoid claims. In addressing different forums in the profession, I have often made reference to the fact that while some claims may arise out of a *bona fide* mistake on the part of a practitioner, many arise out of negligence in the practice and other claims arise out of conduct which borders on recklessness and can best be regarded as egregious.



Thomas Harban,
Editor

As will be noted from the piece on cybercrime related claims below, it is rather unfortunate that despite the numerous warnings published, attorneys are still falling victim to these scams. It is important that practitioners keep up to date with the changing risk environment and take measures to protect themselves against all the risks applicable in their practices. An examination of the risk surveys published by the large auditing firms and other risk consultants in recent years shows that cyber related risks now consistently form part of the top ten risks identified each year. No individual, business enterprise or law firm is immune from this type of risk and appropriate measures must be put in place to guard against this risk materialising.

In the previous edition of the *Bulletin* (August 2017: No. 4/2017) we published the statistics of claims notified to the Attorneys

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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.



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RISK MANAGEMENT COLUMN continued...

Fidelity Fund. Many readers reacted with shock at the extent of the theft of trust funds in firms. In this edition we have included a note on the sentences received by some practitioners thus far this year. Practitioners (and their staff) must be aware that the misappropriation of trust money could lead to lengthy jail terms!

Many practitioners will read this edition of the *Bulletin* at around the same time that they will be applying

for their Fidelity Fund certificates. We, once again, urge practitioners to complete the AIIF risk self-assessment form at the same time that the application for the Fidelity Fund certificate is completed (if they have not already done so this year). This is also an opportune time for practitioners, when assessing their trust balances, to ensure that a proper accounting can be made of all funds (including estate funds) and to regularly report to the AIIF in respect of those matters where

a bond of security has been issued by the AIIF in favour of the attorney appointed as executor.

We look forward to engaging with practitioners at the upcoming annual general meetings of the various structures in the profession.

Thomas Harban

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IMPORTANT NOTE TO PRACTITIONERS UTILISING THE PRESCRIPTION ALERT SYSTEM

The AIIF claim statistics published below show that prescription is a serious risk for the profession. Practitioners will be aware that the AIIF offers the Prescription Alert system as a back-up diary system for the profession. This system is an important risk mitigation measure (for the practitioners and the AIIF alike) and is widely used by members of the legal profession to register their time-barred matters. As this service is offered as a back-up to practitioners, attorneys must also have their own reliable internal diary systems. An internal dual diary system between a practitioner and the support staff will be a prudent measure to prevent matters from 'falling through the cracks'.

In the last year, we noted that there were certain functionality challenges with the current Prescription Alert system and thus commissioned a service provider to develop an updated software platform off which the system is to be run. Due to circumstances beyond our control, the finalisation of the software development has un-

fortunately been delayed. This matter has been escalated and is now being dealt with as one of the major strategic projects within the company.

While the work around the development proceeds, the Prescription Alert unit will continue functioning on the existing system. We are aware that, in recent months, some practitioners have faced challenges in using the current system. We apologise for any inconvenience caused by this and assure practitioners that these challenges are receiving attention within the highest levels of the company. Those practitioners who are facing any challenges with the current system are requested to kindly notify us immediately so that appropriate urgent remedial action can be taken on our side. All challenges faced by users of the system will be addressed by us.

The Prescription Alert system has been developed for the benefit of practitioners. As such, we want to ensure that we meet the expectations of the profession. As part of the development of the new system, practitioners

will be invited to workshops where their expectations, experiences and suggestions relating to the Prescription Alert system will be addressed. It is important for the AIIF that the new Prescription Alert system continues to meet the expectations of the profession as the users of the service. It is important that as many users of the Prescription Alert system as possible give us their input. Practitioners are also welcome to address any experiences and suggestions in respect of the system to the AIIF.

We look forward to obtaining the input of the profession and engaging with the users in developing an improved Prescription Alert system.

Further communication on the Prescription Alert project will be sent out as the project progresses.

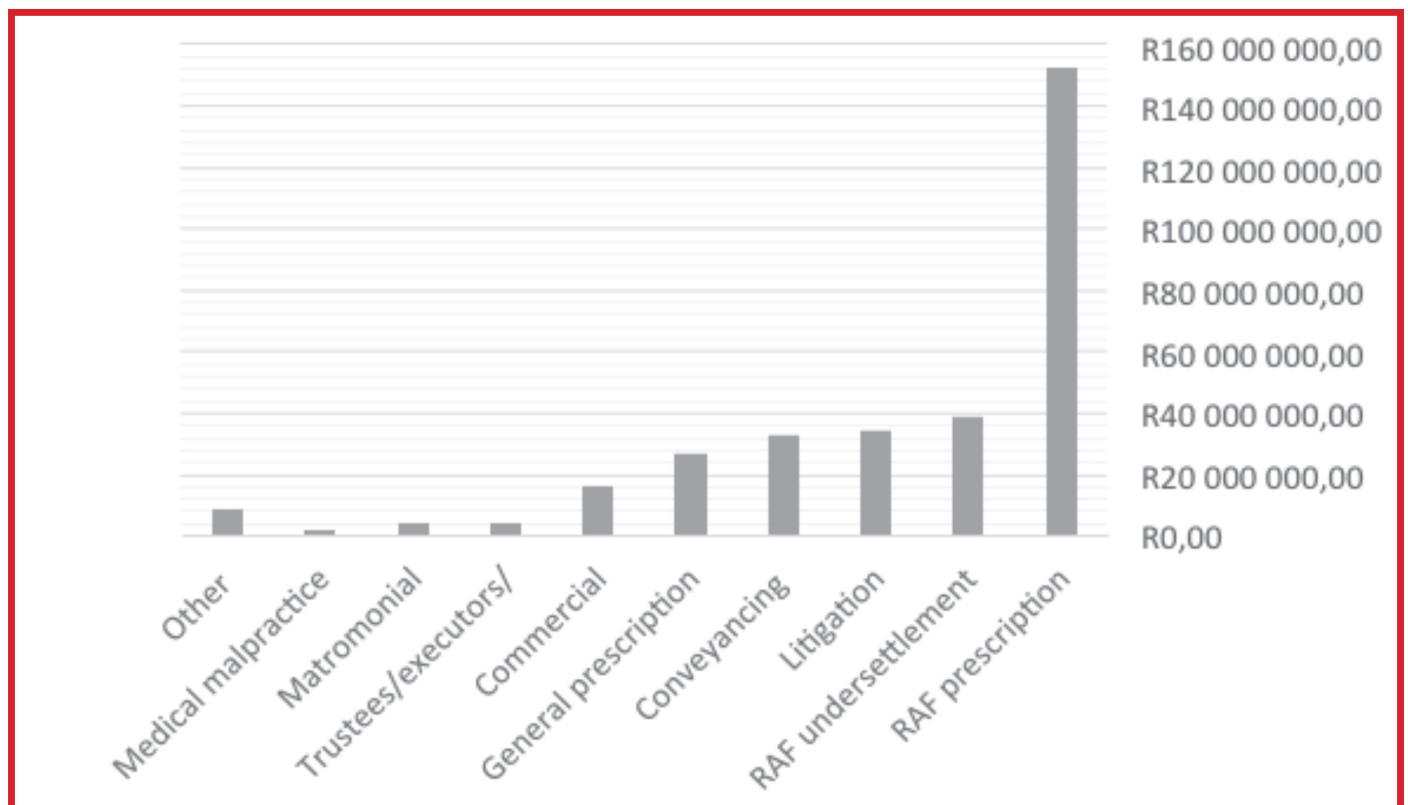
Any queries and/or suggestions in respect of the Prescription Alert system can be addressed to either Lunga Mtiti or Zodwa Mbatha at the email address alert@aiif.co.za

RISK MANAGEMENT COLUMN continued...

AIIF CLAIMS STATISTICS

Table 1 below gives a breakdown of claims paid by the AIIF since 2011.

TABLE 1



The largest claims categories have remained constant in recent years- these are RAF claims (prescribed and under-settled), litigation, conveyancing and general prescription claims. Prescribed RAF claims make up almost 48% of the total value of claims paid by the AIIF in this period. RAF related claims (prescribed and under-settled) make up almost 60% of the total value of claims paid. These figures are of a

great concern to the AIIF and should be to attorneys conducting practice in this area as well.

Claims arising out of the prescription of RAF matters can be avoided by practitioners implementing even basic risk management measures in their practices, including:

- **Not accepting instructions where the prescription date is looming!**

- **Ensuring that summons is issued well in advance of the prescription date-** this will allow for errors to be rectified where necessary, such as where the action was instituted out of the incorrect court. In a recent claim notified to the AIIF, the firm concerned had set out an incorrect address for the RAF on the summons resulting in the sheriff not being able to effect service as the address, as stated,

RISK MANAGEMENT COLUMN continued...

fell outside of his jurisdiction. The summons had to be returned to the firm and, in the interim, the claim prescribed. There have also been a number of claims where the action is initially instituted out of the incorrect court and by the time the plaintiff's attorney realises this and wishes to withdraw that action and institute a fresh action in the correct court, the prescription date has passed. Messengers are human and could thus also make errors in either delivering the documents to the incorrect sheriff or the latter may delay in effecting service.

- **Recording the correct prescription date prominently on the file and also in the diary-** if the accident date is incorrectly stated, then the running of prescription will be calculated from a false date. Imagine, for example, a client instructs an attorney in November 2015 to pursue a claim for injuries arising out of that an accident occurred on 1 January 2013 but that the accident date is recorded as 1 January 2015 on the file and/or the diary? This could lead to disastrous consequences for the firm concerned. Firms also need to ensure that they capture correct dates when registering claims with the Prescription Alert unit.
- **Registering all time barred matters with the Prescription Alert unit-** the Prescription Alert system is a back-up diary system

made available to attorneys at no cost. Practitioners must also comply with the reminders sent by the Prescription Alert unit. It will be remembered that a failure to register RAF matters with the Prescription Alert unit or to adhere to the notifications sent by that unit will attract a higher deductible (an additional 20%) in the event of claim.

- **Instituting regular file audits-** in many cases practitioners allege that the prescribed matter had been dealt with by some of other staff member who has since left the practice or that they were under the impression that the matter was being properly attended too. Regular file audits go hand in hand with adequate supervision of staff and peer reviews between professionals.
- **Properly supervising staff-** junior and administrative staff, paralegals and even candidate attorneys must be properly supervised (no matter how experienced they may be). Ultimately, the responsibility (and liability in the event of a claim) will lie with the principal/s in the firm. The client has instructed you as an expert and it will not be a defence to a professional indemnity claim that you delegated the matter to a junior employee in your firm. In fact, a failure to supervise staff may amount to a breach of your professional duties.

- **Obtaining as much information on a matter as early as possible** – this will assist in your investigation and assessment of the matter timeously. Also, obtain more than one contact number for the client.

- **Familiarising themselves with the law and the applicable prescription period in your matter.** It is a concern that there are many practitioners who are unable to calculate prescription or to identify the prescription periods applicable to their specific matters.

- **When a file is taken over from another practice, carefully checking to ensure that prescription is not imminent, before accepting the mandate.**

- **Ensuring a proper handover and inspection of files each time there is a change in personnel.**

- **Being wary of RAF claims handlers giving verbal 'assurance' that an offer is imminent and that there is thus no need to issue summons-** once the claim prescribes, the plaintiff's attorney will not be able to rely on the fact that assurance had been given or that there was an assumption that the RAF would make an offer of settlement.

The cases discussed below contain important considerations that practitioners need to take into account in dealing with RAF claims.

RISK MANAGEMENT COLUMN continued...

By any definition, and despite having been in existence for over 20 years, the South African democracy is by all accounts relatively young. It is therefore not surprising to find that our jurisprudence is constantly being developed by the courts, more specifically the Constitutional Court, to align our rule of law with the constitutional imperatives that we have set for ourselves as a democratic society based on principles of human dignity, equality and freedom.

This constitutionally driven development was demonstrated in the case of *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 (commonly referred to as the “Please Call Me” case), when the Constitutional Court overruled the *dictum* in the case of *Desai N.O. v Desai & others* 1996 (1) SA 141; [1995] ZASCA 113 (A) “that a debt must be given a wide interpretation and that every obligation to do something or refrain from doing something constitutes a debt.”

In the *Makate* case, the Plaintiff sought an order to compel Vodacom to commence negotiations with him for payment for his idea. The court ruled in favour of the applicant, Mr Makate. The Constitutional Court, in addressing the provisions of the Prescription Act 68 of 1969, applied Section 39(2) of the Constitution.

Section 39(2) provides:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.”

The court held further that “*Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations onto them, and when legislature provisions limits or intrudes upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.*”

In another turn of events, the AIIF has been advocating equal rights and protection for victims of road accidents,

NOTES ON PRESCRIBED RAF CLAIMS

HIT AND RUN CLAIMS

THE WINDS OF CHANGE ARE UPON US - THE ADVENT OF A CONSTITUTIONAL DISPENSATION

where neither the identity of the driver nor the owner is known (so-called ‘hit and run’ cases). In all hit-and-run Road Accident Fund cases, the law requires claimants to lodge their claims within two (2) years from the date of the accident and to issue summons within five (5) years from the date of the accident, ‘irrespective of any legal impediment’.

Such impediments include, *inter alia*, being a minor, mentally incapacity or being incapable of managing your own affairs or being under curatorship. Therefore, in hit-and-run claims, the running of prescription was not suspended.

Recently the High Court in *Combrink and Another v Road Accident Fund and Another* [2015] ZAGPPHC 760 declared Regulation 2(4) which provided that summons had to be issued within the collective period of 5 years unconstitutional. The court did not express a view on the requirement to have lodged a claim within 2 years.

The AIIF therefore sought to challenge the Road Accident Fund and the Minister of Transport on the issues in relation to having to lodge a claim within a period of 2 years.

In a matter in the Durban High Court, an attorney and the RAF had been sued by the plaintiff who was alleged to have been injured in a motor vehicle accident. The claim involved a minor involved in a hit-and-run accident. The claim had not been lodged within the required period of 2 years. The RAF pleaded that the claim had prescribed and the client therefore sought to hold the attorney liable and, in the alternative, in the event that the RAF’s special plea of prescription succeeded.

The AIIF, through its attorneys, challenged the constitutionality of Regulation 2(3) and raised various grounds upon which the Regulations could be constitutionally abolished. For an extensive discussion on the constitutional issues surrounding Regulation 2(3), see our publication in the February 2017 (Issue No.1/2017) edition of the *Bulletin*. The limitation inflicts very severe harm to a right that is of particular importance to an open and democratic society based on human dignity, equality and freedom. Recently, the RAF has informed the AIIF’s legal representatives that they intend to withdraw their special plea. The effect of this is, in a sense, a capitulation to the argument, albeit not elevating the concession to a formal point in law resulting in the consequential development of the law. Regrettably, in this particular case, the AIIF does not have any further *locus standi* to challenge or develop the law where the RAF has accepted liability, which in turn releases the attorney from the suit.

The AIIF hereby wishes to inform the profession that in hit-and-run cases where attorneys have failed to lodge a claim within the required period of 2 years, all is not lost and it is important that a claim is persisted with against the RAF.

We are on the cusp of legal advancement in respect of these claims and perseverance will tender its reward in due course. Practitioners faced with similar cases are invited to contact us should they wish to discuss our thinking around this important point of law.

Jonathan Kaiser
Legal Advisor at the AIIF

RISK MANAGEMENT COLUMN continued...

In the matter of *Kgoale and another v Road Accident Fund and Others* (A769/2015) [2016] ZAGP-PHC 493 (24 June 2016), the Pretoria High Court was called upon to rule on consolidated matters which raised a number of questions of which practitioners should be aware. The two plaintiff's had been involved in separate accidents and had instituted their respective actions in the magistrates' court. In preparation for trial and during the medico-legal consultations, it became apparent that their damages would exceed the monetary jurisdiction of the magistrates' court. It was then necessary that the cases be transferred to the High Court. This would require that the plaintiff's withdrew their respective actions in the magistrates' court and issue fresh summonses in the High Court. A withdrawal of the magistrate court actions would have resulted in the prescription of the respective claims. The plaintiffs had applied for a transfer of their respective cases to the High Court in terms of section 50 (1) of the Magistrate's Court Act 32 of 1944. The applications had been refused by the respective magistrates' courts and an appeal against those rulings was dismissed by the High Court.

For present purposes, I wish to focus on two issues:

- (i) The fact that it was only when preparing for trial that it became apparent that the quantum of the damages suffered by each of the two plaintiffs were significantly more serious than initially estimated; and
- (ii) When the attorneys acting for the respective plaintiffs realised that the actions should have been insti-

PRESCRIPTION: ISSUING SUMMONS OUT OF THE INCORRECT COURT AND THE LATE INVESTIGATION OF QUANTUM



tuted in the High Court, prescription of the claims then became a factor.

It is important that practitioners ensure that the necessary investigation is done on all aspects of the matters, including all aspects of the merits and the quantum. Understandably some injuries may only become apparent sometime after the accident and others may only stabilise later. This approach would not only protect the plaintiffs and their attorneys from the fate of those in the *Kgoale* case, but would also mitigate against the risk of an under-settlement. An in-depth investigation and proper analysis of

the quantum would also have possibly assisted the parties in this case to appreciate an earlier stage that the quantum would exceed the jurisdiction of the magistrates' court. Leaving the investigation until too late in any matter (personal injury or otherwise) also exposes practitioners to the risk that one or more head of damages may not be included in the initial claim and, at a later stage, when an amendment is sought to add that head/s of damages, the defendant may raise the argument that the amendment seeks to introduce a new cause of action which has prescribed.

GENERAL PRACTICE

TO WHOM DOES THE AIIF GRANT BONDS OF SECURITY?

The AIIF grants bonds of security to practising attorneys who have been appointed as executors of deceased estates. The applicable policy is available on our website www.aiif.co.za and was also published in the July 2017 (No. 3/2017) of the *Bulletin*. We receive a number of queries regarding the executor bond facility and thus publish a number of points aimed at addressing these queries.

The AIIF will not grant bonds of security to attorneys acting as agents for the executors or those appointed in terms of section 18(3) of the Administration of Estates Act 66 of 1965.

Firms with an existing exposure of more than R20 million in active bonds

will not receive any further bonds from the AIIF until that exposure has been reduced to below the R20 million threshold and all of the AIIF's requirements have been met.

Practitioners to whom bonds of security have been granted must comply with all the AIIF policy conditions and must keep the company updated with regards to the progress being made in the administration of the estate. Practitioners who move from one firm to another must inform the AIIF of the change.

An examination of some of the records held by the Master of the High Court reveals that in many cases practitioners do not respond to queries re-

ceived from the Master's office. This delays the finalisation of the administration process, prejudices those parties who have an interest in the estate and amounts to unprofessional conduct. The AIIF is also prejudiced by this in that the bonds have to remain open in the company records. The total value of outstanding bonds currently stands at approximately R10 billion.

When the administration of the estate has been finalised, practitioners must inform the AIIF accordingly. Clause 2 of the executor bond policy lists the circumstances under which the AIIF will not issue a bond of security.

CRIMINAL CASES AGAINST DEFAULTING ATTORNEYS

Criminal cases against attorneys accused of misappropriating trust funds may be opened by either the parties having an interest in those funds or by members of the Attorneys Fidelity Fund (AFF) team.

The statistics provided by the AFF Prosecutions Unit show that the team currently has 128 matters under investigation. In the last year, 28 criminal cases have been finalised against the attorneys and their staff charged with misappropriation of trust funds. In an additional five matters, the accused have been convicted and are awaiting sentencing. (These statistics

relate only to matters where the AFF prosecutions team have laid the criminal charge.)

In one matter a former attorney was found guilty of 3 charges of fraud and 3 of theft amounting to **R5 290 000**. On 15 November 2016 he was sentenced to five (5) years imprisonment on each of the first two charges and fifteen (15) years direct imprisonment in respect of another charge. The practitioner will serve an effective prison sentence of 15 years!

In another matter, a former practitioner was convicted of misappropri-

ating just over R 5 million. He was sentenced to 12 years in prison of which 6 years were conditionally suspended. The High Court refused his application for leave to appeal.

These are just two of the many matters where sentences have been handed down to practitioners in the last 12 months. In many of the cases, as part of the sentence, the convicted practitioners are also ordered to pay compensation to the AFF. In all matters the AFF team assists the police and the NPA in prosecuting the accused and pushes for an appropriate sentence.

GENERAL PRACTICE continued...

CYBERCRIME

It is concerning to note that despite the various publications of warnings to practitioners regarding cybercrime, many are still falling victim to cyberscams. Claims arising out of cybercrime are excluded from the AIIF policy (see clause 16(o)). The definition of cybercrime is stated as follows in the AIIF policy:

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);*

The cybercrime exclusion has been effective since 1 July 2016. To date, we have excluded 80 claims with a total value of R52, 256,607.60 which fall within the cybercrime exclusion. Practitioners must be alert to the dangers of cybercrime and ensure that their staff are also educated on cyber risks.

QUERY FROM A PRACTITIONER

An attorney has sent us a list of questions which may be on minds of many other members of the profession. With his permission, we publish the questions as well as our responses thereto.

1. What is the difference between the Attorneys Fidelity Fund and the Attorneys Insurance Indemnity Fund?

The Attorneys Fidelity Fund (the AFF) is established in terms of section 25 of the Attorneys Act. The primary purpose of the AFF is to refund members of the public who have suffered losses as a result of the theft of money entrusted to an attorney. The Attorneys Insurance Indemnity Fund NPC (the AIIF) is an insurance company that was established by the AFF to provide a level of professional indemnity insurance to all practicing attorneys in South Africa. The AIIF provides cover to attorneys in terms of a Master Policy applicable to all insured attorneys. The level of cover is determined by the number of partners/ directors in the firm on the date that the cause of action arose. The AIIF also provides bonds of security to attorneys appointed as executors of deceased estates.

2. Are these funds in the sense that they own or hold funds i.e. money

in an account, or an investment portfolio, OR do these two funds administer and adjudicate claims to money held by someone else?

No, these are not funds in that sense.

3. Are all practising attorneys “automatically” members of these two funds?

The AFF covers claimants in respect of the theft of money entrusted to an attorney (see sections 26 and 47 of the Attorneys Act). The AIIF cover is afforded automatically to every attorney who is either in possession of a valid fidelity fund certificate or obliged to apply for such a certificate. The AIIF cover extends to the staff in the practice.

4. How are these two funds financed?

The AFF is financed by the interest earned on funds entrusted to attorneys. The AIIF is financed by way of a single premium paid annually by the AFF on behalf of practitioners. Please note that, in the near future, practitioners will be called upon to make a contribution to the premium funding of the AIIF. Communication in this regard will be sent to practitioners by the AFF, AIIF and the Law Societies.

5. Who claims from these two funds;

clients of attorneys who have lost money due to the action/omission of an attorney OR attorneys who have received claims from clients who have lost money due to the action/omission of the attorney?

Clients who have suffered losses arising out of the misappropriation of trust funds will be the claimants against the AFF (in many instances those clients will instruct attorneys to pursue the claims on their behalf). The claimant will need to pursue the attorney concerned and exhaust all their legal remedies against the attorney (excussion) before submitting a claim to the AFF.

In the case of the AIIF, the insurance relationship is between the attorney (as insured) and the AIIF (as insurer). The claimant will have to pursue a claim against the attorney (by, for example, issuing a letter of demand, summons, an application or some other process demanding payment). Should the attorney then wish to apply for indemnity in respect of the claim, she/he will notify the AIIF of the claim in terms of the policy. The AIIF policy does not give rights to third parties (such as clients) to claim directly from the insurer. (see clause 39)