

THE RISE OF BITCOIN AND OTHER CRYPTOCURRENCIES

*Diplomatic law: Service of process on
foreign defendants*

**Personal stressors and legal practice:
Your firm needs a plan**

**Overview of air quality regulatory
developments**

*Whether to invest in
junior attorneys or not?*

**What do you call practising attorneys
trading as estate agents?**

Latest AGM news

What constitutes adequate
accommodation (housing)
in eviction matters?

**Why the need for
confidentiality on the
content of Suspicious
Transaction Reports?**





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FEATURES

30 The rise of Bitcoin and other cryptocurrencies

Cryptocurrency (also known as 'virtual currencies' or 'cryptographic money') is rapidly becoming a significant reality in the modern financial world and making major inroads into the areas once dominated by traditional payment methods. The South African National Treasury has cautioned the public to remain extremely vigilant of the risks and benefits that accompany cryptocurrencies. In this article, **Jason de Mink** writes that cryptocurrencies, while currently unregulated, present complicated challenges to governments, institutions and law enforcement agencies and having been linked, *inter alia*, to crimes related to financing for assassinations, corporate espionage, pornography, drugs and weapons.

34 Diplomatic law: Service of process on foreign defendants

Members of the public or businesses often transact with diplomatic missions, consular posts or representative offices of international organisations in South Africa by leasing properties to them or by rendering one or other service. **Riaan de Jager** writes that it is inevitable that disputes will invariably arise between the parties which, if not resolved amicably, could result in litigation. If this happens, an attorney will be instructed to institute legal proceedings against the foreign mission for the dispute to be adjudicated and there is not always clarity regarding the manner in which service of process should be effected on the particular 'foreign' defendant. The purpose of this article is to clarify this seldom-used part of diplomatic law.

38 Overview of air quality regulatory developments

Even though climate change has been on the agenda since 1993 when South Africa first became a signatory to the United Nations Framework Convention on Climate Change, it is the ratification of the Paris Agreement in November 2016 that has introduced a spur of developments to the air quality regulatory regime. The movement interlinks with the mitigation component of SA's Intended Nationally Determined Contribution, which commits to a peak, plateau and decline of greenhouse gas emissions trajectory range. **Alecia Pienaar** gives an overview of the key regulatory developments in the area.

42 What do you call practising attorneys trading as estate agents?

The practice of attorneys trading as estate agents is nothing new writes **Maartens Heynike**. From times immemorial attorneys have, together with their other services, applied their skills and expertise in the estate agency. The Estate Agency Affairs Act 112 of 1976 (the Act) came into effect and regulated the estate agency industry in South Africa for the first time in 1977 and among its many provisions, the Act defined the meaning of an 'estate agent'. In other words, does the Act restrict an attorney, who carries out the business of an estate agent within their law practice, from doing so in a different name, other than the name of their law practice?

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A united profession is stronger than the sum of its separate groupings

We are now on the eve of what may turn out to be a pivotal year for the legal profession. The year 2018 will finally bring to life the Legal Practice Council (LPC) with the start of a new regulatory dispensation for the profession. It will be momentous as, for the first time, legal practitioners will be governed by a single, national regulatory body, as the Legal Practice Act 28 of 2014 (LPA) is intended to restructure the profession from a regulatory perspective.

There are many positive aspects to the LPC. The public will for the first time have one point of reference for all inquiries, relating to all legal practitioner, *inter alia*, such as checking their status and addressing complaints. There will also be greater transparency, which members of the public are entitled to in order to make informed choices about their legal representatives.

As much as the above is important, it does not address all that is required for the profession to be effective.

The concept of a 'legal practitioner', which encompasses both attorney and advocate, is entrenched under this dispensation. This first step towards unity must be supported. Attorneys and advocates will have to ensure that, through their own unified professional organisations, legal practitioners are represented to guarantee a strong and independent profession from which our independent judiciary is selected.

The LPA allows the LPC to have powers which cater for some of the needs of the profession, such as legal education and various committees. The LPC will, however, remain largely regulatory in nature. It has the interest of the public as a major part of its mandate and will report to Parliament. Once the LPC is elected, the LPA does not make provision for annual general meetings where the elected councillors can be held to account by legal practitioners. Some of the members of the LPC may be non-practising legal practitioners, and will include ministerial appointments and academics. For the first time in the history of the profession, complaints against legal practitioners may be heard also by representatives who fall outside of the practising profession.

So where does this leave legal practitioners from a non-regulatory perspective? Who will protect and promote their interests? Who will be their voice within the public space? Who will interact and negotiate on their behalf with the LPC? This calls for legal practitioners urgently to secure their voice and establish a plat-

form through a nationally representative body that will provide support, representation and education. This body will need to fill the vacuum not covered in the LPA to ensure a strong, transformed and united profession.

The provincial law societies will cease to exist by late 2018 when the LPA is expected to be fully implemented. These were the provincial bodies that attorneys were all statutorily obliged to be members of, and which also performed a 'trade union' function for the profession. These provincial bodies are also the majority of the constituent members of the Law Society of South Africa (LSSA). So their demise will leave a void that can be filled only by a national organisation, which represents all legal practitioners.

Without such an organisation the consequences for the profession may be dire. The unity which the LPA seeks to engender may, in fact, see the profession fragmenting into many smaller groupings representing different specialisations, interests and affinities. The profession will lose its unified collective and independent strength with which to engage government, the public, the media and the international legal community. We may lose what sets us apart from the corporate world – collegiality, shared experiences, professional competence and a common purpose.

As a unified entity we will be stronger than the sum of our separate interest organisations. Legal practitioners will need a unified home – parallel to the LPC, not competing with it but complementing it – where their interests and concerns are attended to.

The LSSA has set up a Transitional Committee that is considering various scenarios.

As Co-chairpersons we have undertaken to visit practitioners across the country. We want to share our vision for a transformed, unified and representative (non-regulatory) body for legal practitioners with you. We also need to hear what such a body can do to assist and support you. In the first few months of 2018 we plan to hold two major conferences on the future of the profession. We invite you to join us on this journey.

Should you wish to contact us, please feel free to do so at e-mail: LSSA@LSSA.org.za

We wish you a peaceful festive season and good wishes for the coming year.

• See p 6, 9 and 13 for the latest AGM news.

*Walid Brown and David Bekker,
Co-chairpersons
Law Society of South Africa*



The De Rebus Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year. De Rebus will be back in 2018 with its combined January/February edition, which will be sent out at the beginning of February 2018.

De Rebus staff, back from left: Shireen Mahomed, Kevin O'Reilly, Kgomotso Ramotsho, Isabel Joubert. Seated from left: Kathleen Kriel, Mapula Sedutla.

Re-positioning women in the legal profession discussed at SAWLA AGM

The South African Women Lawyers Association (SAWLA) held its elective annual general meeting (AGM) under the theme 'Re-positioning Women in the Legal Profession'. The AGM was aptly held during 'women's month' in August.

Chairperson of the Attorneys Development Fund and treasurer of SAWLA, Nomahlubi Khwinana, welcomed delegates to the AGM. In her address, Ms Khwinana said the legal profession was currently taking a new dimension and this is where women lawyers can make their mark. 'We must make sure that in all the organisations that we are part of we do not allow others to make decisions for us. We need to be bold, we need to protect and support each other, we should never laugh at other women,' she added.

Outgoing President of SAWLA, Noxolo Maduba, began her address by saying that she was leaving her position with grace, that she had done her part and will give support to the next president. She urged women legal practitioners to be part of the deliberations on the Legal Practice Act 28 of 2014. She questioned why there were only three women in the Law Society of South Africa (LSSA) Council and no women in its Management Committee. 'Why are women poorly represented in the decision making bodies of the LSSA?' she asked.

Ms Maduba added: 'There are barriers around us that should not be there. As women we should be able to hold each other's hands and succeed. No one else will tell us what to do as women legal practitioners. No one else will make things happen for us, we cannot be bystanders in the profession. ... We sometimes find ourselves in spaces that do not favor us. We need to take a closer look into what we can do to make the legal profession more welcoming to



Outgoing president of the South African Women Lawyers Association (SAWLA), Noxolo Maduba, speaking at the recent SAWLA AGM held during 'women's month'.

women. We need to make sure we leave a legacy that ensures that future women legal practitioners are welcomed in the profession. When you look at the history of our organisation, every time we have tried to put two women in positions of power, they compete [against] each other for that position. We should rather be supporting each other. Most importantly, as women we should not be scared to seek for assistance.'

Women Task Team

National Association of Democratic Lawyers (NADEL) nominee to the Council of the LSSA, Noliitha Jali, said the Women Task Team was convened in June 2016, following a panel discussion on achievable objectives for promoting women in law during the 2016 LSSA AGM. 'The task team identified two achievable objectives during 2017, which were to support the LSSA Significant Leadership program. The leadership program is aimed at assisting experienced women

attorneys in developing business and leadership skills in order to occupy more senior positions in the profession. The second thing we support is the mentorship program. A proposal to promote gender ratio in the sponsorship of female candidate attorneys and those attending [practice management training] and [continuing professional development] courses has been tabled with the [Attorneys Development Fund].

Regarding mentorship, we have received feedback from female attorneys that they do not know what mentorship is. We are in the process of receiving funding from SASSETA, which will be used to roll out a one-day mentorship program for all those women who want to be mentors. We are also looking at doing this training online so that people do not have to leave their spaces to attend training and lose out on making money in their offices. We also work with LEAD in the mentorship program.'

- See 'Towards a unified independent



National Association of Democratic Lawyers nominee to the Council of the LSSA, Noliitha Jali, spoke about the Women Task Team, which was convened in June 2016.



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Legal Profession' 2016 (June) DR 13 and 'Women attorneys' panel takes AGM discussion to the next level' 2016 (July) DR 19.

Project on ending impunity towards violence against women

Founder and Executive Director of the Initiative for Strategic Litigation African, Sibongile Ndashe, said that South Africa has high levels of violence against women. She added: 'There was a time earlier this year in March and April when there was just news about violence against women and that is because there is attention, it does not mean that there is something that is happening out of the ordinary. The news then disappears from the media but the violence actually continues. Where this project came from

was through a series of conversations with many people who cared and said as lawyers what can we do as part of our response. One of the things that have happened in the early 2000s South Africa was leading in the development of jurisprudence on violence against women. ... We celebrated those cases because what those cases were telling us was that for the very first time what the Constitution has done is to go and find us as women where we are and protect us.

The promise that by developing this jurisprudence it was going to trickle down and impact on every day violations that women would be able to sue the state if the police, the prosecutors, the judiciary do not do what they have to do ... that did not happen. It did not happen because over the past 15 years, there has been a very silent but quiet clear obliterating of legal services pro-

vision. ...Women are moved from pillar to post seeking justice and that is where this came from that as lawyers our response has to be more than what can we do [when] the state is not doing anything. That is where the campaign to end impunity came from.'

New National Executive Committee

- President – Nolutshanyiso Gcilitshana.
- Deputy President – Mpho Poee.
- Treasurer – Nomahlubi Khwinana.
- Secretary – Podu Mamabolo.
- Deputy Secretary – Zodwa Maluleke.

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Legal practitioners to go beyond the call of representing those who instruct them to do so

Minister of Finance, Malusi Gigaba, gave the keynote address at the Johannesburg Attorneys Association's annual general meeting in September. Mr Gigaba said that legal practitioners should go beyond the call of representing clients who have instructed them to do so. He added that legal practitioners should involve themselves in crafting a legal framework for the country, which seeks to bring equal-

ity before the law in accordance to the material condition of a developmental country such as South Africa (SA).

Mr Gigaba noted that developed firms should play an active role in assisting in capacity building and skills transfer to those less advantaged. He said the playing field must be levelled in all the fraternities in the country, to bring a balance in fighting for social justice. He added that the term rule of law is used by many people, but he asked how many had actually examined the concept? Mr Gigaba said SA relied on legal practitioners to ensure that the rule of law is balanced and to guarantee a responsive government as it has been seen in recent court judgments.

Mr Gigaba pointed out that the rule of law is an important factor that contributes to the economic growth, peace, security and cooperation of the country. 'It is without a doubt that the rule of law is a basic unit of a developmental state and must be nurtured carefully to enhance our democracy. By drawing in the energies and intellectual contribution of all sectors of our society, we can develop SA within a generation,' Mr Gigaba said.

Mr Gigaba was asked about 'state capture' and other issues surrounding Eskom and South African Airways (SAA). He said that SA must put the issue of state capture behind it and move on. He

added that in the period of 23 years, SA has built a democracy where nothing can be hidden, people are active and informed and he said that it was a good thing. Mr Gigaba noted that SA had faced many challenges before, but not once did it lose sight of the vision of where it was going.

Mr Gigaba said that problems at SAA are not as complicated as they have been made to be. He added that he was confident that SAA will be turned around and



Finance Minister, Malusi Gigaba, was the keynote speaker at the Johannesburg Attorneys Association's annual general meeting in September.



Chief Executive Officer of the Business Leadership South Africa, Bonang Mohale, at the Johannesburg Attorneys Association's annual general meeting.

that SAA needed chairpersons who were not directly linked to any political party. SAA is to be run as a business, by business minded management, he added.

Chief Executive Officer of the Business Leadership South Africa, Bonang Mohale, spoke about state capture and related topics. Mr Mohale said state capture is 'evil' and steals disproportionately from the poor. He added that it creates a culture where service is not delivered. He said state capture is systemic and systematic, chronological and methodical in its approach.

Mr Mohale said state capture did not

fall from the sky, but added that the Gupta family came to the country and did nothing for three years but to study and look at who is for sale. 'This is a project that has been going on for the last ten years, it just did not happen for the last 36 months,' Mr Mohale said. He pointed out that the Gupta family had tried to capture other states elsewhere in the world, and by the time they came to SA they had perfected the formula and the framework to capture the country. Mr Mohale said for state capture to work it repurposed state owned enterprises and it ensured the entrenching of

parallel and weak governance. He noted that for state capture to be a success, it needed chaos for it to grow and thrive.

Mr Mohale noted that for the past ten years there has been a project of deliberately taking out the 'good cops' and filling state owned enterprises with 'bad cops'. He said it was not an accident that four senior executives at Eskom, six months into their careers were fired for doing nothing wrong.

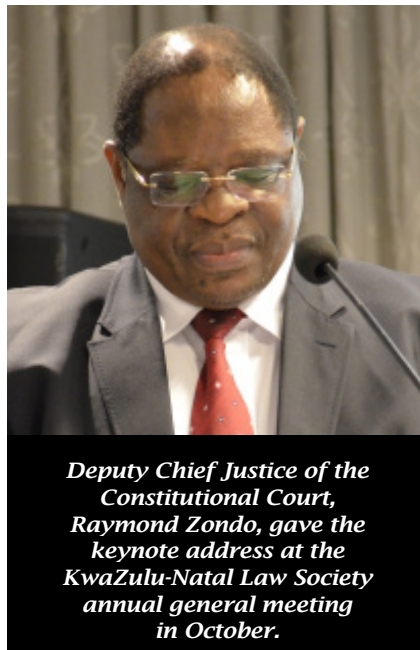
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Separation of powers discussed at KZNLS AGM

The KwaZulu-Natal Law Society (KZNLS) held its annual general meeting (AGM) on 20 October in Umhlanga. The keynote address was delivered by Deputy Chief Justice of the Constitutional Court, Raymond Zondo.

Deputy Chief Justice Zondo started his keynote address by saying that the invitation he received from the KZNLS was special to him, as he registered his articles of clerkship in 1985 under the late Victoria Mxenge and after being admitted as an attorney, he became a full member of the KZNLS for a number of years. He added though, that this was not the only reason why the invitation extended to him was special. 'When I was nominated for appointment as a judge of the Labour Court in 1997, this law society supported my nomination and gave me unconditional support. ... This law society has given me support throughout my judicial career over the past 20 years. It is, therefore, appropriate that after my elevation to the position of Deputy Chief Justice of the Republic, I should thank this council and all previous councils, over the past 20 years, and members of this society for their unconditional and unwavering support.'

Deputy Chief Justice Zondo's keynote address was entitled: 'The separation of powers, the South African Model'. Deputy Chief Justice Zondo said that the doctrine of the separation of powers is a common feature in many modern democracies and in its simplest form it means there should be a division of power between the legislative, the executive and judicial branches of government. He said that each of the three branches of government are required to perform their functions independently from one another. He went on to explain that in



Deputy Chief Justice of the Constitutional Court, Raymond Zondo, gave the keynote address at the KwaZulu-Natal Law Society annual general meeting in October.

the United States (US) there is a strict separation in the functions and personnel between the congress and senate (legislative powers) on the one hand and the president and members of the executive on the other hand.

Deputy Chief Justice Zondo referred to checks and balances and said: 'We will remember that prior to the [Convention for a Democratic South Africa] negotiations, President FW de Klerk had on numerous occasions and public platforms advocated that a negotiated settlement for the country should incorporate checks and balances ... the negotiating parties agreed ... the final Constitution should conform to principle 6, which concerned the separations of powers. It read: "There should be a separation of powers between the legislature, the ex-

ecutive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness," he said.

Deputy Chief Justice Zondo said that from the text of the quoted principle, the drafters of the Constitution were not given much detail in order to enable them to decide on a model for the separation of powers, which they had to incorporate into the final Constitution. The final Constitution does not contain any express reference to the separation of powers, nevertheless, the Constitutional Court did not think when it dealt with the certification of the Constitution that because the Constitution made no express mention of the doctrine of separation of powers that meant that our Constitution did not comply with principle 6. 'The court took the view that the doctrine of the separation of powers could be deduced from the structure of the Constitution. ... The legislative authority of the Republic vests in Parliament. ... The executive power of the Republic vests in the president who must exercise that power together with members of the cabinet. The judiciary authority of the Republic vests in our courts,' he said.

Deputy Chief Justice Zondo said the model of separation of powers in this country - unlike the US model, where there is strict separation between members of the legislature and members of the executive - does not have such strict separation between the legislative arm and executive arms of government. He added: 'Our model of the separation of power has certain features that other people from other jurisdictions might find offensive to the doctrine of separation of powers. How can a member of the executive at the same time be a member of the legislature?'



**Law Society of South Africa
Co-chairperson, David Bekker,
discussed the mid-term report at
the AGM.**

Deputy Chief Justice Zondo said that there is no single model that applies to all countries. All countries have different histories and political ideologies that have influenced them to make a choice for their own country. 'The drafters of our Constitution chose the model that we have, because they believed that with our history and our circumstances that is the model that would work. ... It works quite well in our country,' he added.

Deputy Chief Justice Zondo said that there are a number of bodies where you will find that members of different branches of government come together to perform a certain function. He used the example of the Judicial Services Commission, who make recommendations to the president regarding the appointment of candidates to be judges.

Deputy Chief Justice Zondo referred to the extensive powers of the Constitution that are given to the courts. He said it was a huge responsibility of the judiciary, particularly on members of the Constitutional Court. He added that members of the judiciary should not be 'drunk' with power. 'We have to exercise these powers responsibly and we must not exercise them in a way that makes the other branches of government believe that we are exercising them in a manner that is not founded on integrity and the oath of office that we take when we commence our judicial functions. We must exercise these powers in a way that even when the other branches of government are unhappy with our decisions, when they read our judgments and reflect on them they will not be able to say ... judges are abusing these powers,' he said.

Deputy Chief Justice Zondo concluded by saying: 'The judiciary are called upon to make sure that ... we must at all times, in performing our functions, follow the promise that we made to this nation when we were appointed, which is that

we will administer justice to all without fear, without favour and without prejudice.'

LSSA mid-term report

The Law Society of South Africa (LSSA) Co-chairperson, David Bekker, said that the LSSA consisting of the four provincial law societies (the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces), the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL), is a voluntary association and not a body of individual members looking after the interests of attorneys. 'That is going to change next year. It is a fact. You must accept it,' he said.

Mr Bekker added that it was most concerning that when asking members attending the AGM who has read the Legal Practice Act 28 of 2014 (LPA), seven people out of 70 raised their hands. He urged members to get involved to ensure that as an association 'we are well organised'.

Mr Bekker referred to the 2016 KZNLS AGM, where Richard Scott spoke about a professional interest body. He said that many things had happened since then and added 'I daresay, unfortunately, the make-up of the LSSA is sometimes politically driven and we need to get away from that.' Mr Bekker added that since the LSSA was established in 1996, the co-operation between colleagues who were separated from each other, because of Apartheid, have moved closer and colleagues were working together and trusting each other, but sometimes differences were still experienced. 'But the main focus is that we must tackle the differences, speak out about them and resolve them. It is possible. We are lawyers, we do adversarial work every day, and we do arbitration and mediation. We can solve that problem as well,' he said.

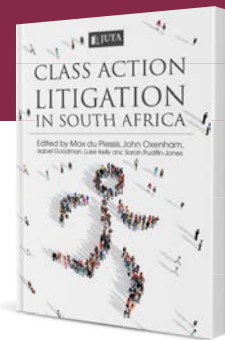
Mr Bekker referred to litigation that the LSSA has been involved in and highlighted the *Proxi Smart Services (Pty) Ltd v Law Society of South Africa and Others*, which will be heard in the Gauteng Division of the High Court from 6 to 8 February 2018. Mr Bekker said that Proxi Smart intends taking over certain functions that conveyancers are responsible for and it would impact the income of the Attorneys Fidelity Fund (AFF).

Mr Bekker said the Management Committee (Manco) of the LSSA met on 19 October and it was decided that Manco will go around South Africa (SA) to start talks with members. 'We cannot start a new organisation if we do not have your inputs,' he said.

Mr Bekker said that there was a need to identify the core functions of this association. He added that the association will have to look at the member's needs,

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and Isabel Goodman (Editors)



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— [Foreword by Malcolm Wallis]

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Chairperson of the Board of Control of the Attorneys Fidelity Fund (AFF), Strike Madiba said in the past financial year, the AFF experienced a 3,3% growth, and is currently valued at an amount of R 4,4 billion.

membership to the organisation, budget requirements and how the association will deal with government and international relations. 'We need an independent association that can look after our interest, but also bearing in mind public interests, rule of law and other issues,' Mr Bekker said.

A word from the AFF

Giving the AFF report, Chairperson of the Board of Control of the AFF, Strike Madiba said in the past financial year, the AFF experienced a 3,3% growth, and is currently valued at an amount of R 4,4 billion. According to Mr Madiba, this amount, which on the face of it is huge, must be seen in the context of the Fund's expenditure obligations, which for the past three years have grown at a rate that exceeds the growth in the income stream.

Mr Madiba said that the primary source of the AFF's income is trust interest. He added that the low interest rate environment for the past number of years is unlikely to change in the foreseeable future. He added that in the past three years, it was necessary for the AFF to use investment income to cover operational expenses.

Mr Madiba said that during the past year the AFF spent R 400 million on funding activities for the benefit of the profession – that is beyond its primary mandate – which is to provide theft protection to clients of attorneys.

With regard to the implications of the implementation of the LPA, Mr Madiba said that in the current environment, the provincial law societies have the power to carry out functions, for example, the inspections of books of accounts and applications for the appointment of curators, etcetera. The LPA vests these pow-

ers in the AFF and because of this, the AFF has had to adapt its business model so that when the Act comes into operation in 2018, the AFF will be ready.

Mr Madiba referred to professional indemnity (PI) cover and said that it is provided to all practitioners for free via the Attorneys Insurance Indemnity Fund NPC (AIIF). However, in the past seven years it has become clear that the sole funding by the AFF is not sustainable. The premium has risen from an approximate R 55 million in 2011 to R 185 million at present. Mr Madiba said that this has made the possibility of practitioners contributing annually towards the premium a real requirement going forward.

A word from the AIIF

Managing Director of the AIIF, Sipho Mbelle, said that the AIIF was formed in 1993 by the AFF and the main purpose of the AIIF is to service the profession as a PI provider. In the 24 years of existence, the AIIF has paid out claims to the value of R 1 billion, which is an average of R 40 million per year. Mr Mbelle said that it is interesting to note the distribution curve of the payments. 'While the average remains at R 40 million, when you look at the average payments in the last five to six years they are bordering and tendering in the R 100 million mark per year and that is something we would like you to be aware of as the profession.'

Mr Mbelle said because the AIIF is a claims incurred policy, the AIIF have ongoing claims going into past years, he added: 'At this point it does look like 2011 was probably one of the worst years that we had. But the most important point that I wanted to make to you is the fact that it is increasing at a compound annual growth rate of over 9%.'

Mr Mbelle added that claims are a result of the behaviour and practice in the profession. 'We have more and more claims to be paid out because of the growth in the profession, but when you compare the growth in the profession at the compound annual growth rate of 4% against a compound annual growth rate of just under 9%. It cannot be explained just by the growth in the profession. ...



Chief Executive Officer of the Attorneys Development Fund (ADF), Mackenzie Mukansi, said that much was achieved by the ADF through the assistance of the KZNLS.

It is important that we look at the aspect of how we practise, we look at issues of risk management and we make sure that as we get into our practices we bear in mind the impact of the PI provision that we have.'

Mr Mbelle said that the legal profession needs to be proud of itself in terms of having created the scheme from a PI perspective. He added that when you compare the PI cost at a base level and the structure of PI cover in SA, PI cover for attorneys is still the cheapest when compared to other professions in the country. 'As much as the costs are increasing, we have an opportunity, as a society, to keep it at the level it is from a cost perspective,' he said.

Mr Mbelle spoke about the decision that the board of the AIIF took in November 2016, where it was decided that the profession would have to pay a contribution towards PI cover. He added that it will be included with the 2018 Fidelity Fund Certificate (FFC) applications. Mr Mbelle said that the AFF will for the first five years assist in subsidising PI cover, but in year six, practitioners will be expected to pay the full amount.



2016/7 council members of the KZNLS from left: Vice President, Vernon O'Connell, Praveen Sham, outgoing President Umesh Jivan, Dee Takalo and Richard Scott.

A word from ADF

Chief Executive Officer of the Attorneys Development Fund (ADF), Mackenzie Mukansi, said that a lot was achieved by the ADF through the assistance of the KZNLS. He said that the theme for the year was 'Support for practitioners through risk management'. Mr Mukansi said the ADF had been visiting legal practitioners in provinces around SA speaking about the services they offer and, in conjunction with the AFF and AIIF, they have been making practitioners aware of various scams and the LPA (see news 'Legal practitioners taught risk management at SAWLA's exhibition and seminar' 2017 (Nov) DR 8).

Mr Mukansi said that in the coming year the ADF will continue in a robust way as there is a need for information. 'Look out for our new outlook, because we have heeded the call through the LSSA and council, we need to align ourselves with the changes in the profession,' he said.

The current number of beneficiaries that were assisted by the ADF totalled 72 at June. The number of declined applications were 7. The total repayable amount loaned to date, to the 72 firms amounted, to R 1,6 million.

President's report

Outgoing President of the KZNLS, Umesh Jivan, said that it had been his honour to serve as President. He said that the position gave him the opportunity to serve both members of the attorneys' profession and the public and added that the highlight of his term was addressing the Pan African Lawyers Union in July (see



Outgoing President of the KZNLS, Umesh Jivan, with incoming President of the KZNLS, Asif Essa.

'The legal profession re-capturing its place in society discussed at PALU conference' 2017 (Sept) DR 6).

Mr Jivan made reference to the LPA and said that it introduces the concept of advocates who will have FFC and offer their services directly to the public. 'I suggest that attorneys re-engineer their practices in order to be prepared for the new competition from advocates before the Act comes into place.'

Mr Jivan made reference to the Provincial Efficiency Enhancement Committee, which was an initiative started by Chief Justice Mogoeng Mogoeng, to enable all stakeholders involved in the administration of justice to communicate with each other on a provincial and national basis with a view to improving all round efficiency in the justice system. Mr Ji-

van said that any issues that attorneys would like to be raised can be sent to the KZNLS.

Subscription increase

The subscriptions for the 2017/8 period has increased with R 150 for practising and non-practising members. Practising members will pay R 2 510 (excluding VAT) and non-practising members will pay R 2 090 (excluding VAT).

Council members 2017/8

- Asif Essa (President).
- John Christie (Vice President).
- Gavin McLachlan (Vice President).
- Lunga Peter (BLA) (Vice President).
- Charmane Pillay (NADEL) (Vice President).
- Raj Badal (NADEL).
- Eric Barry.
- Poobie Govindasamy (NADEL).
- Saber Jazbhay.
- Umesh Jivan.
- Muke Khanyile-Kheswa (BLA).
- Phila Magwaza.
- Ebi Moolla.
- Ugeshnee Naicker (NADEL).
- Matodzi Neluheni (BLA).
- Richard Scott.
- Praveen Sham.
- Manette Strauss.
- Dee Takalo (BLA).
- Eric Zaca (BLA).

Alternate councillors:

- Russell Sobey.
- Ilan Lax (NADEL).
- Sthembiso Kunene (BLA).

Kathleen Kriel
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Black Lawyers Association's contribution to the transformation of justice not underestimated

The Black Lawyers Association (BLA) held its elective conference and annual general meeting (AGM) on 20 - 21 October in Bloemfontein under the theme '40 years of struggle and professional service to the marginalised. Where to from here?' Starting the proceedings of the conference, attorney and representative of the BLA at the National Forum on the Legal Profession (NF), Kathleen Matolo-Dlepu, gave an update on the NF. Ms Matolo-Dlepu said that the NF was established to deliver recommendations for the new regulatory body, namely, the Legal Practice Council (LPC). She noted that the role of the NF is included in s 97 of the Legal Practice Act 28 of 2014 (LPA). She added that the NF has completed its mandate and submitted its recommendations to the Minister of Justice and Correctional Services, Michael Masutha, on 26 October.

Ms Matolo-Dlepu added that the NF submitted the following recommendations to the minister –

- election of the LPC;
- establishment of the provincial councils (PCs);
- election of PCs and their composition, powers and functions;
- practical vocational training (PVT) requirements;



High Court Judge of the Gauteng Division in Pretoria, Tati Makgoka, announced the relaunch of the journal the African Law Review.



Attorney and representative of the Black Lawyers Association at the National Forum on the Legal Profession (NF), Kathleen Matolo-Dlepu, gave an update on the NF.

- right of appearance of candidate legal practitioners;
- winding-up of the NF; and
- LPC cost structure and funding.

Ms Matolo-Dlepu said the NF in terms of s 97(2)(a) of the LPA must reach an agreement with the four statutory provincial law societies on transfer of assets, rights, liabilities, obligations and staff to the LPC and PCs, however, she pointed out that an agreement had not yet been reached.

Ms Matolo-Dlepu encouraged legal practitioners to read and familiarise themselves with the LPA.

For more articles pertaining to the NF, see:

- 'LPA National Forum expected in 2015' (2015 (Jan/Feb) DR 21).
- 'First meeting of the National Forum of the Legal Practice Act' (2015 (May) DR 12).
- 'National Forum start shaping the new dispensation' (2015 (Sep) DR 18).
- 'National Forum meets for third time to continue Legal Practice Act work' (2015 (Nov) DR 16).
- 'National Forum on the Legal Profession one year on' (2016 (March) DR 10).
- 'First recommendations emerge from National Forum deliberations' (2016 (June) DR 22).
- 'National Forum to propose separate voters' for rolls for attorneys and advocates for first Legal Practice Council elections' (2016 (Oct) DR 17).

- 'National Forum races against time to submit recommendations to minister' (2017 (June) DR 17).

- 'National Forum racing against time to submit recommendations to minister' (2017 (Aug) DR 11).

African Law Review relaunch

High Court Judge of the Gauteng Division in Pretoria, Tati Makgoka, announced the relaunch of the journal the *African Law Review*. He said he had pointed out to the BLA that it was time it considered how matters concerning black legal practitioners can be debated and narrated by black legal practitioners themselves. Judge Makgoka said the role of black women is still a cause for concern. He added that black women as legal practitioners and as judicial officers' still face the same challenges that the generation before them faced.

Judge Makgoka pointed out that the relaunching of the *African Law Review* was at an advanced stage and added that the journal, although it will not have changed much from the past, will have a fresher feel to it. He noted that nothing much will change for the simple reason that nothing much has changed for black legal practitioners. Judge Makgoka said the focus of the journal will be Pan Africanism. He said the journal will also



Deputy Minister of Justice and Constitutional Development, John Jeffery, said the Black Lawyers Association's contribution to the transformation of justice and the transformation of the Bench cannot be underestimated.

focus on the needs and aspirations of black legal practitioners.

Judge Makgoka added that the journal will hopefully have a slot for BLA and BLA student chapter activities. He pointed out that the journal will be a quarterly publication and invited those interested to submit articles for the journal. Judge Makgoka said the first publication of the *African Law Review* will be a celebratory issue.

Transformation of justice

Deputy Minister of Justice and Constitutional Development, John Jeffery, said the BLA's contribution to the transformation of justice and the transformation of the Bench cannot be underestimated. He pointed out that there are still obstacles that black legal practitioners have to overcome, from finding financial means to study, to finding articles of clerkship and finding means to support themselves. He added that it is not an easy path for student legal practitioners more so for black student legal practitioners.

Mr Jeffery said concerns raised by the BLA, when they marched to the Union Buildings in July, included dissatisfaction with the lack of representation of black legal practitioners and women practitioners in the governments briefing patterns and distribution of legal work. He noted that his department took the concern raised by the BLA very seriously and added that President Jacob Zuma had tasked the Department of Justice to look into the challenges raised by the association (see 'BLA marches to voice dissatisfaction on legal work distributed by government' (2017 (Sept) DR 9)).

Mr Jeffery pointed out that lack of transformation in the legal profession impacts on briefing patterns. He said as a starting point the legal profession has to be looked into as a whole. Mr Jeffery noted that there are roughly 24 000 practicing attorneys in the country, of



Delegates attending the BLA 40th Anniversary Dinner.

which 60% are white and that the advocate profession is even less transformed with 2 800 advocates of which 65% are white, 'we encourage all arms of the state to prioritise and empower black lawyers, particularly women,' he said.

Mr Jeffery said the legal fraternity is one of the key sectors that is being touted as part of government's radical, social and economic transformation programme in order to get rid of uneven, unequal, racial and gender representation in the key sectors of the society and in the economy. He pointed out that the Law Society of South Africa hosted a summit on the distribution of work for attorneys and briefing patterns for advocates in 2016 (see 'LSSA hosts summit on briefing patterns' (2016 (May) DR 6)).

Mr Jeffery added it was after that summit that the Action Group was formed, he said that the Action Group is made up of attorneys, advocates and officials from the justice department. Mr Jeffery noted that the Action Group, obtained the assistance of Judge Presidents of various divisions of the High Courts, to

document statistics on legal practitioners who appear in the courts on both civil and criminal matters. He added that Chief Justice Mogoeng Mogoeng expressed his support for the initiative at the Provincial Efficiency Enhancement Committee meeting he chaired.

Mr Jeffery said the Action Group drafted Procurement Protocol that has been approved by attorneys and the advocates' profession and the signing of protocol took place in June in Johannesburg (see 'Procurement Protocols for the legal profession adopted' (2017 (June) DR 18) and 'A historic moment-Action group on Briefing Patterns delivers procurement protocols' (2017 (Aug) DR 6)). He added that other initiatives that have been taken, such as that of the Johannesburg Bar Council (JBC), where advocates of the Johannesburg bar adopted the resolution that would see members face charges of unprofessional conduct if a team of three or more advocates does not include a black advocate.

Mr Jeffery pointed out that the resolution seeks to advance the course of black women facing responsibility amid council to take appropriate steps to ensure that women are identified and given preference. He said the chairperson of the JBC said the legal profession should take the lead in promoting and fulfilling the ideas of the Constitution. He added that in April the Cape Bar Council advised that regular meetings between the legal firms and the Cape Bar Council should be held to meaningfully address the problems of skewed briefing patterns.

Mr Jeffery said the programme will play a key role in motivating those responsible for briefing patterns and identifying any bias, which stands in the way of equitable briefing patterns. He pointed out that at the end of each financial year, attorney firms will provide data on the number, nature and value of briefs



Black Lawyers Association members toasting before cutting of the cake at the association's gala dinner.



Toast at the BLA 40th Anniversary Dinner.

according to race, gender and seniority for the Bar Council. However, Mr Jeffery added that despite the legal profession being overwhelmingly white, 79% of the value of government briefings were paid to previously disadvantaged individuals and of the number of 5 296 government briefs given 4 872 went to previously disadvantaged individuals.

Mr Jeffery added statistics for briefs that were given out are uploaded on the Justice Departments' website for public knowledge. He said if legal practitioners have problems with regards to briefing patterns and if legal practitioners think that certain individuals are being favoured they must let his department know.

A question was posed to Mr Jeffery regarding the appointments of acting magistrates. Acting Magistrate, Ruth Nwane, told Mr Jeffery that she was told to submit a report in respect of her position as an acting magistrate, on why she should be kept in the position. She asked why the Justice Department did not keep

acting magistrates for more than two years. Mr Jeffery responded by saying that when he took office, he found that some acting magistrates had been acting for years, some for 12 to 15 years. He said the process of appointing an acting magistrate was not a thorough one, because if a legal practitioner wanted to become an acting magistrate, they go to the magistrate of that area and request for space to become an acting magistrate. He pointed out that the department cannot have a situation where one can act as an acting magistrate indefinitely.

Mr Jeffery added that the idea of an acting magistrate is to give legal practitioners an opportunity to experience the Bench and added that two years as an acting magistrate is a rough guide. He noted that he had spoken to some chief magistrates and some were keen on indefinite appointments, but added that he asked why, after two years, the person acting as a magistrate did not apply for a position and if they applied why did they not get accepted in the permanent position?

Mr Jeffery said there have been situations where acting magistrates have applied for permanent posts and gone to the magistrate commission. He noted that the commission had found that the person was not suitable. He added that some acting magistrates do not apply at all because they know that they will not get the job.

Gala dinner

On the evening proceeding the AGM, the BLA held their 40th Anniversary Gala Dinner and Awards Ceremony. Chairperson of Black Business Council, Sello Rasethaba, delivered the keynote address.

Speaking about briefing patterns, Mr Rasethaba said the big law firms are built on the proceeds of work they received from government. 'The question that you need to ask is why are black lawyers not doing that work. Remember, government's budget is in the public domain; you are able to see what each department

is paying. ... Unless as black professionals we stand up and demand our spaces nothing will happen. Things are bad for black professionals, on top of that if you leave your practice and go work for government you will be treated like you did not go to school with the same white people that they are giving work to. I am calling upon you that as you meet tomorrow at your annual general meeting, you really have to think very hard. I do not think you should be shy from taking this government to court if your rights are abused. Why should you be afraid of taking them to court and say that you will not get work in the future, but others take them to court and tomorrow they are legal advisers for them?'

President of the BLA, Lutendo Sigogo, asked: 'What are we celebrating when we celebrate 40 years of the BLA? When I reflect on what we are celebrating, I see a few things, but the chief amongst them, I see the role the BLA played to unify our black people, particularly black legal practitioners. It is through the efforts of the BLA that we do not see each other in terms of our tribes, we do not see each other in terms of ethnicity, where we come from, ... whether we differ in terms of religion we still relate very well as members of the BLA. BLA makes us South Africans; it is indeed that when we are in BLA we see past our origin.

When we see Alfred Mangena in the video that we just saw, we are reminded of the pain he went through, he was refused permission to be admitted as attorneys by the Law Society of the Transvaal and had to go to court in order to win that matter. From that day onwards until today, we are all allowed to practice law, to be admitted as attorneys or advocates and we no longer go through that battle, which Alfred Mangena had to. So we see this as strength when the two first



The BLA President, Lutendo Sigogo, spoke at the association's gala dinner in October.



Chairperson of Black Business Council, Sello Rasethaba, delivered the keynote address at the BLA's gala dinner in Bloemfontein.

black attorneys [Mr Mangena and Pixley ka Isaka Seme] had to come together and form a legal practice. ... We have seen that when they were practicing on their own, they faced several challenges but when our leaders like Godfrey Pitje came together with other black lawyers and formed the BLA in 1977, they put to rest the challenges that were facing those lawyers who came before them.

I should also indicate as I am reminded back then before the BLA and other organisations like it were formed, it was not going to be possible to think of us to be in institutions like the National Prosecuting Authority. It was impossible for us to think of us as judges, so BLA made it possible. ... When we celebrate this 40-year anniversary, we are celebrating the deeds that we did through the Legal Education Center. We should remind ourselves that had it not been for the Legal Education Center, a number of lawyers

who came before us would not have been equipped to do proper legal representation. It was the Legal Education Center that brought to them the trial advocacy training and commercial litigation training. ... The education center did not only teach the members of the BLA it realised that the education it gives could help the community to be transformed.'

Elections

A statement rereleased by BLA stated that at the close of the AGM the meeting resolved to adjourn the election of the National Executive Committee (NEC) for a period not exceeding three months from the date of the AGM. The adjournment of the election was necessitated by a technical glitch, which caused a delay in the production of election materials such as ballot papers. The statement went on further to state that the BLA is known for its steadfastness in observing

the law and its internal rules. Since its inception the BLA consistently held elections of the NEC and Branch Executive Council (BEC), biennially, in accordance with the provisions of its Constitution.

The statement added that the BLA prides itself for respecting its democratic processes through periodical election of its leadership. The NEC will, in line with the AGM's mandate, reconvene the AGM for the purpose of conducting elections. Members of the BLA will, in due course, be advised of the date and venue of the continuation of the AGM.

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National unified body for the legal profession discussed at FSLs AGM

The Free State Law Society (FSLs) held its annual general meeting (AGM) on 27 October in Bloemfontein. Starting the proceedings, Law Society of South Africa (LSSA) Co-chairperson Walid Brown, said there has been a debate around the retention of the assets of the statutory law societies (the Law Society of the Northern Provinces, FSLs, KwaZulu-Natal Law Society and the Cape Law Society) and whether the assets should be retained or handed over to the Legal Practice Council (LPC). However, he noted that the National Forum on the Legal Profession (NF) came back and put the ball in the court of the four statutory law societies to make a decision regarding the assets.

Mr Brown encouraged the FSLs to debate the issue and come up with a proposal that will benefit them as best it can. He added that the LSSA could add little to the debate, and that all the LSSA would say when the debate concludes is that the decisions made should be in the best interest of the attorneys' profession.

Mr Brown added that another debate revolved around the period of articles candidate legal practitioners should serve. He said discussions have been around what the most applicable time period for candidate legal practitioners to serve articles is. He noted that an agreement was reached with regards to the articles, however, the attorneys' representative at the NF submitted a proposal to the Minister of Justice that re-



Co-chairperson of the Law Society of South Africa (LSSA), Walid Brown, gave the mid-term report of the LSSA at the Free State Law Society (FSLs) annual general meeting (AGM).

duces training to 12 months compulsory training, however, one can enter into a contract for a longer period.

Mr Brown noted that one of the aspects of the Legal Practice Act 28 of 2014 (LPA), is that it is going to change how attorneys' practice. He added that people are resistant to change and nobody likes change, particularly attorneys. He said attorneys like their system and all that they want to know is that there is a system in place and that tomorrow is going to be the same as today. However, Mr Brown said not all change is necessarily bad.

Mr Brown added that today attorneys have the benefit of hindsight and those

who were involved in the negotiation for change from 1994 to 1996 with the creation of the LSSA, brought together two groups of attorneys that had never worked together before under one umbrella. He said what the past has taught us is that change is not necessarily bad. He added that if one looks back at the legal profession, the road has been tough and hard, but one thing that can be said is that the profession has done well.

Mr Brown pointed out that the number of attorneys has increased. Transformation has occurred and if one looks back at the number of black attorneys that have entered the profession since 1994 and statistics of the number of black female candidate attorneys in the profession today it is over 60%. He said nobody can say the profession is not transforming. He added that, however, there can be a debate on the pace of the transformation, but that the profession has transformed. 'We will continue to transform and this is the ever changing nature of society and it is not isolated to South Africa, it is a global phenomenon,' Mr Brown said.

Mr Brown noted that another issue that has been debated for a couple of years, is the issue of a representative body for attorneys. He said it has reached the finality and, at the end of the day, no matter the form the LPC takes, the profession is still going to need a unified body, a voice speaking as one to government, to the LPC and to the outside world. Mr Brown said the LSSA believes it can be transformed to speak as the voice of the

profession, to become a direct representative for every attorney in the country.

Mr Brown added that statistics show that reserved work in the profession is shrinking. He said it is not only isolated to South Africa, but it is a global phenomenon that governments across the world are reserving less and less work. He added that attorneys should use their training and experience as their tools, 'yes everybody can draft a Will, but nobody can draft a Will like an attorney,' he said.

Mr Brown also spoke about the passing of the Chief Executive Officer of the LSSA, Nic Swart. He added that since Mr Swart's death, a significant amount of condolences have come from across the nation and not only from the legal profession. He said the profession had lost an icon and everyone who has spoken to him about Mr Swart has said how Mr Swart changed their lives. Mr Brown pointed out that Mr Swart's focus was on youth and black female candidate attorneys. He noted that Mr Swart was passionate about legal education and development and added that whatever decision is taken regarding legal education must honour the memory of Mr Swart.

Briefing patterns

Mr Brown said briefing patterns is a burning issue and that attorney firms and government entities who have committed to the procurement protocol must send their statistics to the LSSA, so that the LSSA can be informed on views and contributions to the changing legal profession. He added that there was no time for complaints on not knowing who government is giving briefs to and pointed out that information on issued briefs are uploaded on the website of the Department of Justice on a monthly basis. However, what is not available on the website is the value of briefings. He said that has to be changed and there must be transparency on the value of briefings. He added that there is still a lot to be done on the issue of briefing patterns, but noted that the end of that chapter is near.

Mr Brown said a submission was made to the portfolio committee on a section in the LPA that appears to reverse some of the gains that attorneys have made in terms of levelling the playing fields with advocates. He referred to the Right of Appearance in Courts Act 62 of 1995 that allowed attorneys to appear in the High Court if the attorney had an LLB or if they had been practicing for three years. 'We made a submission to the portfolio committee that the gains we have made in 1995 should not be reversed,' Mr Brown said. He pointed out that attorneys have been acting on behalf of clients and representing clients in the High Court, since 1995 and they should continue to be able to do that.



Co-chairperson of the LSSA David Bekker, discussing the functions of the LSSA and future plans of a national unified body to protect the interest of the legal profession.

Mr Brown was asked about what role the LSSA was playing to ensure that there is a smooth transition within government departments and entities to ensure that briefs are given to black legal practitioners and female legal practitioners. He said all the LSSA could do after institutions commit to the procurement protocol was to follow up and monitor it. He noted that the Procurement Protocol was signed by state attorneys, government departments, state enterprises, law firms and the private sector.

Mr Brown added that state attorneys are already in the forefront for giving monthly statistics. He said from the state attorneys point of view almost 80% of briefs are being given to the black advocates and female black advocates. He noted that the LSSA has urged state owned enterprises, the private sector and individual law firms to come on board. Mr Brown said when speaking about briefing patterns there is a view that there is still a lot of ground work to be done, however, a great deal has changed, including the amount of work being given to small firms, black firms, black female advocates and attorneys.

Mr Brown was also asked about the issue of assets and why the advocates' assets were not being transferred to the LPC. He said that it was unfortunate and unfair that nothing was being said about the transfer of assets from the advocates, however, he added that the provision of the LPA only makes reference to the four statutory law societies and only compels the four law societies to negotiate with the NF and transfer assets.

Establishment of professional legal body

Co-chairperson of the LSSA, David Bekker, said the LSSA is going to disappear next year and asked if the younger gen-

eration is ready to get involved in a new body. He added that the functions of the LSSA other than its regular functions, include, the Legal Education and Development (LEAD) branch, which provides vocational training, hosting of seminars and providing learning material and informing the profession through *De Rebus* and the LSSA communications department. Mr Bekker said those are not the only functions the LSSA performs, he pointed out that the LSSA has other functions.

Mr Bekker said the LSSA is regularly consulted by government departments on a number of issues, such as, nominating attorneys to various organisations. He added that there are about 30 bodies that attorneys serve and share their knowledge on, including, making people aware of what attorneys do. He noted the LSSA was involved in the Provincial Efficiency Enhancement Committee that Chief Justice Mogoeng Mogoeng presides over, including the Rules Board of Courts of Law, King Commission, Companies Tribunal, Deeds Registries Committee and many others.

Mr Bekker added that the LSSA also nominates representatives on certain task teams, such as the Rural and Land Affairs matters, the BEE, Mining Rights and others. He added that the LSSA monitors the news for advertisements to see where people with legal backgrounds can be involved. He said the LSSA is not only the voice of the profession in the country, but internationally as well. Mr Bekker pointed out that the LSSA has started a committee called LSSA In Transition, the committee has ten attorneys looking at possibilities of what can be done in regards to the future of the LSSA.

Mr Bekker said the committee agreed that there is a need for a national unified body. There are three issues the committee is faced with, which are:

- How will the new body be funded?
- The functions of the new body. Will it



Outgoing president of the FSLs, Cuma Siyo, speaking at FSLs AGM in October.

perform the same functions the LSSA has been doing, or can functions of a new body be minimised?

- Will membership be open to individual attorneys and advocates or to circles and provincial councils?

Mr Bekker pointed out that from early next year the LSSA will host road shows across the country to inform its members and to give more information on the issue of a new body. He said the road shows will be followed by two national conventions, which will be held in Cape Town and Gauteng in March 2018, to discuss the way forward.

Board member of the Attorneys Fidelity Fund, Jan Maree, said the objective of the LPC is, among others, to promote and protect public interest and thereafter regulate all legal practitioners. He noted that when the draft Bill was published the attorneys profession responded by stating that it should also protect the interest of the profession. He added that government was quite adamant that the new body be a regulatory body and not to protect the interest of the legal practitioners. 'Importantly what we need to realise is that the professional interest functions up to now, the four law societies and the LSSA has fulfilled, is not catered for in the LPA and for that reason it is quite important for the future of the profession,' Mr Maree added.

Attorneys' Fidelity Fund

Chairperson of the Board of Control of the Attorneys Fidelity Fund (AFF), Strike Madiba, noted it had come to the attention of the AFF that legal practitioners have not been taking advantage or using the resources it has been providing. He said the AFF has identified service providers, such as, the Black Lawyers Association, National Association of Democratic Lawyers and LEAD, to provide seminars or projects that are enhancing the profession.

Mr Madiba noted that with regard to the implications of the LPA on the AFF, the LPA has brought with it fundamental changes in the regulatory environment of legal practitioners. He pointed out that in the current environment only the law societies have the power to carry out functions, such as, doing inspections, of book accounts, appoint curators or initiating prosecutions against legal practitioners. However, Mr Madiba noted that the LPA has vested those powers to the AFF, including the part to determine the rules associated with inspections, which it must carry out.

Mr Madiba said to ensure that the AFF is ready when changes come, the AFF has completed a re-design project that will ensure that it delivers its mandate. He added that the AFF is developing a computer environment to service its needs, the needs of the AIIF and those of the regulator. He pointed out that currently the agency fees is payable to the law societies by the AFF, however, next year it will be replaced by a central allocation to the national regulator in terms of s 22(1)(b) of the LPA.

A word from the President

Outgoing President of the FSLs, Cuma Siyo, said that the FSLs is in the good hands of men and women who work endlessly to make sure it fulfils its mandate. However, he added that there were concerns of disconnection between the society and its members. He said members are not following the developments in the profession and have not read about the LPA.

Mr Siyo added the struggle is not being able to access information about the voluntary association and other issues, such as, the matter of the transfer of assets. He said when there is no information there is no growth and the profession loses information and wisdom that it can get from its members. He said moving forward the focus should be on developing new membership for the society, to look at how to develop membership of practices, and how to help members of the society to flourish so that their businesses can grow. He encouraged members to engage with the FSLs council and communicate with the council so that the council can be sure that it is representing the interests of its members.

Mr Siyo said the council of the FSLs was experiencing a situation in regard to complaints received about legal practitioners who mismanage trusts. He noted that when investigations are concluded, the council finds out that there was a lack of information, training and support for the member. He added that in most cases when investigations are conducted it showed that some of the matters they deal with could have been avoided early on, but ultimately members are suspended or struck off the roll. Mr Siyo said there was a document that was made available for the members, a document that seeks to help members understand what is needed in terms of trust management.

2017/8 councillors

At the time of going to print the FSLs President had not been elected yet. The council consists:

- Cuma Siyo
- Vuyo Morobane
- Arnold Mohobo
- Tsiu Vincent Matsepe
- Noxolo Maduba
- Dumisani Qwelane
- Deidré Milton
- Johannes Fouche
- Henri van Rooyen
- David Bekker (Vice President)
- Etienne Horn
- Jan Maree.

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



Association of Arbitrators (Southern Africa) NPC The leading Alternative Dispute Resolution organisation in Southern Africa.

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- Fellowship Admission Course (CI Arb accredited);
- Specialisation in Construction Law.

Closing date for all registrations:

28 February 2018

Visit: www.arbitrators.co.za/education/
To register, kindly send an email to Mandisa:
coursecoordinator@arbitrators.co.za

Picket staged for human rights against Tanzanian government

The Initiative for Strategic Litigation in Africa (ISLA), together with Community Health Services and Advocacy (CHESA) and Lawyers for Human Rights (LHR), staged a picket outside the Tanzania High Commission in Pretoria demanding the release of the 13 people who were arrested in Tanzania in October, for allegedly promoting homosexuality.

ISLA and CHESA released a joint statement that said the arrest of the 13 people came after a legal consultation that was held by ISLA and CHESA, was raided by Tanzanian police. The statement added that the consultation was convened in order to receive instructions and evidence on a case that the organisation planned to file before court, which would challenge the government's decision to limit the provision of certain health services that it had previously provided.

ISLA and CHESA said the 13 people who were detained, were granted bail without being charged, however, the bail was later revoked without a valid reason. The two organisations said the mischaracterisation of a legal consultation where legal practitioners and their clients were discussing a specific case to be referred to court was unfortunate. ISLA and CHESA added that police had a copy of the concept note and the agenda of the consultation. Three lawyers and ISLA's Executive Director, Sibongile Ndashe, were part of the group that was detained.

Ms Ndashe's mother, Winnie Ndashe, joined the picket pleading for the safe return of her daughter and those arrested with her. She said that she was wor-



The Initiative for Strategic Litigation in Africa (ISLA) together with the Community of Health Services and Advocacy and Lawyers for Human Rights, staged a picket outside the Tanzania High Commission in Pretoria.

ried and scared for her daughter as she is being detained in a foreign country.

CHESA and ISLA pointed out that Art 30(3) in the Tanzanian Constitution enshrined the right to seek legal redress when fundamental rights have been violated.

The organisations added that in Art 7(a) of the African Charter on Human and Peoples' Rights, which Tanzania is a signatory to, recognises an individual's right to an appeal to competent national organs against acts violating their fundamental rights as recognised and guaranteed by conventions, laws and customs in force. 'We view this as an attempt to intimidate citizens from approaching judicial institutions when their rights have been violated to create an environment where lawyers are afraid to provide legal presentation and ultimately create an environment where it is unthinkable to hold the state accountable for human rights violations,' the statement said.

They added: 'There is no legal basis for these proceedings. We call upon Tanzanian authorities to discontinue the ongoing persecution of lawyers and their clients, [and] allow citizens to access legal representation without intimidation and to allow the foreign nationals whose passports have been seized to leave the country.'

National Director of LHR, Jacob van Garderen, said Tanzanian authorities were abusing the rights and freedom of human rights activists. He said that social activist societies and LHR practitioners were concerned about how governments, such as Tanzania, were closing down the space for civil society to participate in public life, including the right to advocate for a better society, rule of law, democracy and freedom.

Mr van Garderen said governments, such as Tanzania, should stop abusing criminal procedures to close down on human rights activism. He pointed out that should the Tanzanian government not give in to their demands, activist voices will become even stronger and they will mobilise support not only in South Africa, but on the continent and internationally. He added that every legal strategy will be explored to compel the Tanzanian government to release the detainees and to expose the government for the abuse that they conduct.

Tanzanian officials allowed Mrs Ndashe, accompanied by veteran activist, Burnie Sexwale, to enter the Tanzanian High Commission and hand over a memorandum of demands. The memorandum was signed by officials as an acknowledgment that it was received.

The Law Society of South Africa (LSSA) also released a statement condemning the arrest. 'We join our colleagues at ISLA and Lawyers for Human Rights in calling on Tanzanian authorities to release those arrested immediately. We understand there to be no legal basis for the arrests. We agree with the many institutions that have voiced their outrage that these proceedings appear to be an attempt to intimidate citizens from approaching judicial institutions when their rights have been violated, and also an attempt to instill fear among lawyers who wish to assist them. As our colleagues have said, this ultimately creates an atmosphere where it is impossible to hold the state accountable for human rights violations,' said LSSA Co-chairpersons Walid Brown and David Bekker.

Kgomotso Ramotsho,
Kgomotso@derebus.org.za



ISLA's Executive Director, Sibongile Ndashe's, mother Winnie Ndashe joined the picket asking for her daughter and 12 other people who were detained in Tanzania to be freed.

Law Society Library – enhancing professional standards

Access to the Law Society Library, run by the KwaZulu-Natal Law Society, and its services is strictly for attorneys and advocates, together with their pupils and candidate attorneys.

The library has a team of highly skilled and experienced librarians who can assist members of all law societies nationally in finding the information they need. It is no longer necessary to physically visit the library to use these services, simply contact the Law Society Library via their helpdesk e-mail system.

The library is able to assist with answers to inquiries on points of law by sourcing commentary and cases, precedents, updated legislation and much more. It must be noted, however, that the library personnel cannot provide legal advice or legal opinion.

In addition to searching the extensive collection of volumes, which include a wide range and extensive collection of textbooks, legislation, journals, law reports, government gazettes (both national and provincial) and databases, the librarians can search online databases, such as –

- Juta Law, which provides electronic full text, up-to-date legislation, law reports/cases, commentary, online journal articles and more.
- My LexisNexis, which provides up-to-date legislations, law reports/cases, commentaries, journal articles and forms and precedents, references such as Law of South Africa and more.
- Sabinet, which provides up-to-date and retrospective legislation, gazettes both provincial and national, law reports/cases, journal articles, municipal bylaws and more.

• Additional sources, include access to the Parliamentary Monitoring Group, SAFLII and the Organisation of South African Law Libraries. These resources supplement the library's collection where financial constraints limit the material that can be purchased.

Other facilities in the library, include, computing, printing and photocopying.

The Law Society Library's operating hours are from 8:00 am to 16:30 pm from Monday to Friday. For more information, contact the Law Society Library at (033) 345 1304/(033) 301 1621 or e-mail: help@lawlibrary.co.za or visit their website at www.lawlibrary.co.za.

*Thembinkosi Ngcobo, Manager Library
Service at the Law Society Library*

Free online Acts and Regulations from the Law Library of the University of Pretoria

All legal practitioners, and indeed, all South Africans should have free access to updated legislation, and it is for this reason that the Oliver R Tambo Law Library of the University of Pretoria (UP) provides this service, which makes Acts and regulations free to all.

Laws of South Africa is a work in progress, the database already provides access to over 300 Acts and all their regulations. The Acts and regulations are fully consolidated with amendments and new material is updated weekly on receipt of the *Government Gazette*.

Access to this database is free and

the documents in the database may be used and shared, for example, in legal documents, training material or correspondence.

Besides the currently enforced Acts, users also have access to historical (also called 'point-in-time') versions of Acts and regulations, which have been clearly marked to show what time period they cover, for example, the current National Credit Act 34 of 2005, as well as the last version before the latest or current one are shown.

Initially the service was launched with seed funding from UP and was able to continue with funds from the Constitutional Court Trust. For the past three years all the funding has been donated

by private law firms and the South African Institute of Chartered Accountants.

South Africans are fortunate to have Southern African Legal Information Institute (www.saflii.org) providing free case law and links to open access South African journals. This, combined with the Laws of South Africa website, provides a substantial body of free online legal sources.

• To access the Laws of South Africa website visit www.lawsouthafrica.up.ac.za

*Shirley Gilmore,
head of the Oliver R Tambo Law Library
at the University of Pretoria.*

Professional examination dates for 2018

Admission examination:

- 6 February
- 7 February
- 14 August
- 15 August

Conveyancing examination:

- 9 May
- 5 September

Notarial examination:

- 20 June
- 10 October

Registration for the examinations must be done with the relevant provincial law society.

Launch of the Tax Ombud annual report

The Office of the Tax Ombud, in collaboration with the University of South Africa's (Unisa) Department of Taxation in the College of Accountancy Sciences held the launch of the Tax Ombud's Annual Report on 17 October.

In her welcoming address, the Deputy Executive Dean of the College of Accountancy Sciences, Professor Philna Coetzee, welcomed delegates to the launch. She said that everyone present were lifelong students of taxation and referred to a quote by Albert Einstein who said: 'The hardest thing in this world is to understand income tax'. Prof Coetzee added that the college shares the Tax Ombud's values of accountability, independence, efficiency, fairness and confidentiality and said that these values are indispensable for the realisation of the vision of strengthening the taxpayer's confidence in the tax administration process in the country. 'The launch of the report is not just another event, but it signifies the close alignment of the universities and the taxation community in the country. It signifies a mutual respect for the millions of tax payers that we serve. ... The Office of the Tax Ombud signifies fairness and independence, and is an indispensable safeguard for good governance,' Prof Coetzee said.

Tax Ombud, Judge Bernard Ngoepe, started his presentation by stating that the report had already been presented to Parliament and what he might see as a high point, the public might see as a low point and *vice versa*. Judge Ngoepe said that no complaint or case is too small or too big and that each case is important to the Office of the Tax Ombud. He added: 'This is the attitude we have because what criteria do you use to determine the importance of a particular case? Is it the quota of the money involved? R 20 million may be a lot of money to an individual but to a big company that may be nothing, but R 10 000 may be everything that an individual person has.'

Judge Ngoepe said that everything in the report was important and he urged practitioners to read it and make contributions that they feel are necessary.

Legislative amendments

Judge Ngoepe referred to Legislative Amendments and said that the changes to the Tax Administration Laws Amendment Act 16 of 2016 (the Act) that were promulgated and came into effect in January, included:

- Increasing the term of office of the Tax Ombud from three to five years, so that there is continuity and retention of institutional memory.
- Giving the Tax Ombud powers to appoint the staff of the offices without consulting the South African Revenue Service (Sars) Commissioner as previously stipulated.



Tax Ombud, Judge Bernard Ngoepe, at the launch of the Tax Ombud Annual Report 2016/17 in October.

- Having its budget determined by the Finance Minister instead of the revenue collector.

Giving the Office of the Tax Ombud powers (with approval from the Finance Minister) to initiate investigations into any systemic and emerging issues. A stage has been reached where the Office of the Tax Ombud can approach the minister for his permission to allow the Office of the Tax Ombud to investigate cases in terms of s 16(1)(b) of the Act and to investigate what the Office of the Tax Ombud believes is systemic issues. Judge Ngoepe said it was a compromised situation. 'We would have wanted a situation where [we] did not need to go to the minister for permission,' he said.

Increase in complaints

Judge Ngoepe said that there had been a huge increase in terms of the number of complaints and queries received since the last annual report. According to the report a total of 15 658 contacts were received, of those 12 204 complaints were queries and 3 454 were complaints as opposed to the previous year where only 5 904 complaints and queries were received. 55,4% of the queries were received telephonically and 40,5% through e-mails. 77,13% of users were individual taxpayers.

The report states further that 1 722 complaints were rejected due to complaint not falling within the mandate of the office. Accepted complaints falling within the mandate of the office totalled an amount of 1 270 and 462 of the

complaints were not validated yet. The report states that 39,5% of complaints reviewed related to dispute resolution and 24,9% to refunds.

Judge Ngoepe said in a process like this, the Office of the Tax Ombud receives complaints that are not valid, some are valid and some are in a grey area. 'What they tell us about the office is that it was not a mistake to establish the Office of the Tax Ombud. It was the right thing to do. ... The climate was right for the establishment of the office. South Africans are very lucky to have an Office of the Tax Ombud as not every country has that kind of mechanism,' Judge Ngoepe said.

Delays in tax refunds

Judge Ngoepe said according to the mandate given to the office in s 16(1)(b) of the Act, he wrote to the minister who gave his permission to investigate one of the major issues that the office had to deal with, namely, the unduly delayed payments of tax refunds. The report was annexed in the annual report. 'You will see that a number of issues were raised. ... We made recommendations to Sars as to how these issues should be addressed and so forth. Obviously, there were some debates between the office and Sars. ... The complaints were justified and we did make some recommendations and Sars committed themselves to implementing some of the recommendations that we did make and hopefully they will



Chief Executive Office of the Office of the Tax Ombud, advocate Eric Mkhawane said the Office of the Tax Ombud was a young office and there are a couple of challenges, but the challenges were a work in progress.



South African Institute of Chartered Accountants Senior Executive of Tax and Legislation, Pieter Faber gave his view of the Annual Report.

soon see some fruit being born out of that,' Judge Ngoepe said.

Judge Ngoepe added that some of the recommendations that were made can be categorised and perhaps Sars could improve on some of the documentation that they issue to tax payers. One point that Judge Ngoepe highlighted was that the Tax Administration Act 28 of 2011 prescribes that Sars must issue a final demand before appointing a third party owing money to or holding money on behalf of an indebted taxpayer, to pay those funds over to Sars directly to satisfy the tax debt. Sars is obliged to issue a final demand for payment to the tax debtor, which must be delivered at least ten days before the issuing of the notice to the third party and the final demand must contain all the prescribed information required.

Engagements

Judge Ngoepe spoke about engagements and collaborations, which were organised and co-hosted with different stakeholders. The purpose of the engagements was to raise awareness about the Office of the Tax Ombud and the services it offers. He added that various engagements took place with media owners and journalists and coverage included print articles, as well as radio and television features and online articles.

In conclusion, Judge Ngoepe told delegates that after reading the report, they should ask themselves whether it was right to establish the Office of the Tax Ombud. He added that it was necessary for revenue authorities to have drastic powers in order to effectively collect tax, as there are people who are not trustworthy and who do everything possible to avoid paying tax, which the law does not allow. 'It is very fortunate in a constitutional state, such as this, that everybody's exercise of authority must

be subject to some counter-balance ... and the office is there to do just that. ... What is our purpose? Our main objective is to make sure that people pay tax, but I have used this expression before, we do not like Sars to adopt a *skop* and *donner* attitude. We want them to treat people fairly, because we know that when you treat people fairly you ... enable them to comply with their tax duties. ... Our task is to make sure that tax is collected as much as possible but as fairly as possible,' Judge Ngoepe said.

Panel discussion

After Judge Ngoepe's presentation a panel discussion took place, facilitated by Unisa's Advisor to the Unisa Principal and Vice-Chancellor and Director: Special Projects, Dr Somadoda Fikeni. The panel consisted of -

- Chief Executive Office (CEO) of the Office of the Tax Ombud, advocate Eric Mkhawane;
- Unisa College of Accounting Sciences Senior Lecturer, Werner Uys;
- South African Institute of Chartered Accountants Senior Executive of Tax and Legislation, Pieter Faber;
- South African Institute of Tax Professionals CEO, Keith Engel; and
- Sars Group Executive: Relationship Management, Mark Kingon.

During the panel discussion, Mr Mkhawane said that he could see the impact that the Office of the Tax Ombud has on the tax paying public. He added that the Office of the Tax Ombud was a young office and there were a couple of challenges, which Judge Ngoepe dealt with in his presentation, but the challenges are a work in progress. 'In moving towards more independence we are in the process of trying to find a proper model for this office going forward,' he said.

Mr Mkhawane said that the Office of the Tax Ombud is not just there to deal with complaints. 'We are here to make sure that you have a great experience when you deal with the revenue authority. That is what we are there for, to make sure that there are no underlying obstacles when dealing with Sars and we are there to make sure that Sars is an effective organisation,' Mr Mkhawane said.

Mr Faber said that from the report it is clear that an impact is being made by the Office of the Tax Ombud and that is an important aspect to focus on. He added that the biggest sin would be not to learn from the complaints and mistakes reported in the annual report.

Mr Kingon said: 'We welcome the report, we welcome the opportunity to always try and improve. ... We have instituted a number of changes, one specifically where we were raising assessments incorrectly as identified by the Ombud and we are committed to continue to identify areas where we fail. Will we get to a point where we never make mis-



South African Revenue Service (Sars) Group Executive: Relationship Management, Mark Kingon, said that Sars welcomed the report.

takes? ... We will never get there. When we are dealing with millions of clients, mistakes will be made. Clients will do things that will cause problems. We need to find a way to deal with them expeditiously and in a fair manner.

Kathleen Kriel
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So what does the LSSA do for you?

By representing 25 800 attorneys and 6 700 candidate attorneys, the Law Society of South Africa (LSSA) has the leverage to represent the profession and speak on its behalf at national level and in various local, regional and international fora. Below is a summary of what the LSSA does for you.

Provides free updates

- *De Rebus* on a monthly basis to all attorneys and candidate attorneys.
- Legalbrief LSSA weekly every Friday morning.
- Advisories, newsletters and guidelines regularly.
- Online resources and information brochures.

Empowerment

- Significant Leadership training for women lawyers.
- Mentorship initiatives.
- Participates in the Attorneys Development Fund.
- Free seeking/ceding articles adverts in *De Rebus* for prospective candidate attorneys.

Leadership

- Provides leadership for policy development:
 - LLB summit, ethics summit, summit on briefing patterns.
- Speaks nationally on behalf of the attorneys' profession.
- Brings six key stakeholders together as its six constituent members:
 - Four provincial law societies, Black Lawyers Association and National Association of Democratic Lawyers.
- Nominates attorneys to some 70 committees, boards and forums, such as: The Judicial Service Commission, Magistrates' Commission Rules Board, Deeds Registries and Sectional Titles Regulation Boards, Securities Regulation Panel, National Cybersecurity Advisory Council, National Forum on the Legal Profession, Information Regulator, etcetera.
- Cooperates with local and international stakeholders.
- Brings lawyers to South Africa by co-hosting regional and international conferences with stakeholders.
- Represents the profession on the Southern African Development Community Lawyers Association (SADC LA), Pan African Lawyers Union, BRICS Legal Forum, International Bar Association and Commonwealth Lawyers Association.

Protects and promotes democracy

- Protects and promotes the independence of the judiciary and of the legal profession.
- Undertakes advocacy initiatives and comments on legislation in the interests of the profession and public.
- Supports the efficient administration of the justice system.
- Monitors national and local elections.
- Undertakes democratisation initiatives with the: SADC LA, International Criminal Court and African Court.

Advocacy

- Undertakes litigation in the interest of the profession and the public:
 - Proxi Smart matter.
 - SADC Tribunal matter.
 - Muslim marriages matter.
- Cooperates with stakeholders on advocacy issues.

Specialist committees

- Interact with Parliament, government departments and other stakeholders.
- Comment on policy documents and draft legislation.
- Protect the interests of legal practitioners in many forums and with stakeholders.

Training for practitioners

Through Legal Education and Development (LEAD):

- Provides affordable education for over 11 000 legal practitioners a year.
- Continuing legal education seminars, workshops and courses.
- Webinars and e-learning via e-LEADER.
- Practice management training.
- Conveyancing and notarial courses.

Provides practical vocational training

for more than 1 500 candidate attorneys a year at nine attendance centres of the School for Legal Practice providing day and night training classes.

- Distance training School in cooperation with the University of South Africa.
- E-learning.
- Full-time, part-time and evening classes for compulsory courses for 2 500 candidate attorneys.
- Training for law firm support staff and corporate lawyers.

LSSA meets with Judge President Waglay

A delegation from the Law Society of South Africa's (LSSA) Labour Law Committee met with the Judge President of the Labour Court (LC) and Labour Appeal Court (LAC), Judge Basheer Waglay on 19 September. Judge President Waglay confirmed that the LC is now sitting at the:

- KwaZulu-Natal Local Division in Durban;
- Eastern Cape Local Division in Port Elizabeth;
- Mpumalanga Division in Nelspruit; and
- Limpopo Division in Polokwane.

Legal practitioners are encouraged to contact the Registrar of the LC to make the necessary arrangements for suitable matters to be heard at such divisions with the aim of increasing the public's access to the LC. The LC's contact details are available on the website of the Department of Justice and Constitutional Development at www.justice.gov.za.

Judge President Waglay commended legal practitioners for their courteous and respectful behaviour toward the judges in the LC, but expressed concern that, in a few instances, frivolous and inconsequential arguments have been presented by legal practitioners. Although the latter has been addressed in judgments, the Judge President requested



*Back row from left: LSSA Labour Law Committee members Vuyo Morobane, Jan Stemmett and Roy Ramdaw.
Front row from left: Deputy-Chairperson of LSSA's Labour Law Committee, Melatong Ramushu, Judge President of Labour and Labour Appeal Court, Basheer Waglay, and Chairperson of LSSA's Labour Law Committee, Jerome Mthembu.*

the LSSA's assistance in urging legal practitioners, to avoid arguing frivolous and inconsequential matters in the LC as this places an undue burden on the judicial system with miniscule impact on the parties. This meeting forms part of the LSSA's ongoing commitment to promote

accessibility of all to the courts and to enhance access to legal services.

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

Pro bono work under the Legal Practice Act

The Law Society of South Africa (LSSA), together with its six constituent members, (the Black Lawyers Association, National Association of Democratic Lawyers, the Law Society of the Northern Province's, the Cape Law Society, the Law Society of the Free State and the Law Society of Kwa-Zulu Natal, incorporated as the Natal Law Society) have with the support of the Foundation for Human Rights undertaken a dialogue project aimed at investigating relevant models for the implementation of a national model for the delivery of *pro bono*/community services by the South African legal profession.

One of the purposes of Legal Practice Act 28 of 2014 (LPA) is to broaden access to justice by putting measures in place to provide for the rendering of community service by candidate legal practitioners



Attorney Ilan Lax was a facilitator at a consultative workshop on community service and pro bono under the Legal Practice Act 28 of 2014, hosted in Johannesburg in October.

and practising legal practitioners. The LPA compels the Minister of Justice and Correctional Services, Michael Masutha, to prescribe the requirements for community service after consultation with the South African Legal Practice Council.

The consultative workshops took place in Bloemfontein, Cape Town, East London, Johannesburg and Pietermaritzburg and were attended by legal practitioners and a diverse range of stakeholders. Attorney and facilitator, Ilan Lax, provided an introduction to s 29 of the LPA, which captures the provisions relating to community service and then juxtaposed that with the current Rules for the Attorneys' Profession r 25 dealing with *pro bono* services. The discussion reviewed the context and implications of the *status quo* and how the envisaged system might work.

Some of the key issues emanating from discussions, include:

- That *pro bono* services are not explicitly encapsulated under the concept of community service envisaged under the Act.
- That the Act should be amended to specifically include *pro bono* services.
- To what extent technology can be used to ease the administrative cost and burden of implementing a community service/*pro bono* framework for the legal profession.
- Mechanisms for incentivising participation by legal practitioners.
- The possibility of extending this framework in some other way to law students and judges.

Judge of the Western Cape Division of the High Court in Cape Town (WCC), Taswell Papier, briefly addressed participants after the Cape Town workshop and he expressed the view that the application of the community service provision

is timeous. 'I remain enormously proud of our legal practitioners and firms who dedicated time and effort in the infancy phase of the [*pro bono*] project,' Judge Papier said.

'The enactment of the community service provision in the Act is timeous and offers an enormous opportunity to the profession to take the *pro bono* project to its next level with vigour, innovation and commitment. We must always be mindful that community service must not be rendered at a lesser quality. The time has come to revisit the establishment of a clearing house for *pro bono*,' Judge Papier added.

Judge Papier emphasised the constitutional promise: Access to justice and social justice for all.

Judge Papier replied to a question that suggested that the *pro bono* framework could be funded through a grant under s 46(a)(i)(cc) of the Attorneys Act 53 of 1979 from the public funds accumulated

by the Attorneys' Fidelity Fund for the purpose of 'furtherance of the administration or dispensation of justice'. 'This would be one of the strongest options of funding a clearing house in line with this purpose,' Judge Papier said.

Other judges who were present from the WCC at the cocktail function held at the community service/*pro bono* workshop were -

- Judge Siraj Desai;
- Judge Vincent Saldanha;
- Judge Nolwazi Boqwana;
- Judge Lister Nuku;
- Judge Mokgoatji Dolamo; and
- Acting Judge Mushtak Parker.

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



LOOKING FOR A CANDIDATE ATTORNEY?

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

This free of charge service operates as follows:

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

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



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**Should you wish to participate in this project, please feel free to contact:
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People and practices

Compiled by Shireen Mahomed

Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. Please also note that *De Rebus* does not include candidate attorneys in this column. Advertise for free in the People and practices column. E-mail: shireen@derebus.org.za

100th anniversary

Erasmus Jooste celebrates its 100th anniversary this year. The firm was established in 1917 by a local attorney, Erasmus Jooste. Since the opening of the firm by Erasmus Jooste there have been 17 partners that have come and gone and today Piet Scholtz is at the helm of the firm. The firm is currently practising in association with Esme Coetzer and has offices in Orkney and Klerksdorp.



Current director, Piet Scholtz (front row, seated third from left), along with former professional personnel.

Jurgens Bekker Attorneys in Alberton has two new appointments.



Megan van der Merwe has been appointed as the managing associate.



Sheralyn Pieterse has been appointed as a junior associate.

Guthrie Colananni Attorneys in Cape Town has two new appointments.



Portia Manzini has been appointed as a partner in the commercial litigation department.



Melissa Webb has been appointed as a partner and she heads the conveyancing department in the residential, industrial and commercial transfers.

Sefalafala Inc has two new appointments.



Tumelo Lenyai has been appointed as an associate in Johannesburg.



Kamogelo Maleka has been appointed as an associate in Polokwane.



FourieFismer Inc in Pretoria has appointed four new directors. Front, from left: Dawie Bekker and Bernard Bahlmann. Back, from left: Abby Ntimbana and Louis Fourie.

Stegmanns Inc in Pretoria has appointed Stella Zondi in the general litigation, family and labour law department.



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



By
Thomas
Harban

Personal stressors and legal practice: Your firm needs a plan

In this column, the Attorneys Insurance Indemnity Fund (NPC) (AIIF) have sought to raise a number of risk management issues for legal practitioners to consider and have also suggested appropriate measures that could be implemented by firms in order to mitigate or avoid the risks materialising. All these risk management suggestions may be futile if the most important part of the practice is not addressed, namely, the people making up the practice. In a number of jurisdictions internationally studies have been conducted on the level of stress faced by legal practitioners. The AIIF are not aware of a similar study conducted in South Africa. However, one international professional indemnity (PI) insurer has pointed out that as part of their post-claim analysis, a discussion is held with the insured practitioner in order to identify what, in the practitioner's behavior, could be changed in order to avoid future claims. It has been indicated that, in many instances, factors outside of the legal practice have been identified as having affected the practitioner concerned to the extent that this led to the practitioner not being able to give the practice the required level of attention resulting in the PI claim. Issues such as debt, divorces, the illness of a loved one, a death in the family and the abuse of alcohol and drugs have been identified as some of the factors, which practitioners report as having affected them at the time that the events giving rise to the claim arose.

The practice of law, by its very nature, can be a very stressful undertaking. There are a host of competing pressures on the legal practitioners, their staff and even their families. These include the challenges of chasing multiple deadlines, ensuring that the practice is financially viable, securing clients and carrying out the mandates received from clients. The often adversarial nature of legal work adds to the stressors. At the end of the day, the people who make up the practice are human beings who have to deal with the stresses of practice, as well as those associated with their lives outside of the law firm. It is trite that these stresses must be acknowledged and managed. Each person will have their own individual tolerance level for stress and some may have adopted certain stress management techniques. The

approach adopted by some that 'stress is a part of the job and nothing can be done about it' is not helpful.

In planning the firm's risk management strategy, the risks associated with stress (and all other personnel related risks) should also be taken into account. Have you considered how the firm and its clients will be affected if a key person is unable to function for a significant period due to stress or some other unexpected illness? Do your policies encourage staff to manage their stress levels? Is the culture in the firm one that encourages personnel to work very long hours over extended periods of time? Does the firm culture encourage the attaining of fee targets at all costs (no matter the personal sacrifices involved)? All these factors could add to the 'pressure cooker' environment that many people in the profession find themselves in. High stress levels could lead to a lowering of motivation and affect the standard of output produced. This in turn may lead to dissatisfaction by clients and result in PI claims being brought against the firm.

A person facing financial stress may, unfortunately, be tempted to misappropriate funds. If a practice is facing constant financial pressures, the attorney concerned should consider closing the firm rather than continue with an entity that is not commercially viable.

It is not always possible to live the various components of one's life (the professional and the personal) in silos and to completely isolate the pursuit of practice from everything else that is happening in other areas of life. A legal practitioner or member of the support staff that is 'snowed under' by work for extended periods of time could be in potential danger of burn out and of something falling through the proverbial cracks. Similarly, a member of the firm facing stressors from outside of the work environment may not be able to meet the outputs expected of them in the practice.

The symptoms of stress should never be ignored. Legal practitioners must have an awareness of their own stress levels, as well as those of their staff. If, for example, there has been a decline in the quality of work produced, a sudden change in behavior or some other indication that the person concerned is under an increased amount of stress and is not coping, these should be addressed

in a compassionate manner. The person concerned should be assisted in getting the required professional assistance (and encouraged to get the appropriate professional help). There are a number of organisations that offer assistance to people facing stress related or psychological issues. A firm may consider developing an employee wellness programme.

A PI claim brought against a legal practitioner will also result in heightened levels of anxiety and stress. A pending disciplinary inquiry by the provincial law society could have the same effect. In one particular matter notified to the AIIF, the issue was whether the practitioner concerned had taken an instruction from his client on a particular point. In preparation for trial it emerged that the practitioner had very little recollection of the events around the issue. He had been dealing with many professional and personal issues at the time in question and was thus unable to pay the required level of attention to the instruction at hand. This resulted in him breaching his mandate that he received from the client and the latter instituted action against him for the resultant damages. By the time the PI claim was finalised, the practitioner was unable to function due to the many issues he had had to deal with.

Some measures that firms can consider in order to assist with the management of stress include:

- Being a caring employer and adopting a compassionate approach to stresses faced by practitioners and staff.
- Implementing an appropriate support system with stress management techniques and an employee wellness programme.
- Ensuring that there is a manageable workload across the firm.
- Not accepting instructions unless the firm has the appetite, time and capacity to carry out the mandate.
- Properly managing client expectations and avoiding unreasonable demands from clients.

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



By
Emmie
de Kock

Whether to invest in junior attorneys or not?

I once heard the Chief Financial Officer ask the Chief Executive Officer (CEO): 'What if we invest in our employees and they leave?' The CEO replied: 'What if we do not, and they stayed?'

If you are an owner of a law firm and you are faced with these questions, how will you answer?

Becoming more senior in the attorney profession, and in a law firm, could perhaps be described as climbing a ladder leaning against a house. While climbing up the ladder to the top of the roof, it will be helpful if someone could keep the ladder steady on the ground. To get that person to eventually help you with the work on the roof, you will have to pull them up and ask a new person to hold the ladder steady on the ground.

Based on the statutory and ethical rules of our legal profession, principals must invest time and effort in training and mentoring candidate attorneys (CAs) to help them qualify as attorneys. After CAs qualify as attorneys, it may take further time and money to mold them into well-rounded profitable attorneys. A well-rounded profitable attorney is an asset for a law firm.

However, when a well-trained junior attorney decides to leave a firm, the firm may experience a loss of its investment. While in the past, law firms hired with a certain long term view, the strategies of law firms must perhaps change to keep up with the work attitude changes of the new generation of junior attorneys.

Although researchers do not always agree on the dates, most indicate that Generation Y or 'millennials' generally refer to the generation born between 1980 and 2000. It is generally known that millennials are more focused on work-life balance, having a creative outlet apart from work, and being socially connected through technology. Multiple sources reveal that Generation Y associates job satisfaction with the free flow of information, immediate feedback and close relationships with supervisors. However, despite the many healthy outlooks of millennials, they are apparently also less likely to be loyal to institutions and switch jobs more frequently, which could pose challenges for employers.

Unless management of law firms adapt their hiring and career development strategies, the characteristic of frequent job hopping may be demotivating to management due to the long time it may take for a junior attorney to qualify and show a return on investment for a firm.

Notwithstanding the challenges of employees, for the sake of the growth of our profession, senior attorneys ought to employ junior staff to be profitable and have succession plans, law firms should also plan to manage their risks and strive to make appointments of CAs and junior attorneys a win-win situation.

The following may be considered:

- **Plan for staff changes:** As many CAs or junior attorneys may only have short-term plans at a firm to learn and gain experience before moving on, law firms should plan for such possible staff changes. Planning should be done on at least two levels, namely, operationally and financially. In this regard, it will make sense to allocate a back-up person to the junior attorney who will always know what is going on with the matters and clients dealt with by the junior attorney. Junior staff should also be taught to keep good records. It is also important for a law firm to put systems and processes in place with an operations manual, to help with training of new staff and ensure consistency in service levels. On a financial level, a junior attorney should be taught and allocated tasks as soon as possible, which should be covered by a budget, and could assist the firm to be more profitable.

- **Discuss career development:** Some big firms take charge by employing a number of CAs at the same time and telling them that only some of them will be offered a further contract after qualifying as attorneys. This motivates all to work hard, but also helps all employees plan for possible changes after their fixed term of articles. To retain talented junior attorneys, it is best to develop and discuss possible career paths, to regularly review it, set realistic goals and to stick to it.

- **Coaching:** Coaching by an external lawyer coach, could help CAs and junior attorneys to develop faster and become more valuable to firms sooner. In this

regard, the focus of coaching is to improve the competencies of an individual attorney to acquire skills and behaviours which lie beyond legal knowledge. This should assist any junior attorney to manage their practice and matters more efficiently and profitably. As coaching sessions per hour would generally cost less than the professional time of senior attorneys per hour, coaching may save the law firms money, achieve results sooner, and make junior attorneys realise the extent of the firm's investment in them.

- **Mentorship:** If you are the owner of a law firm, and are pressed for capacity, or lack management experience in some areas, it may also be helpful to involve an external mentor. A mentor with more attorney experience can give guidance to younger attorneys and assist with skills transfer. In this regard, the Legal Education and Development branch of the Law Society of South Africa offers a Mentorship Programme for qualified attorneys, which may be helpful. More information is available at www.lssalead.org.za.

Law firms need to hire good CAs and junior attorneys to grow. Although it may take a while for a junior attorney to develop professionally and reach their full potential as an attorney, there should be benefits for both, the employer and employee, to embark on these working relationships. Apart from all the good business reasons to hire and mentor junior attorneys, senior attorneys should continue to contribute to the profession's next generation of attorneys. The next generation of attorneys are our profession's future. The transfer of skills and knowledge is essential to take our profession forward.

Reverting to the question whether you should invest in your junior attorneys or not, how will you answer? How steady is your ladder?

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

By
Moroke
Phajane

Effective governance and controls can give law firms a competitive edge

Third party risk management is currently an important topic for most corporate entities. Most corporate entities are carefully scrutinising their third party suppliers in order to minimise the risk exposure inherent in such relationships.

This also applies to professional service providers, including, law firms. As a result of the current economic climate corporate entities are also exploring innovative ways of saving costs without compromising the quality of services required from third party suppliers. This simply means a professional services provider with effective governance, controls, suitably qualified personnel and a flexible fee structure will be most attractive to corporate entities.

This definitely creates an opportunity for law firms. The operating model of law firms is inherently flexible and makes it possible for such firms to negotiate alternative fee arrangements with their clients. This fee model coupled with effective governance, controls and suitably qualified personnel enhances the stature of the law firm without necessarily increasing in size.

Most corporate entities have a Procurement of Goods and Services Policy, which requires that a formal transparent process be followed when selecting suppliers. This involves a formal, transparent process in which suppliers are invited to bid for the provision of the required services. In most cases an independent cross-functional sourcing team is selected to assess the bids presented by the various suppliers using specified criteria and select the most suitable supplier. The following generic criteria are generally used to assess and select suppliers:

- Preferential procurement (the service provider's Black Economic Empowerment (BEE) status).
- Operational and technical capability.
- Assessment of service provider's liquidity and solvency.
- Commercial assessment (charge out rates, pricing structures, cost benefit analysis).
- Risk and compliance management controls (information security, business continuity, compliance with laws).

Preferential procurement

Most corporate entities are rigorously as-

sessing the impact of engagements with service providers on their BEE scorecard. Ownership is one of the elements that is measured on the BEE scorecard for preferential procurement.

Operational and technical capability

Law firms, like any other professional services provider, have to provide evidence of their technical and operational capability. This can be achieved by demonstrating expertise in a specific area of specialisation, the qualifications, experience and capacity of the resources employed to provide the services. This can also include personnel and technology used to provide the resources.

The law firm's track record or success rate is also an important factor in determining the firm's competency and capability. The law firm also has to demonstrate its case management capabilities, which include providing the necessary reports, updates and alerts to clients on the deliverables.

Assessment of service provider's liquidity and solvency

This entails an assessment of the law firms' audited financial statements to verify that the law firms is financially stable and that its financial position will not result in the inability to continue providing the services.

Information security

It is advisable that a firm should – at a minimum – possess the following policies to demonstrate the existence of processes and controls in place for the safe and fair management of information being processed on behalf of the corporate entity:

- Information protection/privacy policy: Internal mandatory statements that define the minimum requirements for fair and secure information handling practices.
- Information security policy: Internal mandatory statements that define the minimum requirements for information security, including, strong password standards, data classification, data retention storage and destruction, data loss prevention security standards, namely, patch management, application

firewalls, anti-virus, anti-malware tools.

- Access management policy: Sets out the procedures and requirements for applying for, granting, managing and revoking user access to systems, data and physical premises. This includes controls to ensure that only authorised individuals enter your premises, including, a visitor sign in process, secure remote access procedures, encryption technology.
- Acceptable use policy: Contains explicit rules for individuals (employees and contractors) around appropriate use of the firm's information assets, including networks, devices and good practices to secure such assets.
- Risk management framework and policy: The defined risk management framework as it pertains to people, data, financial risk and the mitigation thereof.
- Compliance policy: The defined compliance management approach or framework to deal with regulatory compliance as it pertains to the organisation. This includes operational, security and human resources compliance requirements.
- Business continuity framework/plan: A process in place to manage and test the business continuity and disaster recovery capability. This includes the availability of business continuity plans, disaster recovery plans and robust backup procedures.
- Security management alignment thereof to ISO2700X, Cobit and King III.
- Incident management processes.

Compliance with relevant laws

It is important for the firm to understand the corporate entity's legislative universe that is comprised of legislation, which is applicable to the entity or the industry the entity operates in. This will enable the firm to put measures and controls in their operations that will ensure that in providing the services to the corporate entity, the firm does not cause the corporate entity to contravene legislation or regulation applicable to it.

Business continuity

The firm needs to demonstrate that it has measures and controls in place that it will be able to provide the service to the corporate entity without any disruption resulting from factors such as key man dependencies, technology downtime and lack of back up procedures.

Conclusion

The current economic climate has resulted in businesses and individuals minimising or prioritising their procurement initiatives. Corporate entities are embarking on various initiatives to save costs. Professional services, including, legal services will definitely be on the list of services to be procured at a minimal

as companies are beginning to scrutinise the necessity of outsourcing such services to external service providers. Innovative firms that address the business need at a reasonable and lower cost compared to existing service providers stand to benefit from this. This will certainly give law firms offering sound business solutions and that have adequate risk and

compliance controls and track records the competitive edge.

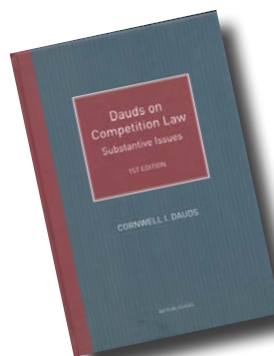
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By
Nkateko
Nkhwashi

Why the need for confidentiality on the content of Suspicious Transaction Reports?

The Financial Intelligence Centre (the Centre) was established by the Financial Intelligence Centre Act 38 of 2001 (the Act). The Centre's key functions, among others, is to 'process, analyse and interpret information disclosed to it, and obtained by it' and to inform, advise and co-operate with investigating authorities, supervisory bodies, the South African Revenue Service (Sars) and intelligence services, in terms of the Act. One of the ways in which the Centre obtains the information (on potential or unlawful activities) to process, analyse and where necessary refer such information to any of the relevant investigating authorities for further investigations is through what is termed as a Suspicious Transaction Report (STR) in terms of s 29 of the Act.

Section 29 of the Act creates a duty for any person including '[a] person who carries on a business or is in charge of or manages a business or who is employed by a business' to report certain suspicious and unusual transactions to the Centre. It is to be noted that from 2 October, when the Financial Intelligence Centre Amendment Act 1 of 2017 (Amendment Act) and relevant regulations came into effect, the scope of STRs would be expanded. This was evidenced by the insertion of reg 23A (information to be reported concerning a suspicious or unusual activity report), reg 23B (information to be reported concerning a terrorist financing transaction report) and reg 23C (information to be reported concerning a terrorist financing activity report), on the draft amendments to regulations and draft withdrawal notice of exemptions GNR909 GG41077/30-8-2017 published for comments by the Centre.

All the new regulations mentioned above set out all the information to be included in each of the relevant reports. Such information is private. It includes the information of the person or institution creating the report, as well as that of the person or institution being reported. Thus the Act justifiably places a responsibility, as well as an obligation on the Centre – as the custodian of such information – to ensure that it is protected in terms of the law (ie, Protection of Per-

sonal Information Act 4 of 2013 and the Constitution). The Act further sets out the roles and responsibilities for those who are entitled to access such information subject to satisfying certain prescribed criteria.

Subsequent to the preceding paragraph one would conclude that requesting and accessing STRs by those entitled to do so in terms of the Act was fairly simple and easy, the reason for this being that the Centre is also obliged to assist the requester of information to satisfying the requirements or setting the criteria for access to such information. However, in practice, this has not proven to be easy. For example, in October 2016 the then Minister of Finance, Pravin Gordhan made an application to the High Court for a declaratory order against the Oakbay Group of companies. The declaratory order sought was to the effect that the executive branch of government (Minister of Finance) is not entitled to interfere with or intervene in the relationship between the bank and its customer(s).

In support of his application, the minister attached a founding affidavit together with a certificate obtained from the Centre, which detailed certain transactions extracted from an STR. From thereon, the Centre alleged it started to receive numerous requests for the actual STR from some of the investigation authorities and private citizens alike. The Centre had to clarify to some of those requesting access to the actual STR that what was attached in the minister's founding affidavit was not the actual STR but a certificate. Furthermore, the Centre had never shared an actual STR with anyone 'including the Minister of Finance who is the Executive Authority responsible for [the Centre]'. The Centre also had to explain and clarify that it is not allowed to share such reports with private citizens.

Despite the Centre's efforts, there were persistent suggestions in the media that the Centre was 'not co-operating fully with its law enforcement and other competent authority partners'. Uncharacteristically, the Centre had to issue a media statement entitled 'Co-operating fully with law enforcement and other competent authority partners' on 11 No-

vember 2016 trying to clarify and refute the claims that it was not co-operating. In that media statement the Centre explained some of the following issues:

- Its role and responsibilities as the custodian of the information.
- The role and responsibilities of those seeking access to the information.
- The need for privacy and confidentiality regarding the information contained in the actual reports.
- The fact that the content of an STR is hearsay evidence and thus inadmissible in a court of law (see www.fic.gov.za/Documents, accessed 3-11-2017).

The media statement focused on the need for confidentiality in order to protect the rights of all involved. It, however, left out or did not explicitly explain the concerns around 'tipping-off' and how confidentiality ensures the effectiveness of the entire reporting regime. These are, however, captured in the Act. Recently in the Draft Guidance for Private Sector Information Sharing (www.fatf-gafi.org/media, accessed 6-11-2017), the Financial Action Task Force (FATF) also acknowledged the need for confidentiality for similar reasons or purposes as follows:

'Ensuring the confidentiality of STRs is critical to an effective function of the reporting regime. Confidentiality of STRs is needed so that the subject of STR and third parties are not tipped-off, as this can adversely affect intelligence gathering and investigation, and can enable persons to abscond or dispose of assets.'

The rule against tipping-off essentially prohibits disclosure of the 'fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made' subject to certain prescribed exceptions. Determining whether there is tipping-off in a particular case or circumstance is sometimes not easy. A case in point is the matter involving the Chief Officer at Sars, Jonas Makwakwa.

Suspicious and unusual transactions reports were filed with the Centre against Mr Makwakwa by some banks. After analysing and processing the reports the Centre passed the information to Sars.

Regardless of the way in which the

Commissioner approached Mr Makwakwa, a question remains whether such amounted to 'tipping-off' as prohibited in the Act. Similar concerns were raised by Corruption Watch in 2016 when pressing charges against Mr Makwakwa and his co-accused (Corruption Watch's Affidavit of 8 November 2016 deposed to by Mr Nhlamulo Mvelase marked Annexure L_2, www.corruptionwatch.org.za, accessed 3-11-2017). This case is still under investigation and it will be interesting to see how it is resolved, especially how the relevant sections of the Act will be interpreted.

The complexity around the determination of 'tipping-off' is not new. For example, in 2003 when the Act, was about to come into effect the Cape Law Society issued Guidelines in order to assist its members in complying with the Act. In those Guidelines it was noted that there will be instances where an attorney's duty to report certain information to the Centre will clash with an attorney's professional duty of disclosure to their clients. In such circumstances the guidelines advised attorneys to give full effect to their professional duties towards their clients, namely, report as required by the Act, but also disclose such information to their client or alternatively first withdraw as the client's attorney of record and then report whatever information required in terms of the Act. It should be noted that this was during the early days

of the Act and the regulations, as well as the exemptions were not in effect yet. The Guidelines were, however, well-crafted and informative as they also drew a distinction between the concept of 'confidentiality' and 'privilege' within the context of the Act. I submit that with the introduction of the Risk-Based Approach ushered in by the Amendment Act will be helpful for the attorney's profession to have similar guidelines issued by the Law Society of South Africa. In the United States (US), for example, the American Bar Association has done so – since 2010 – with the support and endorsement of US Treasury Department (see American Bar Association 'Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing' 23-4-2010, www.americanbar.org, accessed 3-11-2017).

Conclusion

In a nutshell, the sensitivity of the information contained in STRs necessitates that they be dealt with in a confidential manner in order to protect the interests and rights of all involved and thus ensure the effectiveness of the entire reporting regime. As already alluded to above, the scope of STRs is set to be expanded with the Amendment Act and relevant regulations coming into effect. This, however, does not mean that the need for confidentiality will fall away and that access be afforded to everyone other than those

designated in the Act. The Centre will also continue to execute its mandate of analysing, processing and distributing information to all its partners in the same way as it used to. It is imperative to note that the Centre does not share the actual STR filed, but only a certificate, which contains some of the information extracted from the actual report. The confidentiality of the report also ensures that those suspected of unlawful activities are not tipped-off and as a result abscond or dispose of their assets. Lastly, and as noted by the FATF recently, where STRs are not treated with confidentiality 'concerns ... exist regarding ... potential misuse for unrelated purposes, leakage to media for political gains, and sharing without due process of law' (www.fatf-gafi.org, accessed 7-11-2017). The *Makwakwa* case is one, which perfectly illustrates this point as some of the information extracted from the STRs was splashed through-out the pages of various newspaper articles.

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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The rise of Bitcoin and other cryptocurrencies

By
Jason de
Mink



Ongoing innovation creates opportunities to improve the general wellbeing of mankind but with the advent of new technologies also comes great challenges for nations and their citizens. Cryptocurrency (also known as 'virtual currencies' or 'cryptographic money') is one such innovation, rapidly becoming a significant reality in the modern financial world and making major inroads into the areas once dominated by traditional payment methods.

The South African National Treasury has cautioned the public to remain extremely vigilant of the risks and benefits which accompany cryptocurrencies. They evolve rapidly and have a number of attributes making them attractive as a payment method. These are the abil-

ity to instantaneously transcend national borders while providing anonymity and security due to high-level encryption.

Cryptocurrencies, therefore, present governments, institutions and law enforcement agencies with complicated challenges, having been linked, *inter alia*, to crimes related to financing for assassinations, corporate espionage, pornography, drugs and weapons.

While currently unregulated, this emerging technology is being carefully monitored and strict controls may be imposed at any moment due to its wild price fluctuations, potential for fraud, and undoubted potential for use by criminal elements.

However, despite the negative perception in some quarters, it is clear that cryptocurrencies and the block chain technology that underpins them provide a refined, efficient and adaptable

peer-to-peer platform, which empowers the average citizen to deal with their finances without government and bank interference.

The rise of cryptocurrency

In a recent World Economic Forum Report: The Future of Financial Services (2015), The World Economic Forum (WEF) described traditional value transfer across geographies as '[a] centralized model, rife with cost and complexity' with its basic elements having 'been in place for more than 150 years, since telegraph companies began "wire transfers"'. The WEF has identified that the payment industry is undergoing a major revolution that has enormous implications for providers of payment services as well as the end-users of these services.

Virtual currencies have been identified as 'compelling alternatives to traditional

value transfer', with Bitcoin being mentioned as a method to 'radically streamline the transfer of value' via a 'simpler, faster and more efficient process, in which payment and settlement happen simultaneously within a closed system that is highly transparent to both sender and receiver' and free of the 'complex process relied upon in the traditional method' which makes it 'potentially vulnerable to fraud' (<http://reports.weforum.org>, accessed 1-11-2017).

A cryptocurrency, such as Bitcoin, is a digital or virtual currency utilising encryption (cryptography) for security. A cryptocurrency is difficult to counterfeit because of this high-level security feature. A defining feature of a cryptocurrency is its 'organic nature'; it is not issued by any central authority and is not denominated in any national currency, rendering it theoretically immune to government control, intrusion or exploitation (www.investopedia.com, accessed 1-11-2017).

Bitcoin is a decentralised, anonymous/pseudonymous payment network (D Bryans 'Bitcoin and money laundering: Mining for an effective solution' (2014) 89 *Indiana Law Journal* 441 at 443). It operates on a peer-to-peer platform, meaning that transactions occur directly between users, without the need for a wider institutional framework (ie, the bank). Bitcoin is by its very nature international in scale, is more secure than previous electronic payment methods and carries within it protection against inflation (<https://bitcoin.stackexchange.com>, accessed 1-11-2017). All-in-all, Bitcoin is viewed by many as a superior payment mechanism.

At the same time, the viability and growth of these innovations have led to heightened concerns about their use, as they allow both legal and criminal users to transfer money nearly instantly across jurisdictions. Coupled with features such as low/no costs, ease of access, virtual anonymity and no public records, it is evident why cryptocurrencies are on most countries' regulatory radar (D Bryans (*op cit*) at 447).

Some governments are concerned that anonymised, peer-to-peer private payment systems will weaken measures to control the value of their own currencies, in the worst-case scenarios making them potentially vulnerable to catastrophic and unprecedented attack by speculators. Naturally, uncontrolled anonymous outflow of value is also of grave concern to nation states.

These concerns have led to actual or potential regulatory measures in various jurisdictions:

- Unlike the US and much of Europe, it is currently illegal to pay for anything with

cryptocurrencies in Russia or convert them into rubles (Art 27 of the Federal Law On the Central Bank of the Russian Federation (Bank of Russia) www.cbr.ru, accessed 13-11-2017), although it is speculated that this is simply a way for the government to control and dominate the cryptocurrency market with its own 'CryptoRuble' (C Sebastian 'Russia eyes cryptocurrency dominance' <http://money.cnn.com>, accessed 13-11-2017).

- Bitcoin remains banned in China (MP Ponsford 'A Comparative Analysis of Bitcoin and other Decentralized Virtual Currencies: Legal Regulation in the People's Republic of China, Canada, and the United States' (2015) 9 *Hong Kong Journal of Legal Studies* (<http://jolt.law.harvard.edu>, accessed 13-11-2017)).

- Cryptocurrencies are illegal in Vietnam (JP Buntinx 'State Bank of Vietnam Declares Cryptocurrencies are now Illegal' www.newsbtc.com, accessed 13-11-2017).

- Cryptocurrencies are also illegal in Bangladesh and several countries in South America including Bolivia (2014) and Ecuador (2015) (UW Chohan 'Assessing the Differences in Bitcoin and Other Cryptocurrency Legality across National Jurisdictions' <https://papers.ssrn.com>, accessed 13-11-2017).

- Cryptocurrencies are coming under increasing scrutiny in Europe.

Canada appears to be a leader in the field of regulation, with the most cogent, detailed and sophisticated legislative measures to regulate Bitcoin, being the first jurisdiction in the world to introduce concrete legislative measures to regulate Bitcoin (T Ahmad 'Canada: Canada Passes Law Regulating Virtual Currencies as "Money Service Businesses"' www.loc.gov, accessed 13-11-2017). So far, however, in the United States there has been little attempt at regulation while the cryptocurrency is currently unregulated in South Africa (SA).

Recent trends, case law and legislation

In 2014 a civil case in the Netherlands resulted in a judge declaring that Bitcoin was not money, as it did not meet the criteria of legal tender within the region (P Rizzo 'Dutch court declares Bitcoin isn't money in civil trial' www.coindesk.com, accessed 14-11-2017).

The same result was achieved in the 2016 case of *The State of Florida v Mitchell Abner Espinoza* Criminal Division Case no. F14-2923, (Fla. 11th Cir. Ct.2016). The accused and an accomplice engaged in fake transactions with undercover agents through an online marketplace and converted US\$ 30 000 of cash into Bitcoin.

They were charged under Florida's anti-money laundering law but were acquitted on all charges because the court did not deem Bitcoin as money, stating that

'Bitcoin has a long way to go before it [becomes] the equivalent of money.' This decision has very recently been taken on appeal.

The *Espinoza* case characterised the conflicting definitions of what cryptocurrency across the US federal, state and local governments is. Adding to the confusion is the guidance published by the US Department of the Treasury Financial Crimes Enforcement Network 'Application of FinCEN's Regulations to Persons Administering, Exchanging or Using Virtual Currencies' (www.fincen.gov, accessed 14-11-2017) in 2013 that "virtual" currency [cryptocurrency] is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency ... [and] does not have legal tender status in any jurisdiction'.

Further, as a direct response to the failure to convict Espinoza, House Bill 1379 was recently passed in Florida, defining virtual currency and prohibiting its use in laundering criminal proceeds.

The resulting outcome is that criminals using cryptocurrencies will be charged with money laundering, as well as the underlying criminal activity.

This trend is being followed in many US states and recent cases in the US mostly seem to accept a wider definition of money into which cryptocurrencies can fall, although divergent views still exist.

The use and legality of cryptocurrency

As a payment mechanism a cryptocurrency can facilitate greater flexibility, efficiency, speed, wider operational reach and may reduce the costs associated with the conventional banking system.

Cryptocurrencies such as Bitcoin are popular for the following reasons:

• Decentralisation

They have no direct links to the laws, rules or regulations of any government, institution or bank. The interest rates, fees and charges usually payable on a traditional banking account (current, savings, credit card, etc) do not have any effect on the cryptocurrency.

The rate of inflation that can potentially diminish the purchasing power of government-issued currency cannot affect the value of cryptocurrency.

• Anonymity

Cryptocurrency provides its users with total anonymity, as opposed to traditional purchases with a debit or credit card where personal information attaches to each and every transaction. It is now recognised internationally that businesses, banks and even governments utilise this information to track individuals and take note of purchases. In contrast, cryptocurrency transactions carry no person-

al information unless added by the user.

• Control

Accounts that hold traditional currency are subject to national laws that allow them to be garnished or frozen completely, while cryptocurrency exists outside the regulations and laws that allow this to happen.

• Speed of transaction

Using credit cards or bank accounts for international transactions lead to delays. Being linked to the legal tender of a specific government can render attempted payments subject to exchange rates, fluctuating interest rates, and country-to-country transaction fees, which can slow the process.

• Ease of access

Users worldwide can download the free, open-source software with which they can transfer funds securely, anonymously and virtually instantaneously across vast distances.

Virtual currencies in SA

The South Africa Reserve Bank (SARB) does not currently oversee, supervise or regulate the sphere of virtual currencies. While it does not have any views regarding the effectiveness, soundness, integrity or robustness of virtual currencies as a payment system, the SARB contends that there is no significant risk to financial stability, price stability or the National Payment System (South African Reserve Bank Position Paper on Virtual Currencies December (2014) at 12).

However, while the SARB sees no significant risk in cryptocurrency, it has cautioned end-users, whether individuals or businesses, that any activities performed or undertaken with such currencies are at their sole and independent risk. It has in the past warned that 'Bitcoin has no legal status or a regulatory framework. Thus it poses a number of risks for those that would choose to transact with it such as the lack of guarantee of security, convertibility or value' (L Donnelly 'Bitcoin: Is virtual currency here to stay?' <https://mg.co.za/>, accessed 1-11-2017).

According to the South African Reserve Bank Act 90 of 1989, the SARB governs the management of currency and has the sole right to issue coins and notes, commonly known as 'legal tender'. Bitcoin, however, falls outside of the definition of legal tender. Consequently, it may be possible to argue that payments made via Bitcoin in SA may not discharge a debtor's monetary obligation and purchasers run the risk that their Bitcoin payments are not recognised by SA law. Merchants are also not legally obliged to accept Bitcoin as legal payment, whereas they may not refuse legal tender.

Additionally, virtual currencies are not defined as securities in terms of the Financial Markets Act 19 of 2012. They are, therefore, not subject to the regulatory standards that apply to the trading of securities.

Bitcoin operates without the authority or administration of any state or banking institutions. This leads to various issues, including concerns about –

- taxation;
- circumvention of exchange control regulations;
- loss of fees for banks; and
- in the future perhaps even a diminishing demand for local currencies.

Its ease of use and low transaction costs provide an attractive alternative to traditional banking, but clearly raise sufficiently serious concerns to place it on most governments' radar.

Cryptocurrencies are not illegal *per se*. They are regularly utilised by consumers to conclude all manner of legitimate transactions. These highly secure payment methods allow rapid funds transfers effortlessly across national borders without being linked/pegged to any particular country's currency or being impeded by exchange controls, banking costs etcetera.

Potential dangers

Clearly, cryptocurrencies can be harnessed by criminals to further their illegal aims and provide a platform for, *inter alia*, money laundering and the financing of terrorism (South African Reserve Bank Position Paper on Virtual Currencies (*op cit*) at 5). In the early days of cybercrime, only extremely knowledgeable and skilled criminals could effectively harness the Internet for nefarious purposes.

With modern criminals becoming increasingly technically proficient and with systems becoming simplified, cryptocurrency is being embraced by a far wider demographic within the criminal classes.

There is a widely held view that an entirely new knowledge base will need to be developed by law enforcement and anti-money laundering agencies to identify and investigate suspicious transactions (J Mari, and P Warrack 'Blockchains and Money Laundering' <https://slidelegend.com>, accessed 13-11-2017).

Conclusion

Cryptocurrencies are prevalent in almost every country in the world. They offer a potential benefit by increasing access to simplified and efficient payment methods, but they also create potential risk for nations and individuals, as they may be harnessed by criminals to enhance their capacity to carry out money laundering, terrorist financing and other cybercrimes.

It is accepted that criminals are inclined to exploit services with weak or

nonexistent anti-money laundering and customer identification programs. Those systems generally flourish in countries with poor regulatory oversight and ineffective enforcement (B Nigh and CA Pelker 'Virtual currency: Investigative challenges and opportunities' <https://leb.fbi.gov>, accessed 1-11-2017).

The true danger of cryptocurrency is that it is not a traditionally-valued or backed currency; it has the value ascribed to it by its users. It is instantaneous, virtually untraceable, and can allow individuals, groups, companies or even entire countries to exit traditional value-based markets. Imagine a 'Brexit' that included the introduction of a currency available to every human being on the planet, with no rules, no values, just cold, hard exchange, free of regulation, laws etcetera. Taken to its worst case scenario, global superpowers could fund terror via a cryptocurrency without there being a possibility of any sanctions. If you 'opt out', then the traditional methods of 'punishment' do not apply.

While many jurisdictions are still struggling with implementing appropriate anti-money laundering, know-your-customer and customer due diligence programs (Acting Assistant Attorney General Mythili Raman Testifies Before the Senate Committee on Homeland Security and Governmental Affairs (www.justice.gov, accessed 1-11-2017)), the use of cryptocurrencies by both law abiding citizens and their criminal counterparts is set to increase (B Nigh and CA Pelker (*op cit*)).

The use of cryptocurrency clearly presents law enforcement with various unique challenges but these difficulties are by no means insurmountable. Regulators and investigators will still be able to employ traditional investigative techniques, adapted as necessary to address modern criminal capabilities (B Nigh and CA Pelker (*op cit*)).

It is apparent that the developments in the sphere of cryptocurrency will require a more coordinated and internationally integrated regulatory framework in future. The challenge for each jurisdiction, as well as global organisations, is maintaining a balance between the introduction of comprehensive, adaptable and robust regulatory systems (criminal, financial, legal) and protocols, while enabling and supporting technological innovation and growth.

- At the time of going to print, the cost of 1 bitcoin was equal to R 115 596,14.

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Diplomatic law: Service of process on foreign defendants

By
Riaan de
Jager

Members of the public or businesses often transact with diplomatic missions (ie, embassies or high commissions), consular posts (eg, consulate-general, consulates, consular agencies, trade offices, etcetera) or representative offices of international organisations (eg, the United Nations (UN), the International Labour Organisation, the African Union, etcetera) in South Africa (SA) by leasing properties to them or by rendering one or other service. It is inevitable that disputes will invariably arise between the parties which, if not resolved amicably, could result in litigation. If this happens, an attorney will be instructed to institute legal proceedings against the foreign mission for the dispute to be adjudicated. Based on queries, which the Office of the Chief State Law Adviser (International Law), attached to the Department of International Relations and Cooperation (DIRCO), often receives from attorneys, there is not always clarity regarding the manner in which service of process should be effected on the particular 'foreign' defendant.

The purpose of this article is to clarify this seldom-used part of diplomatic law. In doing so, a distinction should be made between instances where a foreign state, represented by a diplomatic or consular mission, is the defendant and those occasions where an international organisation is the opposing party.

Foreign states

Even though the plaintiff may have interacted or dealt with a particular foreign mission and would want to issue summons against that mission, it is settled international law that a mission has no legal personality separate and independent from the sending state and merely acts as the representative of the sending state (see E Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 4ed (Oxford University Press 2016) at 235). Accordingly, it would not be advisable to cite that mission (ie, the Embassy of X or the Consulate-General of Y) as the defendant in proceedings but rather the actual sending state (ie, the Republic of X or the Kingdom of Y).

The Sheriff sometimes attempts to serve process directly on a diplomatic mission in Tshwane or on a consular post elsewhere in SA. One of the reasons for this measure seems to be that a diplomatic mission or consular post is mistakenly regarded as part of the territory of the sending state (ie, that the British High Commission is part of the United Kingdom). This belief is fiction, since the mission premises is not an extension of the sending state but instead inviolable (see J Dugard *International Law: A South African Perspective* 3ed (Cape Town: Juta 2006) at 262 to 263; I Roberts (ed) *Satow's Diplomatic Practice* 6ed (Oxford University Press 2011) at 107; and *Santos v Santos* 1987 (4) SA 150 (W) at 152C-H).

Inviolability in modern international law is a status accorded to premises, persons or property physically present in the territory of the receiving state, albeit not subject to its jurisdiction in an ordinary way. The receiving state is under a duty to abstain from exercising any enforcement rights in respect of inviolable premises, persons or property and under a positive duty to protect inviolable premises, persons or property from physical invasion or interference with their functioning and from impairment of their dignity. These principles are specifically addressed in art 22(1) of the Vienna Convention on Diplomatic Relations of 1961 (Diplomatic Convention) and art 31(1) of the Vienna Convention on Consular Relations of 1963 (Consular Convention), the provisions of which have the force of law in SA pursuant to s 2(1) of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). The South African government, as the receiving state, is thus obliged to prevent its officials and agents from entering or performing any official act within the mission premises and personal service of process, whether it occurs within the premises of the mission or at the door, is prohibited (see Denza (*op cit*) at 110 and 124 to 125 and Roberts (ed) (*op cit*) at 102) and, where it has occurred, such

service will arguably be defective and invalid.

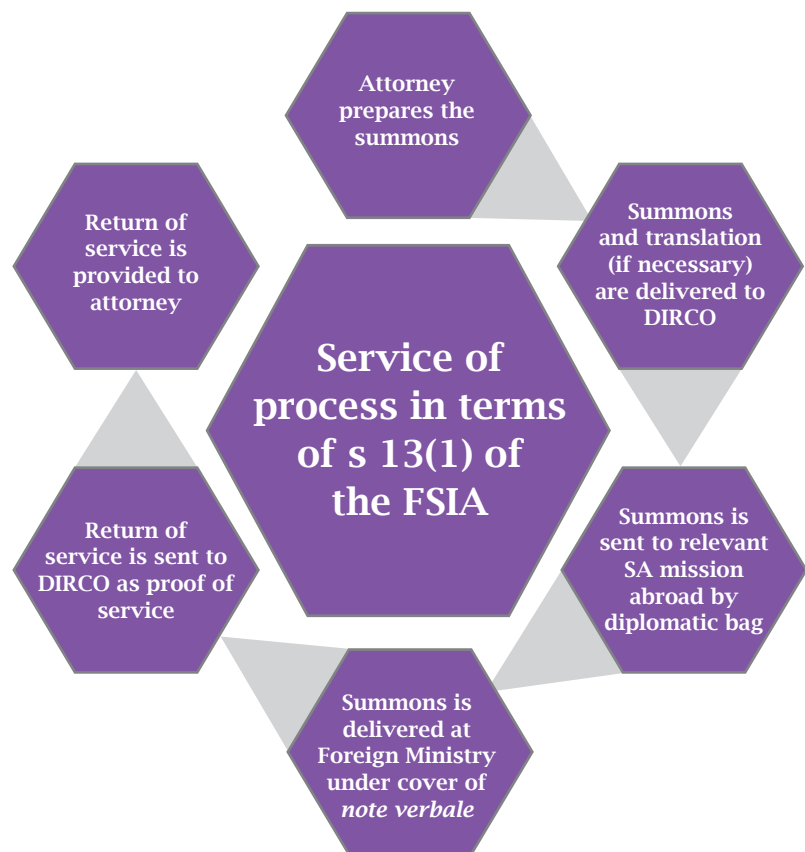
It will not be possible to circumvent the mission premises' inviolability by attempting to serve process on the diplomatic representatives of the sending state. Accredited diplomatic agents, unlike consular officers, enjoy personal inviolability in terms of art 29 of the Diplomatic Convention, while their private residences enjoy the same inviolability and protection as the premises of the mission pursuant to art 30(1) thereof. It will thus be unwise for any person, whether as a party to the proceedings, that party's attorney or the Sheriff, to issue, obtain or execute any legal process against diplomatic agents personally or at their private residences, since such person, attorney or Sheriff will then be *prima facie* guilty of an offence (s 15(1) of DIPA). It will furthermore not be possible in terms of international law to serve process on consular officers, at any location, based on their capacity as agents of the sending state (see LT Lee and J Quigley *Consular Law and Practice* 3ed (Oxford University Press) at 387; and *Holden v Commonwealth of Australia* 369 F. Supp. 1258 (US District Court, ND Cal. 1974)).

Section 13(1) of the Foreign States

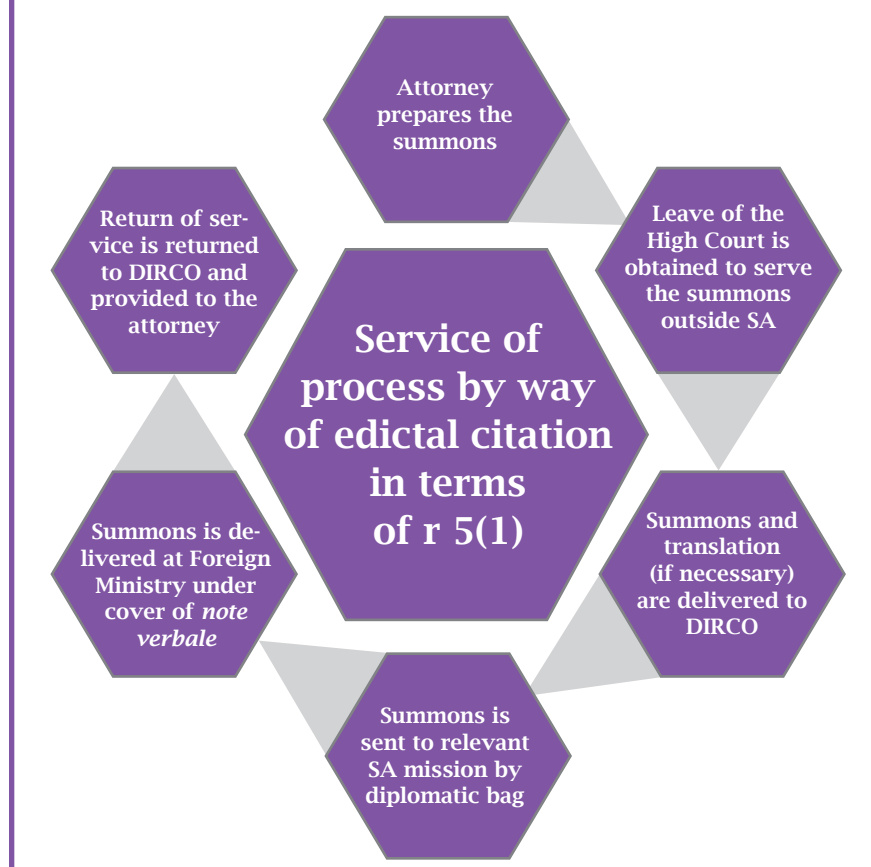
Immunities Act 87 of 1981 (FSIA) regulates the service of process on foreign states. The relevant process of court or document to be served, together with a sworn translation thereof into an official language of the defendant state (see r 4(5)(a) of the Uniform Rules of Court), should thus be delivered to the Chief Directorate: Consular Services of DIRCO, whereafter the documents will be dispatched by diplomatic bag to the relevant South African diplomatic mission in the defendant state concerned. Once received at the mission, the process documents will be delivered at and served on the Ministry of Foreign Affairs of the defendant state under cover of a diplomatic note or *note verbale*. In order to prove that service of process has been effected, the mission will dispatch a return of service to the Chief Directorate: Consular Services at DIRCO's Head Office, which will subsequently be made available to the relevant attorney.

Service of process on the defendant state could in terms of s 13(7) of FSIA, read with r 5(1) of the Uniform Rules of Court, also be effected on a foreign state by way of edictal citation (see *Government of the Republic of Zimbabwe v Fick and Others* 2013 (10) BCLR 1103 (CC) at para 24).

Service of process in terms of s 13(1) of FSIA



Service of process in terms of s 13(7) of FSIA, read with r 5(1) of the Uniform Rules of Court



International organisations

An 'international organisation' is defined as an organisation established by treaty, governed by international law, possessing its own legal personality and with its membership largely composed of states. Where only states are members, it is also known as an 'intergovernmental' organisation. The most important element is the possession of international legal personality – once established, that international organisation becomes a subject of international law and thus capable of enforcing rights and duties in the international plane, as distinct from operating merely within the confines of separate municipal jurisdictions (A Aust *Modern Treaty Law and Practice* (Cambridge University Press 2000) at 54; MN Shaw *International law* 5ed (Cambridge University Press 2003) at 1187 and I Brownlie *Principles of Public International Law* 6ed (Oxford University Press 2003) at ch 31). Unlike the UN, international organisations could have restricted membership established primarily on the basis of geographical criteria (eg, the European Union and the African Union) or may have competence in particular fields (eg, the World Trade Organisation, which is mainly responsible for the promotion of international trade and economic development).

Section 5 of DIPA determines that the 1946 Convention on the Privileges and Immunities of the United Nations (UN Convention) and the 1947 Convention on the Privileges and Immunities of the Specialised Agencies (Specialised Agencies Convention) apply in SA. These Conventions also provide that any organisation recognised by the Minister of International Relations and Cooperation and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation. The agreement referred to in s 5 is usually known as a 'host agreement'.

The scale of privileges and immunities set out in the UN Convention was used as a model for other international organisations having worldwide membership and responsibilities. For the most part, the UN scale was treated as a ceiling and minor reductions in privileges and immunities were negotiated in the case of other organisations, as it was accepted that few other international organisations had to carry out tasks of such political sensitivity or physical danger as the UN itself and that, on a basis of functional need, they could not lay claim to the same level of immunity.

The UN Convention provides specifically that the premises of the UN shall

be inviolable (see art II, s 3) and that the UN enjoys immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity (see art II, s 2). The Specialised Agencies Convention contains similar provisions in this respect (see art III, s 5 and art III, s 4). The inviolability of the regional offices of other international organisations with representative offices in SA will be governed by the individual host agreements and attorneys could consider approaching the South African Treaty Section, attached to the Office of the Chief State Law Adviser (International Law) at DIRCO, to obtain a copy of the relevant host agreement in order to advise their clients appropriately. Alternatively, the information can be obtained from the DIRCO website at www.dirco.gov.za.

Since international organisations are not 'foreign states' for purposes of FSIA, that piece of legislation will not be applicable. The question arises now whether service of process could be effected on an international organisation and, if so, how?

It appears from international practice that the extension of the immunity to 'every form of legal process' is absolute and includes service of process (see *Askir v Boutros-Ghali*, 933 F. Supp. 368, 369 (S.D.N.Y. 1996) where service of process on the UN was considered). Therefore, unless immunity from suit is affirmatively waived in a particular case, international organisations are absolutely immune and service of process cannot be effected on them, either on their representative offices in SA or on their respective head offices abroad.

Conclusion

In order to avoid a challenge on technical grounds and to prevent criminal charges being laid against an attorney or Sheriff for a breach of inviolability, service of process on foreign states could be effected either in terms of s 13(1) of FSIA or by way of edictal citation in terms of r 5(1) of the Uniform Rules of Court. Effecting service of process on international organisations, however, appears to not be possible unless their inviolability is expressly waived. It is evident that doing business with international organisations has inherent risks as contracts cannot be enforced in the domestic courts, something which members of the public are not always aware of.

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Overview of air quality regulatory developments

Even though climate change has been on the agenda since 1993 when South Africa (SA) first became a signatory to the United Nations Framework Convention on Climate Change, it is the ratification of the Paris Agreement in November 2016 that has introduced a spur of developments to the air quality regulatory regime. The movement interlinks with the mitigation component of SA's Intended Nationally Determined Contribution, which commits to a peak, plateau and decline of greenhouse gas emissions trajectory range, that will vary between 398 and 614 Mt CO₂ by 2025 and 2030.

An overview of the key developments are provided below:

National Greenhouse Gas Emission Reporting Regulations

The National Greenhouse Gas Emission Reporting Regulations, published April 2017 in terms of the National Environmental Management: Air Quality Act 39 of 2004 (the Act), introduced the first attempt at a national reporting system for

the transparent reporting of greenhouse gas emissions.

The duty to report greenhouse gas emissions applies broadly to all entities controlling or conducting Intergovernmental Panel on Climate Change emission activities above specified thresholds. Emitters are required to register their facilities and report on emission of the following six greenhouse gases –

- carbon dioxide;
- methane;
- nitrous oxide;
- sulphur hexafluoride;
- fluorocarbons (perfluorocarbons); and
- hydrofluorocarbons (collectively regulated greenhouse gases).

This aligns with SA's mitigation Intended Nationally Determined Contribution, which commits to increased disaggregation over time through domestic, economy-wide mandatory greenhouse gas reporting on six greenhouse gases, with a material focus on carbon dioxide, methane and nitrous oxide.

The regulations are also integral to SA's anticipated carbon tax regime. As provided in the 2015 draft Carbon Tax Bill, any person who conducts an activ-

ity listed in Annex 1 to the Greenhouse Gas Emission Reporting Regulations will be liable to pay carbon tax on the associated emissions.

Priority air pollutants declared

The Minister of Environmental Affairs recently declared the regulated greenhouse gases as priority air pollutants (Final Declaration) under the Act, requiring persons who conduct 'production processes' to prepare and submit pollution prevention plans (PPPs) for approval if so directed by the minister. 'Production processes' include those processes listed in Annex A to the Final Declaration (listed processes), which involve the emission of declared greenhouse gases in excess of 0,1 megatonnes annually (emission threshold) (reported as carbon dioxide equivalents under the Greenhouse Gas Emission Reporting Regulations).

A draft priority air pollutants declaration was first published in January 2016 (Draft Declaration), and proposed a broader scope of application than the Final Declaration. In addition to persons conducting listed processes above the

emission threshold, the Draft Declaration also required persons undertaking a listed process as a primary activity, regardless of whether the emission threshold is exceeded, to prepare and submit PPPs. This category of persons has, however, been removed from the Final Declaration.

As indicated, the Final Declaration also provides that a PPP need only be submitted for approval by the minister where so directed. It is, however, understood that the Final Declaration, as well as the regulations on PPPs (discussed below), constitutes such a directive, as its introductory section requires persons falling within the category specified in the schedule, to compile and submit PPPs. There is, however, some confusion as the Final Declaration does not contain a schedule. It is assumed that this is an erroneous reference and the term 'schedule' must be understood as referring to the listed activities in Annex A to the Final Declaration.

Pollution prevention plan regulations published

The National Pollution Prevention Plans Regulations (PPP regulations) were published under the Act, together with the Final Declaration and prescribe the procedural and substantive requirements for PPPs.

Companies engaging in listed processes must submit their first PPPs to the minister by 21 December 2017 (Initial PPP), which plans must set out, *inter alia* –

- a description of the listed processes undertaken;
- details of the greenhouse gases generated from the listed processes;
- activities reported on in terms of the Greenhouse Gas Emission Reporting Regulations;
- total greenhouse gas emissions from listed processes for what appears to be the full calendar year preceding the submission of the PPP;
- details of the methodology used to monitor annual greenhouse gas emissions and evaluate progress towards meeting greenhouse gas emission reductions; and
- a description of mitigation measures that will be implemented.

Initial PPPs must cover the period from 21 July 2017 to 31 December 2020 and, once approved, will be valid for a period of five years. All subsequent PPPs will each apply for five calendar years.

Implementation of the PPPs for the preceding calendar year must be monitored, evaluated and reported on annually to the minister by 31 March of each year. These annual progress reports must include –

- details on mitigation measures implemented;
- details of any deviations from an ap-

proved PPPs and remedial action undertaken to manage deviations; and

- management of risks and limitations.

To assist in the preparation of PPPs and annual progress reports, the Department of Environmental Affairs has circulated the 'Guidelines for the Developments of Pollution Prevention Plans in respect of Greenhouse Gases' for comment.

The PPP Regulations differ from the initial draft PPP regulations (draft PPP regulations) gazetted in 2016 as it narrows its scope to listed activities exceeding the emission threshold. Affected parties are now also given two additional months to prepare the first draft of their PPPs as the draft PPP regulations required submission within three, as opposed to five months.

Failure to submit PPPs or annual progress reports when due is an offence for which a fine up to R 5 million and/or imprisonment up to five years may be imposed.

Proposed regulations to phase-out the use of persistent organic pollutants (draft POP regulations)

Draft regulations proposing the phasing-out of the use, production, distribution, sale, import and export of certain identified persistent organic pollutants (listed POPs) have been published. This follows from SA ratification of the Stockholm Convention on Persistent Organic Pollutants in 2004.

Persistent Organic Pollutants (POPs) generally comprise of organic chemical substances that are deemed 'persistent' given their resistance to degradation and are being phased-out to prevent, mitigate and minimise their impacts on human health and the environment.

Persistent Organic Pollutants are prevalent in agricultural and certain industrial chemicals. Phasing-out of POPs is important from an air quality perspective given their ability to cause long-range transboundary air pollution.

The draft POP regulations propose varying timeframes for phasing out of the listed POPs. Certain POPs will have to be phased out as early as 31 December 2019. Once the regulations take effect, any user, producer, seller, distributor, importer or exporter of listed POPs will be required to notify the Department of Environmental Affairs of its POP-related activities. In addition hereto, producers, importers and exporters will be required to submit phase-out plans for approval by the Department of Environmental Affairs within 12 months from the date on which the regulations take effect.

To assist the Department of Environmental Affairs to monitor progress on

the implementation of phasing out plans, quantities of listed chemicals used, produced, imported or exported will have to be reported on annually.

Failure to comply with the draft POP regulations is an offence for which a fine and/or imprisonment of up to R 10 million and/or ten years may be imposed.

Climate change considerations infiltrate environmental impact assessment scheme

• *Thabametsi judgment*

Greenhouse gas emission considerations are playing a more prominent role in the environmental impact assessment process following the High Court's decision in *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) earlier this year.

The case dealt with the grant of an environmental authorisation by the Chief Director of the Department of Environmental Affairs to Thabametsi Power Company (Pty) Ltd for the establishment of a 1 200 megawatt coal-fired power station near Lephalale in Limpopo Province. Earthlife Africa unsuccessfully challenged the Chief Director's decision on an appeal to the minister. It then proceeded to take the decision on review before the High Court, arguing, among other things, that the environmental authorisation could not have been granted without consideration of all relevant factors, which, because of government's obligations under national and international law, includes a climate change impact assessment.

Earthlife Africa succeeded in its argument and the court, in ordering that the appeal be remitted back to the minister, remarked that a climate change impact assessment 'is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory as outlined in the NOC, and its commitment to build cleaner and more efficient than existing power stations'.

• *Climate change to revisit the High Court*

The far-reaching impact of the *Thabametsi* judgment is already evident as the Trustees of the Groundwork Trust recently launched two separate applications in the Pretoria High Court for review of the decision by the Department of Environmental Affairs authorities to grant environmental authorisations to Kuyasa Mining (Pty) Ltd and ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd respectively, authorising their proposed 600-watt coal-fired power stations.

Although there are particular nuances to each case, at the heart of the appli-

cations is the Groundwork Trusts' argument that, in light of the *Thabametsi* judgment, the environmental authorisations should not have been granted absent if climate change impact assessments have been done. The climate change impact assessments are of particular importance as –

- both power stations are located in water stressed regions;
- the power stations fall within the highly polluted Highveld Priority Area; and
- SA's international commitments '[a]t minimum ... require rigorous climate change impact assessments to be conducted before granting [an] environmental authorisation for any new coal-fired power station'.

At the time of writing this article, it was not yet clear whether any of the respondents intend on opposing the applications.

The proliferation of applications of this nature should urge developers to first seek advice on the inclusion of a climate change impact assessment into the environmental impact assessment process.

Climate Change Bill possibly in the pipeline

The Department of Environmental Affairs' will encourage the implementation

of a Climate Change Response Framework (framework) to align with international obligations and may see the introduction of a Climate Change Bill. A proposed outline for the framework is currently in circulation, marking a definitive move towards the integration of climate change considerations into legal process.

A draft concept document published by the Department of Environmental Affairs in 2016 suggests that the framework is underpinned by directives entrenched in the Paris Agreement and the National Climate Change Response White Paper. As such, the framework is built on the objective to:

- set a national emission reduction trajectory range and goals;
- provide a regulatory framework for the national emission reduction and national adaptation cycle, including mandatory planning and reporting;
- provide for incentives to support SA's national emission reduction efforts;
- set national adaptation goals;
- provide for alignment of national sectoral legislation, as well as relevant provincial and local legislation with climate change response objectives; and
- establish a national information system.

It is unclear whether the framework will ultimately be published as a stand-alone Bill or as an extension of the Act.

It is also uncertain how the transition from the existing framework under the Act will work, but it has been proposed that transitional provisions ought to provide for migration of the Greenhouse Gas Emission Reporting Regulations, Final Declaration and PPP Regulations from the Act to the Bill.

Conclusion

It is clear that there is a commitment to move towards a formally regulated climate change framework. Although progressive, the environmental law regime, and in particular the air quality sector, is already defined by a continuous proliferation of legislation. From the above, it does not appear that this will be ending soon. This will likely create numerous *lacunas* and ambiguities that industries will have to navigate across as they seek to bring their operations into compliance.

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Attorney

Estate agent

Name?

What do you call practising attorneys trading as estate agents?

The practice of attorneys trading as estate agents is nothing new. From times immemorial attorneys have, together with their other services, applied their skills and expertise in the estate agency industry (*Incorporated Law Society of the Orange Free State v Kalil and Meltz* 1951 (3) SA 645 (O) at 648 F).

On 1 August 1977, the Estate Agency Affairs Act 112 of 1976 (the Act) came into effect and regulated the estate agency industry in South Africa (SA) for the first time. Among its many provisions, the Act defined the meaning of an 'estate agent'. Significantly and importantly, s 1(d) of the Act excludes an attorney from the provisions of the Act, provided they perform the functions of an estate agent:

'[D]oes not include an attorney who, on his own account ... in the course of and in the name of and from the premises of such attorney's or professional company's practice.'

What is significant about the above provisions is that the Act specifically requires that the attorney should perform the functions, 'in the name of ... such attorney's or professional ... practice...', if the attorney wishes to enjoy the exemption under the Act.

This is significant because, prior to the Act (the Pre-Regulation Period), an attorney who acted as an estate agent was strictly required to do so in a different capacity than that of a professional

or an attorney (*Kalil and Meltz (op cit)* at 650 H).

In the Pre-Regulation Period, a clear distinction was made between the non-legal and legal services of an attorney. An attorney could conduct two businesses (one legal and the other non-legal) from the same address and within their legal practice, provided a different trade name was used for the non-legal services (*Kalil and Meltz (op cit)* at 649 B-C and at 651 A-B).

When attorneys advertised their non-legal services they were restricted from adopting their practice names, legal practices and qualifications lest they became guilty of touting (*Kalil and Meltz (op cit)* at 647 G).

An important and critical question to ask is: Did the Act amended the common law concerning the duality of practice names for legal and non-legal work as explained above?

In other words, does the Act restrict an attorney, who carries out the business of an estate agent within their law practice, from doing so in a different name, other than the name of their law practice as was the case in the Pre-Regulation Period?

I submit that it does not. This submission is made on the following grounds:

- The legislature did not intend the phrase 'and in the name' to mean the strict professional practice name (*eo nomine*) of the attorney.
- The purpose of the Act was to exclude

an attorney, who carries out the business of an estate agent, from the provisions of the Act, provided he does it in such a way that it is clear that it is performed –

- by an attorney;
- from their legal practice; and
- in a name (not necessarily the attorney's practice name) that clearly shows they are an attorney and not someone else.

In advocate CDA Loxton SC's opinion (Chambers, Sandown, 24 January 2017), he states:

'It is sufficient that the attorney in question uses his own name, or that of his partnership, or that of the professional company of which he is a member. The fact that in addition to using his own name or that of the firm or company he adds the logo and slogan ... does not in any way detract from his compliance with the requirements of paragraph (d).'

He continues further and states: 'In other words, paragraph (d) does not require that only the name of the attorney, firm or company be utilised in performing the acts listed in paragraph (a) of the definition of "estate agent" or that only such name be used in any advertising material. Had that been the intention of the legislature it would have been an easy matter to make such intention clear by use of words such as "exclusively" or "solely" in conjunction with the word "name".'

Section 1(d) must be interpreted in such a way that:

- The interpretation is in line with the existing law.
- It does not amend the existing law more than what is necessary (LC Steyn *Uitleg van Wette* 3ed (Cape Town: Juta) at 96.
- At least onerous as possible against the person to whom the Act applies (Steyn (*op cit*) at 103).

To interpret the relevant subsection in such a way that, when an attorney, who acts as an estate agent under their legal practice name, is excluded from the Act, but if they do so under a different name, they do not and would not be in line with the intention of the legislature (Advocate HH Steyn's opinion (Maisels Chambers, Sandton, 3 November, 2006)).

It would also lead to the result that if an attorney uses their practice name, they would fall under the jurisdiction of their relevant provincial law society, but if they use, or only add, a different trade name to their practice name (to proclaim that they are an estate agent), they would fall under the jurisdiction of the Estate Agency Affairs Board.

To allow an attorney to trade as an estate agent outside the ambit of the Act, if they do so by trading strictly in their practice name, but to put them in a straitjacket when they add information to their practice name (to proclaim that they also act as an estate agent), would not pass the muster of the Constitution, nor was it the practice of attorneys, who carried on the business of estate agents in the Pre-Regulation Period.

The purpose of the legislature was to exclude an attorney from the Act, provided that, when they act as an estate agent, it would be clear that they are an attorney, that they do so from their existing practice, in the ordinary course of their business and not from a separate practice, address and bank accounts.

The phrase, 'and in the name' is capable of two meanings, namely, it could either mean –

- the precise practice name of the estate agent attorney; or
- a different trade name, provided it is clear that it is the name of the attorney.

For example, the practice name can be 'ABC Attorneys' and the trade name under which the attorney acts as agent attorney can be 'ABC Attorneys trading as "Quick Sell Properties"'.

To conclude, the Act does not restrict an attorney, who practices as an estate agent, to do so under their practice name and an additional name and/or logo and/or slogan.

The next question is how does the Attorneys Act 53 of 1979 and the rules promulgated thereunder affect the above interpretation?

Section 23(1)(c) of the Attorneys' Act provides that:

'(1) A company may, notwithstanding anything to the contrary contained in

this Act, conduct a practice if –

...
(c) the name of the company, other than the expression "Incorporated" or "Inc.", consists solely of the name or names of any of the present or past members of the company or of persons who conducted, either on their own account or in partnership, any practice which may reasonably be regarded as a predecessor of the practice of the company, unless the council of the law society having jurisdiction has approved any other name in writing in accordance with the rules of such law society: Provided that the words "and associates" or "and company" may be included in the name of the company.'

In his opinion, Loxton, SC (*op cit*) states: 'In my view section 23(1)(c) deals only with the name which a professional company may adopt. It does not deal, either expressly or by necessary implication, with the manner in which a professional company may market itself or whether it may adopt a particular logo or slogan in its advertising material. Provided therefore that the name of the professional company complies ... with the provisions of section 23(1)(c), the adoption by it of [a] ... logo or slogan would not amount to an infringement of section 23(1)(c) of the Attorneys' Act.'

The Rules of the Law Society of the Northern Provinces were replaced by the Rules for the Attorneys' Profession (GenN2 GG39740/26-2-2016). The notice came into effect on 1 March 2016, from which date the rules applied.

Rule 46.3 provides:

'A member shall practise only under a style or name which:

46.3.1 is his or her own name or the name of a former proprietor of, or partner in, such practice if he or she practises without partners; or

46.3.2 contains the names of any or all of the present partners or former partners or proprietors of or in such firm if he or she practises in partnership; or ...'

I submit – and to find a meaningful interpretation for the above quoted sub-rule – that the submissions as set out in paragraphs above, should apply *mutatis mutandis* to r 46.3.

If not, it would lead to untenable results:

- It would mean that the sub-rule has amended the common law and/or the Act, which clearly cannot be the case.

- It would also lead to the result that if an attorney trades as a sole proprietor or partnership, they may do so '... only under a style or name which: 46.31.1 is his or her own name or the name of a former proprietor of, or partner in, such practice if he or she practises without partner', but, if the attorney practices in a personal liability company as required by the Companies Act 71 of 2008 (the 2008 Act), they are not bound by these

restrictions (see r 46.4.2 below).

Rule 46.4.2 provides, however, that:

'Notwithstanding the provisions of rule 46.1, it will be sufficient compliance with that rule:

...
46.4.2 in the case of a personal liability company, if the names of the directors are disclosed as required by the Companies Act 71 of 2008.'

I submit that compliance with r 46.4.2 constitutes due compliance with r 46.1.

Section 171(1) of the Companies Act 61 of 1973 (the 1973 Act) provides that:

'A company shall not issue or send, irrespective of whether it is in electronic or any other format, to any other person in the Republic any trade catalogue, trade circular or business letter bearing the company's name unless there is stated thereon or therein in a form capable of retrieving therefrom in respect of every director –

(a) his present forenames, or the initials thereof, and present surname;

(b) any former forenames and surnames not being those referred to in section 215(3);

(c) his nationality, if not South African.'

The provisions of s 171 of the 1973 Act, which dealt with the information to be contained in company communications were not re-enacted in the 2008 Act.

Section 24 of the 2008 Act prescribes the information to be included in company records. For directors, this must include their:

- Full name and any former names.
- Identity number or date of birth.
- Nationality and/or passport number.
- Occupation.

Except for advertisements about offers, the 2008 Act does not require the above information to be included in general advertising material. The mandatory information for a company letterhead is set out in s 32 of the 2008 Act. This section requires that company letters must include the name and registration number of the company.

'It follows that provided that the names of the directors of a professional company are disclosed as required by the 2008 Act in the relevant documents, it is not necessary that the professional company practice under the name of a partner or former partner' (Loxton, SC (*op cit*)).

To conclude, it suffices to the use of a logo and slogan in advertising material, letters and other communications by a professional company as these requirements will not contravene the provisions of either the Act or the Attorneys Act.

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THE LAW REPORTS

October 2017 (5) *South African Law Reports* (pp 329 – 660); July [2017] 3 *All South African Law Reports* (pp 1 – 364); August [2017] 3 *All South African Law Reports* (pp 365 – 737); September [2017] 3 *All South African Law Reports* (pp 739 – 1076); 2017 (8) *Butterworths Constitutional Law Reports* – August (pp 949 – 1087)

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
EqC, J: Equality Court, Gauteng Local Division, Johannesburg
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Appeal – execution of judgment pending

Exceptional circumstances justifying execution of judgment pending finalisation of leave to appeal or appeal itself: Section 18(1) of the Superior Courts Act 10 of 2013 (the Act) provides that: '[U]nless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.' In other words unless the court orders, under exceptional circumstances, that execution of judgment may proceed, application for leave to appeal or the noting of an appeal suspends execution of judgment.

In *Ntsemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA); [2017]

3 All SA 589 (SCA) the then Minister of Police appointed the appellant, General Ntsemeza, as the national head of the Directorate for Priority Crime Investigation (DPCI), an institution commonly known as the 'Hawks'. Section 17CA(1) of the South African Police Service Act 68 of 1995, which governs the DPCI, requires the person appointed as head of the institution to be a fit and proper person who has integrity. The first and second respondents, the Helen Suzman Foundation and Freedom Under Law NPC, both being non-profit organisations, approached the High Court for an order reviewing and setting aside the appointment of the appellant, alleging that his appointment by the minister was irrational and unlawful as he was not a fit and proper person and that he lacked integrity. The accusations stemmed from an earlier case of *Sibiya v Minister of Police and Others* (GP) (unreported case no 5203/2015, 20-2-2015) (Matojane J) in which the appellant, then as respondent, did a number of questionable things such as lying under oath, which led the presiding judge, Matojane J, to conclude that he was not a fit and proper person to lead the DPCI and further that he lacked integrity.

Because of adverse findings on the character of the appellant in the *Sibiya* case, the Full

Court of the GP per Mabuse J (Kollapen and Baqwa JJ concurring) held that the appointment of the appellant was irrational and unlawful with the result that it was reviewed and set aside. The appellant applied for leave to appeal against the order, while the respondents launched a counter-application in terms of which they sought a declarator that the operation and execution of the order should not be suspended by virtue of any application for leave to appeal or any appeal. The High Court dismissed the appellant's application for leave to appeal and upheld the counter-application. The court ruled that the operation and execution of its order would not be suspended and would accordingly continue to be operational and executed in full whether or not there were any applications for leave to appeal and appeal or whether or not there was any petition for leave to appeal against the order. As expected the appellant appealed against the execution order. The present matter was an appeal against the execution order, which the SCA dismissed with costs to be paid by the appellant personally. The personal payment of costs order was necessitated by the fact that although the state was not a party to the proceedings, it was nevertheless funding the appellant's litigation,

and that unfortunately for no apparent reason.

Navsa JA (Ponnan, Majiedt, Dambuzza and Mathopo JJA concurring) held that there was no doubt that the counter-application by the respondents for leave to execute, had there not been one earlier, could have been and would have been competent after application for leave to appeal was filed in the court. Courts had to be guardians of their own processes and be quick to avoid a 'toing and froing' of litigants. The High Court's order achieved that objective. A proper case had been made out by the respondents for anticipatory relief. The High Court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallise the position but also to anticipate further appeal processes.

The proper functioning of the foremost corruption-busting and crime-fighting unit in the country dictated that it should be free of taint. The adverse prior judicial pronouncements and the place that the South African Police Service maintained in the constitutional scheme, as well as the vital role of the national head of the DPCI and the public interest, were all factors that weighed with the court in its conclusion that there were exceptional circumstances.

Attorneys

Contingency fee agreement – strict compliance with the Act required: In *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) the plaintiff, Mfengwana, who had a claim against the defendant, the Road Accident Fund, entered into a contingency fee agreement with his attorneys BR Rubushe Attorneys in East London. The matter was settled by agreement between the parties and as required by the Contingency Fees Act 66 of 1997 (the Act) the settlement agreement had to be made an order of court. To that end the court requested to be furnished with the contingency fee agreement and accompanying affidavits by both the attorney and plaintiff. The contingency fee agreement and affidavit by the attorney were provided but no affidavit by the plaintiff. Clause 5 of the agreement provided that in the event of success the attorney would be entitled to 25% of the total of damages awarded. The attorney's affidavit attempted to moderate the impact of that obvious problem. The issue before the court was whether the agreement was valid.

Plasket J held that the contingency fee agreement was invalid and accordingly set it aside. Strict compliance with the Act was necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients, a phenomenon that was all too common. Problems in relation to contingency fee agreements that came to the attention of the courts appeared, in all likelihood, to be the tip of the iceberg.

The matter was yet another case in which an attorney, an officer of the court who was supposed to act with integrity and comply with the highest ethical standards, was guilty of an attempt to grossly overreach his client, thus engaging in rapacious and unconscionable conduct. Anecdotal evidence within the legal profession pointed towards widespread abuses, a manifestation of endemic corruption embedded in the attorney's profession.

As the contingency fee agreement was invalid the common law applied. That meant that the attorney was entitled to a reasonable fee in relation to the work performed, with taxation being the means by which the reasonableness of a fee was assessed. In other words, the attorney was only entitled to such fees as were taxed or assessed on an attorney and own client basis. Given the amount and quality of work done in the instant case the 25% fee translated into a grossly disproportionate amount and overreaching on an outrageous scale.

• **NB** It was held in *Nash and Another v Mostert and Others* [2017] 3 All SA 918 (GP) (see law reports 'Attorney's fees' 2017 (Sept) DR 40) that a contingency fee agreement could not be entered into regarding non-litigious work done by persons who were not legal practitioners such as curators of pension funds. Therefore, such an agreement could only be entered into between a legal representative, attorney or advocate, and their client.

Companies

Relief from oppressive conduct: The facts in the case of *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ); [2017] 3 All SA 47 (GJ) were that when the first defendant company, Technology Corporate Management (Pty) Ltd was started in 1987, it had two directors who were the only shareholders, namely the first plaintiff, De Sousa, and the second defendant, Cornelli. It was thus a domestic company, which was owned and managed on an equal basis, the relationship between the first plaintiff and the second defendant being akin to that between partners. Subsequently, three other shareholders were added, this bringing the number of shareholders to five. It was not long before the parties divided into two opposing camps, the plaintiffs De Sousa and Diez being minority shareholders holding 37% of the shares, while Cornelli and his camp held the remaining 67%. The majority shareholders,

led by Cornelli, embarked on conduct that was oppressive, unfairly prejudicial and unjust as against the minority shareholders. That conduct included, among others, increasing emoluments payable to the majority shareholders who were also directors of the company while reducing those of the minority; causing the company to assist, Hassim, one of the majority shareholders financially and to pay for the acquisition of the company's shares (in contravention of the law); denying payment of dividends so that the minority could be without funds; misappropriation of company funds; exclusion of the minority from management of the affairs of the company and a few other such things. When the minority sought to sell their shares and leave the company, Cornelli refused to enter into negotiations in good faith.

Because of the above problems the minority (the plaintiffs) approached the High Court in terms of s 252 of the Companies Act 61 of 1973 (the Act) for relief from oppressive conduct, requesting that they be bought out by the company. The order sought was granted, the court also ordering the appointment of a referee to determine the value of shares as on the date of the granting of the order, with no allowance to be made for the fact that plaintiffs were minority shareholders,

that is, no discount was to be factored for that reason. The remedy being sought having been essentially against the majority shareholders, rather than the company, it was ordered that they pay costs on attorney and client basis for the things they did and the manner in which they conducted the litigation. Moreover, the court held that the matter could have been resolved by agreement without the need for litigation.

Boruchowitz J held that the only practicable order that could be made was that the company be directed to purchase the plaintiffs' shares. To that end the plaintiffs were entitled to be paid a fair price for their shares. As a general rule, where the aggrieved shareholder's shares were to be purchased, a fair price was the value that the shares would have had if there had been no unfair treatment.

Section 252 of the Act provided a member or part of the members of a company with the means of obtaining relief from unfairly prejudicial, unjust or inequitable acts or omissions of the company or conduct of its affairs. Emphasis was on the unfairness of the conduct complained of. A member seeking relief had to show that the conduct was unfairly prejudicial, unjust or inequitable to that member or some of the members. The conduct complained of should not only be prejudicial

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but unfairly so. Therefore, fairness was the criterion by which a court had to decide whether it had jurisdiction to grant relief.

In proceedings for relief in terms of the section or its successor s 163 of the Companies Act 71 of 2008, it was not required of the court to resolve every factual dispute. The real and overriding question for determination was whether there was lack of probity and unfair dealing in the affairs of the company, which gave rise to a breakdown in the confidence and trust among the shareholders; whether the majority voting power had been abused or unfairly used to the prejudice of the minority shareholders and whether the plaintiffs had been treated by the company in a manner that was unfairly prejudicial, unjust or inequitable.

To determine whether conduct was unfairly prejudicial the court was not required to consider each complaint in isolation. What mattered was the cumulative effect of the complaints. The unfairness lay not just in the plaintiffs' exclusion from participating in the management of the company, but their exclusion coupled with an alleged inability to dispose of their shares at a fair value. Fairness required that the plaintiffs should not have to maintain their investment in the company, which was managed by the majority with whom they had fallen out. Such unfairness would disappear if the plaintiffs were offered a fair price for their shares.

In determining the nature of the relief to be granted, the court had to consider an order that was appropriate at the time of the hearing and not what would have been appropriate at the date of presentation of the application or institution of the action.

• **NB** Proceedings in the above matter commenced in 2010 before the Companies Act 71 of 2008 came into operation, hence application of the Companies Act 61 of 1973.

Consumer credit agreements

Repossession of goods sold

in terms of instalment sale agreement when consumer falls into arrears and require giving written notice of the estimated value of the goods repossessed: Section 127(1) of the National Credit Act 34 of 2005 (the NCA) provides that a consumer under an instalment agreement may give written notice to the credit provider to terminate the agreement and return the goods to the credit provider's place of business. Within ten business days after receiving the goods the credit provider is required to give the consumer a written notice setting out the estimated value of the goods (s 127(2)), this affording the consumer the opportunity to withdraw the notice to terminate the agreement and accordingly resume possession of the goods unless the consumer was in default under the credit agreement.

In *Audi Financial Services (a division of Wesbank; a division of FirstRand Bank Ltd) v Safer* [2017] 3 All SA 778 (WCC), Audi Centre sold a motor vehicle to the defendant, Safer, in terms of an instalment sale agreement. When the defendant fell into arrears with payment he was given notice of the default after which the agreement was cancelled. Thereafter, Audi Centre ceded the claim to the plaintiff Audi Financial Services who instituted proceedings for confirmation of cancellation of the contract and return of the vehicle. The order to that effect was granted by Eloff AJ who refused leave to appeal. The defendant petitioned the SCA for leave to appeal to the Full Court, which petition was granted. The appeal itself was dismissed with costs on 21 January 2013. However, in the meantime and while the appeal was still pending, the plaintiff repossessed the vehicle after the defendant signed a notice of termination of the contract referred to in s 127(1) and eventually sold the vehicle at an auction.

The present action was for damages suffered by the plaintiff when the repossessed vehicle was sold at an auction for less than the outstanding contract price. The defendant contested the action mainly on the ground

that notice of termination of the contract given to Audi Centre was not valid as it had not been given voluntarily and further that he had not been given written notice of the estimated value of the repossessed vehicle.

Boqwana J granted the plaintiff damages as sought with costs payable on the Regional Court scale as the claim could have been prosecuted there. It was held that s 127 dealt with a situation where the consumer wished to terminate a credit agreement by giving notice to the credit provider and surrendering the goods to same. In that regard s 127(2) required the credit provider to give the consumer written notice of the estimated value so that the consumer could, under s 127(3), consider whether or not to withdraw the written notice of termination and resume possession of the goods, if such consumer was not in default under the agreement. If the consumer did not respond to the notice sent within the stipulated period of ten days, the credit provider had to sell the goods for the best price reasonably obtainable as soon as possible. After selling the goods the credit provider had to credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale and deduct its expenses incurred in connection with the sale. Thereafter, the credit provider had to give written notice to the consumer of the settlement value before the sale and other relevant information resulting from the sale. The above provisions were applicable when the consumer surrendered the goods to the credit provider voluntarily. As the credit agreement was cancelled, on the authority of *Edwards v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA), [2016] 4 All SA 692 (SCA) (see law reports 'National Credit Act' 2017 (March) DR 28), the defendant was not entitled to reinstate the agreement and resume possession of the vehicle as envisaged in s 127(2).

The court also held *obiter* that it was arguable that an e-mail (computer transmitted electronic message) or SMS

(cellular telephone transmitted short message system), if such were chosen by the parties concerned beforehand, could constitute written notice, as long as it conformed to the relevant provision and contained information stipulated in the section as a traditional written notice would contain.

Delict

Liability of Provincial Department of Social Welfare for death of child at day-care centre:

In *Barley and Another v Moore and Another* [2017] 3 All SA 799 (WCC) the first defendant M was a day-care service provider who took Ava, an infant of five and half months of age, into her care. She put the sleeping infant on a bed in her bedroom to prepare her a bottle. When she returned after some 45 minutes the infant had fallen from the bed and lay dead on the floor. As a result the infant's parents, the plaintiffs Mr and Mrs Barley, sued both M, as the first defendant, and the Provincial Department of Social Development in the Western Cape, as the second defendant (the department), being the one in charge of day-care centres in the province. M was sued for failing to take care of the infant while in her care and the department for breach of its obligations in terms of the Constitution and the Children's Act 38 of 2005 and the regulations published thereunder. As it turned out the day-care centre was not registered, M was not qualified or trained to render day-care services nor was her assistant who was in fact her domestic worker. The department was fully aware of the above shortcomings but failed to shut down the day-care centre or insist that it complied with the law.

Dlodlo J held that the probable cause of the death of the infant was her rolling from the bed and falling as a result of which she suffocated after having been left unattended while sleeping on a bed and not in a cot or other secure resting place. Both defendants were held jointly and severally liable for the resulting loss and costs. The quan-

tum of damages was postponed *sine die*.

The court held that it was the department's obligation to facilitate the protection and promotion of the rights of children in line with s 28 of the Constitution. There could be no dispute that the department had to ensure that the day-care centre facilities, services and programmes were well managed, equipped and maintained. There was a duty on the department to monitor the quality of day-care centre facilities, services and programmes in order to ensure adherence to safety standards. It was of importance that the department recognised that registration of partial care facilities in accordance with the Act was a necessary safeguard for young children and to ensure that basic and adequate health and safety standards had been met.

Had the department processed the first defendant's application and visited the premises, which it was supposed to do as part of the evaluation of the application, it would have realised, among others, that the first defendant and her staff were not properly qualified or trained to look after infants and were unfamiliar with safe sleeping practices, which they were not implementing. Had the department fulfilled its function by visiting the facility, by assessing the services there, assessing the experience and qualifications of staff, by mentoring and training the staff, advising on safe sleeping practices and ensuring compliance with the prescribed minimum norms and standards, by registering the facility, that would have significantly reduced the chances of occurrence of the incident under review. Therefore, the department's failure to comply with its statutory duties seriously compromised the care and safety of the children at the facility, which omission caused or materially contributed towards the death of the infant while at the facility. The death of the infant would probably have been prevented had the department intervened as it could and should have done.

• **NB** The judgment mentions the department only, while saying nothing about the first defendant. That had to be so since after seeing trouble coming M left the country 'for good' as a result of which default judgment was granted against her.

Fundamental rights

Freedom of the press and other media to broadcast court proceedings: In *Van Breda v Media 24 Ltd and Others* 2017 (5) SA 533 (SCA); [2017] 3 All SA 622 (SCA) the appellant, Van Breda, was charged with murder of three members of his family and attempted murder of his younger sister who survived, as well as defeating or obstructing the course of justice. The first respondent, Media24, a publisher of news to the general public, brought an urgent application seeking to be allowed to install two video cameras in the trial courtroom in order to record and broadcast the proceedings or alternatively to be permitted to broadcast the proceedings by microphone and sound. It also applied to be allowed to take still photographs and video footage in court for 30 minutes before commencement and after adjournment of proceedings each day. The appellant and the second appellant, the National Director of Public Prosecutions (the NDPP) opposed the respondent's application. The WCC per Desai J granted the order sought, subject to modifications (para 1.3) including the requirement that the cameras be installed 15 minutes, not 30 minutes, before commencement of proceedings; that video cameras be stationary and not attended to by a person and that they be left to record and broadcast.

The appellant appealed the High Court's decision to allow the first respondent to record and broadcast the proceedings as provided for in para 1.3 of the court order while he had no problem with the recording and broadcast of counsel's argument, rulings and judgment of the court. In contrast the NDPP sought a blanket ban on any part of the proceedings being broad-

cast. The appeal was upheld to the extent that para 1.3 of the High Court order was set aside and the matter remitted to the High Court for reconsideration in the light of the decision of the SCA. The first respondent was ordered to pay the costs.

Ponnan JA (Leach, Mbha, Zondi and Van der Merwe JJA concurring) held that the question whether and under what circumstances cameras should be permitted in courtrooms provoked tension between the rights of the press, on the one hand, and fair trial rights of the accused, on the other. For that reason a court had the inherent power to make any order in relation to the publicity of the proceedings. However, such order had to be consistent with constitutional requirements. That had the result that a blanket ban on all broadcasting or adopting a one-size-fits-all approach was not acceptable.

In permitting televising of court proceedings the court was doing no more than recognising the appropriate starting point. It would always remain open to the trial court to direct that some or all of the proceedings before it should not be broadcast at all or should only be broadcast in, for example, audio form. It was for the trial court, in the exercise of its discretion under s 173 of the Constitution, to do so. It was for the media to request access from the presiding judge on a case-by-case basis. It was undesirable for the court to lay down any rigid rules as to how such requests should be considered.

The default position was that there could be no objection in principle to the media recording and broadcasting counsel's address and all rulings, as well as judgments in respect of both conviction and sentence, delivered in open court. When a witness objected to coverage of their testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effect they assert such coverage would have on their testimony. That approach entailed a witness-by-witness determination. Such

individualised inquiry was more attuned to reconciling the competing rights at play than was a blanket ban on the presence of cameras from the whole proceedings when only one participant objected. In brief, courts should not restrict the nature and scope of the broadcast unless the prejudice was demonstrable and there was a real risk that such prejudice would occur. Mere conjecture or speculation that prejudice could occur would not be enough.

Neither the Constitution nor legislation confers on a public school or school governing body the right to adopt the ethos of one single religion to the exclusion of other religions: Section 15 of the Constitution which deals with freedom of religion, belief and opinion and provides that: 'Everyone has the right to freedom of conscience, religion, thought belief and opinion'. In line with the section the South African Schools Act 84 of 1996 (the Schools Act) provides in s 7 that: 'Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary'. Apart from the above every province has its own education legislation containing similar provisions.

In *Organisasie vir Godsdiensle Onderrig en Demokrasie v Laerskool Randhart and Others (Council for the Advancement of the South African Constitution and Others as amici curiae)* [2017] 3 All SA 943 (GJ) the applicant organisation was a voluntary association that acted in the interests of its members and their children at public schools. Although the name of the applicant suggests that it stands for the advancement of religion and democracy, the opposite is in fact the case. Before the court the applicant sought total elimination and removal of religion from public schools, and Christianity in particular. To that end it sought a total

of 71 final interdicts prohibiting religious activities and observances at any public school, as well as several declarations, including one to the effect that neither the Constitution nor the Schools Act confers on a public school or school governing body (SGB) the right to adopt the ethos of one single religion to the exclusion of others.

Final interdict applications failed, while the declaration against pre-eminence of any religion as against all other religions was granted. The court made no order as to costs. The Full Court, per Lamont, Siwendu and Van der Linde JJ, held that according to the subsidiary principle, if there was a specific piece of legislation governing a matter provided for in the Constitution, the provisions of that legislation, rather than the Constitution, would apply. It meant that the impugned conduct had to fall foul of s 7 of the Schools Act, in which case that would be the basis of unlawfulness or, assuming that the conduct was legitimised by s 7 but was still alleged to be constitutionally offensive, the applicant had to attack the constitutional validity of the section. That was not the position in the instant matter as religious observance was provided for in the section whose constitutionality was not challenged. Furthermore, school governing bodies, which had power to make rules for schools, had not been cited as parties to the proceedings nor had any of their rules and policies been challenged in the founding affidavits.

On the pre-eminence of any religion over others the court held that neither a school governing body nor a public school could lawfully hold out that it subscribed to only a single particular religion to the exclusion of others.

Limitation of rights

Hate speech – freedom of expression is not limitless, absolute or a preeminent right: Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) provides that ‘no person

may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be –

- (a) hurtful;
- (b) be harmful, or to incite harm;
- (c) promote or propagate hatred.’

In *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2017] 3 All SA 1029 (Eq C, J) the complainant South African Human Rights Commission (the Commission), acting on behalf of the South African Jewish Board of Deputies (SAJBOD) filed a complaint at the EqC, J, against the first respondent Masuku, an International Relations Secretary of the Congress of South African Trade Unions (COSATU), the second respondent. That was after the first respondent posted a message on a social media platform (blog) and, thereafter, delivered a speech at a rally organised by Palestinian Solidarity Committee at the University of the Witwatersrand. The message and speech were pro-Palestine and anti-Israel. Statements therein contained proclaimed among others that the respondents were engaged in the ‘struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their friend Hitler’ and that Zionists should be subjected to harm and perpetual suffering. Many other such remarks and comments were also made. The complaint was that the remarks amounted to hate speech, which was prohibited by the Equality Act and the Constitution. On the other hand the first respondent contended that he had exercised freedom of expression, the remarks were true, amounted to fair comment, were in the public interest and no more than his personal beliefs.

Moshidi J held that the impugned statements constituted proscribed hate speech and could reasonably be interpreted to indicate a plan intended to be hurtful, harmful or propagate hatred. Some

of the utterances made could with ease amount to direct incitement to cause harm to the South African Jewish Community. There was nothing to the contrary in the content or context of the utterances other than a clear intention to perpetrate hate speech. In essence, the utterances were made to instil detestation, enmity, ill-will and malevolence towards Jewish people in South Africa. They were distinct advocacy of hatred and nothing else. The settled and trite approach was that although the right to freedom of expression was inseparable from normal democracy, it was, however, neither absolute, limitless nor a pre-eminent right.

Harm that could flow from offensive utterances did not have to be violence or criminal activity. It covered emotional damage which could have serious psychological consequences, resulting in humiliation and degradation of the individual targeted by hate speech.

As a remedy the court ordered the respondents to tender an unconditional apology to the Jewish Community within 30 days of the granting of the court order or within such other period as the parties could agree. Such apology was required to receive at least the same publicity as the offending statements. The respondents were ordered to pay costs.

Practice

No rescission of judgment without basis therefor:

In the case of *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA); [2017] 3 All SA 485 (SCA) Moraitis and Kebert worked together in a business which they owned indirectly in that the first respondent Montic Dairy (MD) was a beneficiary of Moraitis Trust (MT), which in turn was shareholder in the first appellant Moraitis Investments (MI) and six other respondent companies. Kebert also had a similar arrangement in that he was a beneficiary of Kebert Trust (KT) who owned shares in Tropica Investments, which in turn owned shares in the first

six respondents in the case. When a fall-out took place, to resolve the deadlock between Moraitis and Kebert, MT and MI instituted proceedings for the winding-up of MD and the other companies in which both sides were shareholders. Alternatively, MT and MI requested that their shares in MD and the other companies be bought by the Kebert Group (K Group). While those proceedings were underway Kebert instituted a claim against Moraitis personally for payment of money regarding his deceased mother’s share of a hotel business, which his mother and Moraitis developed together. Some of the litigation between the two sides took place in the GP, while the other took place in the GJ. To solve endless litigation which the two groups had against each other negotiations were held, a settlement agreement reached and made an order of court. The agreement was signed by Moraitis for the M Group and Kebert for the K Group. In terms of the agreement the K Group would buy M Group’s shares in the contested companies for R 600 000. Apparently, the M Group was not happy with the settlement agreement as a few weeks later MI instituted proceedings to set aside the settlement agreement and court order, alleging that Moraitis had not been authorised by it and MT to enter into the settlement agreement.

The GJ per Windell J granted the order setting aside the settlement agreement and draft order. That order was reversed on appeal to the Full Bench, per Matojane J (Hawyes AJ concurring while Moshidi J dissented). An appeal against the Full Bench decision was dismissed with costs. The SCA per Wallis JA (Leach, Tshiqi, Saldulker JJA and Fourie AJA concurring) held that once it was accepted that it had not been shown that MT and MI were not parties to the settlement agreement, they were bound by the provision thereof due to the fact that they consented to it being made an order of court. Accordingly, when the agreement was submitted to the judge for that purpose, coun-

sel was acting for all the parties to the settlement agreement. The court would only grant a consent judgment if the parties to the litigation consented to its granting. If they did not do so but the court was misled into thinking that they did, the judgment had to be set aside.

The approach to rescission of judgment differed depending on whether it was a default judgment or one given in the course of contested proceedings. In the case of default judgment it could be rescinded in terms of either r 31(2)(b) or r 42 of the Uniform Rules of Court or under the common law on good cause shown. In contested proceedings the test was more stringent. A judgment could be rescinded at the instance of an innocent party if it were induced by fraud on the part of the successful party or fraud to which the successful litigant was a party. It was only where fraud, usually in the form of perjured evidence or concealed documents, was proved that *restitutio in integrum* was granted and the judgment set aside. The mere fact that a wrong judgment had been given on the basis of perjured evidence was not a sufficient basis for setting aside the judgment. Apart from fraud the only other basis empowering a court to set aside its own order was *justus error*. Although a non-fraudulent misrepresentation, if material, would provide a ground for avoiding a contract, it did not provide a ground for rescission of judgment.

Prescription

Interruption of prescription by acknowledgment of indebtedness by a debtor embodied in a without prejudice letter written for the purpose of settling litigation: Section 14 of the Prescription Act 68 of 1969 (the Act) provides that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor and further that if the running of prescription is so interrupted, it shall commence to run afresh from the day on which the interruption takes place.

The application of the above provisions was dealt with in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* [2017] 3 All SA 739 (SCA) where in 2006 the appellant KLD and the respondent Empire Earth, then trading as Seeff, entered into an agreement in terms of which the appellant would market the respondent's residential units and receive commission when transfer took place to the buyer. The appellant alleged that between the years 2008 and 2009 it sold a number of units as a result of which it became entitled to commission in the amount of over R 2 million. It accordingly instituted proceedings in June 2013 to recover the amount claimed. The respondent raised the special plea of prescription to which the appellant replicated, alleging that in July 2011 the respondent's attorneys of record made a written acknowledgment of debt, by way of a letter, the effect of which was to interrupt prescription and cause it to commence running afresh. That had the further effect that a debt, which would have prescribed, was revived by that written acknowledgment of debt.

The issue before the court, in respect of which the matter proceeded by way of a stated case as the facts were common cause, was whether the written acknowledgment of debt, contained in a without prejudice letter, interrupted the running of prescription. The WCC held, per Rogers J, that the running of prescription had not been interrupted by the without prejudice acknowledgment of debt. An appeal against the High Court order was upheld with costs by the SCA.

Lewis JA (Mbha, Tshiqi JJA and Fourie AJA concurring while Schippers AJA dissented) held that the contention raised for by the appellant was well-founded. Where acknowledgments of liability were made such that by virtue of s 14 of the Act they would interrupt prescription, such acknowledgments should be admissible, but solely for the purpose of interrupting prescription. The exception to running of prescription

was not absolute and would depend on the facts of each case. There was nothing to prevent the parties from expressly or impliedly ousting it in their discussions. What the exception allowed for was the prevention of abuse of the without prejudice rule and the protection of a creditor. The without prejudice admission remained protected insofar as proving the existence and quantum of the debt was concerned.

• See law reports 'Prescription' 2016 (Dec) DR 40 for the WCC case.

Unlawful occupation of land

Rights of unlawful occupiers and joinder of local authority in eviction proceedings:

In *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC); 2017 (8) BCLR 1015 (CC) the applicants were a group of 184 unlawful occupiers of a block of flats (the property) in Berea, Johannesburg, which belonged to a certain company, Rocchi Investments. In the process of liquidation of the company the property was sold to a third party, one Maseko, who sought to improve it and rent out flats to tenants on a commercial basis. To that end Maseko, using the liquidators of the company as nominal respondents, sought a court order evicting the applicants from the property. The applicants mandated four of their own to appear at the eviction hearing and ask for postponement of the matter so that they could seek legal representation. Far from asking for postponement, the four appearer applicants entered into a settlement agreement in terms of which the applicants were to vacate the property by a specified date. A draft order to that effect was made an order of court by Khumalo J. Thereafter, when the other applicants found out they sought rescission of that eviction order. The rescission application was dismissed by Adams AJ who later also dismissed the application for leave to appeal. A petition to the SCA for leave to appeal was also dismissed. For that reason the appli-

cants approached the CC for leave to appeal to it. Leave was granted and the appeal upheld. The eviction order of Khumalo J was rescinded while the dismissal of rescission application of Adams AJ was set aside. The matter was remitted to the High Court for reconsideration. The City of Johannesburg was joined as a further respondent to the High Court proceedings so that it could file a report showing how it would provide alternative land or emergency accommodation in the event of eviction. No order was made as to costs.

Reading a unanimous judgment of the court Mojapelo AJ held that the respondent failed to establish a connection between what was consented to by the four appearer applicants and the other 180 applicants who did not attend the hearing. Although the appearer applicants factually consented to the eviction order, that consent was without mandate and uninformed. An agreement to an eviction order would effectively entail the waiver of, at a minimum, the constitutional and statutory rights to -

- an eviction order only after a court had considered all the relevant circumstances;
- joinder of the local authority and production by it of a report on the need and availability of alternative accommodation;
- a just and equitable order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); and
- temporary alternative accommodation in the event that eviction would result in homelessness.

The applicants, who were not legally represented, were not informed of any of the above rights which they were not aware of. The factual consent, which the appearer applicants gave to the eviction order, was not informed and was therefore not legally binding on the other applicants.

Although the court, which heard the eviction application was faced with a purported agreement, it was not absolved from its duties under PIE whose application was

mandatory. Therefore, the court was not absolved from actively engaging with the relevant circumstances where the parties purported to consent. PIE enjoined courts to balance the interests of the parties before it and to ensure that if it was to order eviction, it would be just and equitable to do so. Without having regard to all the relevant circumstances including, but not limited to a purported agreement, the court would not have discharged the du-

ties placed on it by PIE. Those duties arose even in circumstances where parties on both sides were represented and a comprehensive agreement was placed before the court.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Agreement to extend lease extending both incidental and collateral terms of lease, arbitration

award may be delivered in the absence of the parties, contravention of exchange control regulations, disclosure of identity of child victim is prohibited, duty of state to provide suitable alternative accommodation in the event of eviction of homeless occupiers, enforcement of foreign arbitration award, institution of review proceedings within a reasonable time, invalidity of renewal of firearm licences regime, invalidity of provisions authorising detention

of illegal foreigners, limitation of parties to litigation to their pleadings, medical negligence, *mora* interest not running on unliquidated debt, nature of agreement subject to National Credit Act 34 of 2005, no cession of debt after extinction, repentance principle in repudiation of contract, sale of property in insolvency on authorisation by Master, and the usage of bail application affidavit in trial proceedings not allowed and validity of cession.



THE SA ATTORNEYS' JOURNAL

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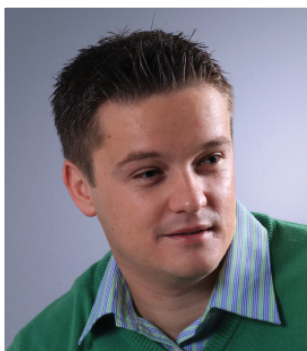
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Bills

Division of Revenue Amendment Bill B24 of 2017.

Adjustments Appropriation Bill B25 of 2017.

Rates and Monetary Amounts and Amendment of Revenue Laws Bill B26 of 2017.

Tax Administration Laws Amendment Bill B28 of 2017.

Protection, Promotion, Development and Management of Indigenous Knowledge Bill B6B of 2016.

Commencement of Acts

Agrément South Africa Act 11 of 2015. Commencement: 1 April 2017. Proc33 GG41186/20-10-2017 (also available in isiZulu).

Selected list of delegated legislation

Animal Diseases Act 35 of 1984

Rescission of the control measures introduced in April 2007 for classical swine fever in certain areas. GN1128 GG41202/27-10-2017.

Animal Improvement Act 62 of 1998

Registration of the Kennel Union of Southern Africa as a registering authority. GN1098 GG41178/13-10-2017.

Architectural Profession Act 44 of 2000

Amendment of the requirements for the recognition and maintenance of the recognition of a voluntary association rules. BN171 GG41183/13-10-2017.

Debt Collectors Act 114 of 1998

Amendment of the Regulations relating to Debt Collectors, 2003. GN R1141 GG41205/27-10-2017 (also available in Afrikaans).

Electronic Communications Act 36 of 2005

Amendment of the Call Termination Regulations, 2014. GenN811 GG41167/6-10-2017.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Amendment of regulations relating to the reduction of sodium in certain

foodstuffs and related matters. GN1071 GG41164/6-10-2017.

Amendment of the regulations relating to preservatives and antioxidants. GN R1124 GG41191/20-10-2017 (also available in Afrikaans).

Local Government: Municipal Systems Act 32 of 2000

Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers. GN1092 GG41173/10-10-2017.

Pharmacy Act 53 of 1974

Fees payable to the South African Pharmacy Council. GenN841 GG41210/27-10-2017.

Plant Breeders' Rights Act 15 of 1976

Amendment of Table 1 of the regulations. GN R1106 GG41179/13-10-2017.

National Environmental Management: Waste Act 59 of 2008

National norms and standards for sorting, shredding, grinding, crushing, screening or baling of general waste. GN1093 GG41175/11-10-2017.

Amendment of the list of waste management activities that have, or are likely to have a detrimental effect on environment. GN1094 GG41175/11-10-2017.

Submission of industry waste tyre management plan to the minister. GN1148 GG41213/30-10-2017.

Public Finance Management Act 1 of 1999

Statement of national revenue, expenditure and borrowings. GenN843 GG41212/30-10-2017.

Small Claims Courts Act 61 of 1984

Amendment of places of sitting of small claims court for Barkly West. GN1115 GG41186/20-10-2017.

South African Police Service Act 68 of 1995

South African Police Service Employment Regulations, 2017. GN R1138 GG41203/27-10-2017.

Spatial Data Infrastructure Act 54 of 2003

Approved land cover classes and definitions. GN1133 GG41202/27-10-2017.

Tax Administration Act 28 of 2011

Returns of information to be submitted by specified persons. GN1117 GG41186/20-10-2017 (also available in Afrikaans).

Water Research Act 34 of 1971

Increase in the water research levy. GN1105 GG41178/13-10-2017.

Draft Bills

Draft Basic Education Laws Amendment Bill. GN1101 GG41178/13-10-2017.

Draft Transport Appeal Tribunal Amendment Bill, 2017. GN1137 GG41202/27-10-2017.

Draft Science and Technology Laws Amendment Bill. GenN833 GG41202/27-10-2017.

Draft delegated legislation

Amendments to the regulations relating to assistance to victims in respect of higher education and training in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 for comment. GenN778 GG41160/4-10-2017.

Draft Radio Frequency Spectrum Assignment Plan for the frequency band 440 to 441 MHz in terms of the Electronic Communications Act 36 of 2005 for comment. GenN788 GG41164/6-10-2017.

Draft Radio Frequency Spectrum Assignment Plan for the frequency band 1518 to 1525 MHz in terms of the Electronic Communications Act 36 of 2005 for comment. GenN784 GG41164/6-10-2017.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1089 GG41169/6-10-2017.

Draft Radio Frequency Spectrum Assignment Plan for the frequency band 2285 to 2300 MHz in terms of the Electronic Communications Act 36 of 2005 for comment. GenN783 GG41164/6-10-2017.

Draft Radio Frequency Spectrum Assignment Plan for the frequency band 2025 to 2110 paired with 2200 to 2285 MHz in terms of the Electronic Communications Act 36 of 2005 for comment. GenN782 GG41164/6-10-2017.

Draft Radio Frequency Spectrum Assignment Plan for the frequency band 138 to 143.6 MHz in terms of the Electronic Communications Act 36 of 2005 for comment. GenN785 GG41164/6-10-2017.

Amended administrative regulatory requirements for imported fish and fishery products and canned meat products in terms of the National Regulator for Compulsory Specifications Act 5 of 2008 for comment. GN1120 GG41186/20-10-2017.

Amendment of the regulations relating to the qualifications for registration of dental assistants in terms of the Health Professions Act 56 of 1974 for comment. GN R1139 GG41203/27-10-2017 (also available in Sepedi).

Proposed regulations regarding the control of import or export of waste in terms of the National Environmental Management: Waste Act 59 of 2008. GN1147 GG41213/30-10-2017.



By
Vuyokazi
Ndamse

Repudiation and the repentance principle

Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality 2017 (5) SA 420 (SCA).

What is repudiation? Repudiation is defined in *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) 835 (A) at 845 as a situation where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention to no longer be bound by the contract. Repudiation is, therefore, a form of a breach of contract. Once a contract has been repudiated, the aggrieved party may either elect to enforce specific performance or accept the repudiation and proceed to cancel the contract and claim damages.

It is entrenched in our law that once an election is made, it is binding. However, what happens when the other party makes it impossible for you to act in accordance with your election? Can a party, who previously elected to enforce specific performance change its election, thereafter proceed to nevertheless cancel the contract and claim damages?

This question was recently considered by the Supreme Court of Appeal (SCA) in the matter of *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA).

During or about March 2010, Primat entered into a contract with the municipality to upgrade the roads in Motherwell, Port Elizabeth, as well as to supply all materials required for the construction works (the works). The project was managed by Iliso Construction (Pty) Ltd (a firm of engineers) and the works commenced on 12 April 2010. There were various delays in the execution of the works, which according to Primat, were mainly attributed to non-payment, alternatively delays in payment by the municipality. The project was extended, and, during the extension period, heavy rain storms damaged the works, which at that time, were almost completed. During this period, Primat was unable to complete the works, but, indicated to the municipality that it would do so when it was able to.

On 17 January 2012, the municipality prematurely cancelled the contract without affording Primat notice to remedy breach. This constituted a repudiation

on the part of the municipality. On the same day, Primat sought access to the construction site but was barred from entering the site by the municipality. On 19 January 2012, Primat wrote a letter to the municipality and recorded that it regarded the municipality's cancellation letter as procedurally incorrect and that it intended to 'remain servicing the contract until the matter is finalised'. In response, the municipality wrote to Primat on 24 January 2012 further emphasising its decision to terminate the contract and requested Primat to vacate the construction site. On 26 January 2012, Primat again sought access to the construction site, but was barred by the municipality. On 27 January 2012, Primat wrote a letter to the municipality demanding access to the construction site and recorded that it had been denied access on the previous day. In this letter, Primat further recorded that the conduct by the municipality constituted a breach of the provisions of the contract. On 30 January 2012, the municipality sent a letter to Primat advising that it was entitled to expel Primat from the construction site and arrange for the completion of the works via other contractors. On 3 February 2012, Primat wrote a further letter to the municipality and recorded that the municipality's cancellation was bad in law, and that this purported cancellation also constituted a repudiation, which repudiation it did not accept.

On 9 February 2012, Primat's attorneys addressed a letter to the municipality in which Primat referred to the correspondence exchanged between the parties from 17 January 2012 to 3 February 2012. In the letter it was recorded that Primat had persisted with its intention to proceed with the contract, and the fact that the municipality's appointment of four other contractors to complete the works constituted a further repudiation. In this letter, the contract was cancelled by Primat.

Pursuant thereto, Primat brought an action against the Municipality in the Eastern Cape Local Division of the High Court, Port Elizabeth for damages suffered as result of the cancellation.

Revelas J, held that the municipality had made specific performance by Primat impossible. The court further held

that the Municipality had acted over hastily in cancelling the contract when it did and that its premature cancellation constituted a repudiation. She further described this repudiation as an unequivocal intention to no longer be bound to the contract with immediate effect.

This is much evident from the fact that the premature cancellation by the municipality was effected shortly before the builder's holiday commenced in December 2011, especially in circumstances whereby the municipality had previously granted Primat an extension to complete the work.

Revelas J then ordered that Primat was entitled to cancel the contract and further that it is entitled to damages.

The municipality brought an appeal against the decision by Revelas J before a Full Bench in the Eastern Cape Division of the High Court, Grahamstown. Counsel for the municipality argued that once an election had been made, the innocent party is not at liberty to seek redress against the defaulting party by way of remedies that are inconsistent with the election made.

Primat argued that it was entitled to change its election, it having been held by Wepener J in *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ) that a party, which had once elected to reject a repudiation, may thereafter, if the other party persists in the repudiation, change its election and cancel the contract.

The Full Bench further argued that the application of the repentance principle is only limited to cases of anticipatory breach, as it was held in the *Sandown* case. Primat argued that this was incorrect and submitted that Wepener J did not hold that in other cases of repudiation, the repentance principle does not apply, and that there is, in principle, no distinction between the repudiation of a past, present or future obligation.

The Full Bench held that Primat would only have been entitled to cancel the contract if a new, positive act of repudiation occurred, and the appeal succeeded.

Pursuant thereto, Primat petitioned to the SCA, and was granted special leave to appeal against the decision of the Full Bench. Primat argued that 'persistence in repudiation' is not only limited to cases

of 'a new or separate act of repudiation' and to insist on specific performance in the face of a continuing repudiation, whether past or present, is 'as fruitless as insisting on specific performance of a future repudiation'. It was further argued that where a contracting party repudiates a contract by prematurely cancelling same, that party specifically indicates its intention of no longer being a party to the contract.

The municipality repeated its previous arguments in the court *a quo* and the Full Bench persisted that once the innocent party is put to an election, it cannot both 'approve and reprobate'. Primat further argued that it was precluded from pursuing a claim for damages on a purported cancellation as this remedy was no longer available to Primat in light of its earlier election to claim specific performance.

The SCA then held that if a contracting party repudiates a contract, the aggrieved party may elect to claim specific performance. However, should the repudiating party persist with its repudiation after this election is made, and shows an unequivocal intention not to be bound by the contract, the aggrieved party may change its election and cancel the contract and claim damages.

The SCA further held that the requirement for a fresh act of repudiation by the municipality before Primat could change its election and proceed to cancel the contract and claim damages made little or no sense, and that Primat was reasonable in perceiving that the municipality would not repent of its consistent repudiation of the contract.

The appeal was upheld with costs of two counsel.

Where a party repudiates a contract and shows no intention to abide by the contract, it is, therefore, superfluous to expect the party to, at some stage or another, change its intention. Where the defaulting party makes it clear that it no longer intends to be bound in terms of a contract, the innocent party is permitted to change its election to claim specific performance, proceed to cancel the contract and claim damages.

- Adams and Adams appeared for the appellant.

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By
Yashin
Bridgemohan

Misrepresentation of qualifications and substantive dismissal

LTE Consulting (Pty) Ltd v CCMA and Others (LC) (unreported case no JR1289/14, 8-8-2017) (Myburgh AJ)

In *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2442 (LAC) at para 34 Waglay DJP held:

'To place an employee who was guilty of dishonesty back in her position where honesty and integrity are paramount to the execution of duties, is to my mind grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-employ a person in a position that was secured by the making of false statements.'

In the *Department of Home Affairs and Another v Ndlovu and Others* (2014) 35 ILJ 3340 (LAC) at para 16 Dlodlo AJA held:

'The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal. Why did the first respondent put in his CV that which

is untrue? He knew how to describe the MBA degree which was then unfinished. He could have described the bachelor of technology marketing degree similarly if he found it necessary to mention it at all in his CV.'

In the case of *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* (2017) 38 ILJ 881 (LAC) at para 30 Savage AJA held:

'The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself ne-

gate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message.'

Facts

From 1 December 2009, the employee was employed by the applicant as its financial manager. At the time of commencing employment, the employee was turning 82 years old, which past the applicant's retirement age for employees of 65 years. The employee was subsequently offered the position of assistant company secretary on a fixed-term contract running from 1 August 2013 to 31 January 2014, but refused the offer, as well as refused a further offer of a permanent position as assistant company secretary.

While considering the fixed-term contract the applicant's company secretary looked through the employee's CV on file, and noticed that particular certificates were outstanding. These included the employee's BCom degree, chartered accountant (CA) qualification and MBA degree. When the company secretary raised the issues with the Human Re-

sources department, he was told that the certificates were requested but the employee failed to provide same.

The company secretary then commenced an investigation, and discovered that the employee was not a chartered accountant and that he did not have an MBA, further assuming that he did not possess a BCom degree either. Disciplinary charges against the employee were then instituted on completion of the investigation. On 13 December 2013, the employee was charged with gross dishonesty for incorrectly providing in his CV that he was a qualified CA.

After the disciplinary inquiry the employee was found guilty and the employee was dismissed. A dispute of unfair dismissal was then referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and at arbitration the commissioner found that the employee's dismissal was substantively unfair and an award of six months compensation was made.

The commissioner found that, insofar as the employee was guilty of any misconduct, dismissal was not warranted as –

- his dismissal was a sham aimed to ensure his retirement;
- the misrepresentations regarding his qualifications was not material in obtaining the financial manager post;

- the employee had equivalent qualifications; and

- an evaluation of factors in mitigation/aggravation evidenced that the sanction of dismissal was inappropriate.

The applicant then made application to the Labour Court (LC) to have the award reviewed and set aside in terms of s 145 of the Labour Relations Act 66 of 1995 (LRA).

Issue

The main issue before the LC was whether the commissioner's finding that the employee was not guilty of dishonestly misrepresenting his qualification's in his CV was reasonable.

Judgment

The court noted that the findings made by the commissioner were unreasonable. The commissioner's main finding that the dismissal was aimed at effectively ensuring the employee's retirement was unreasonable as it could not be reconciled with the company secretaries unchallenged explanation of how he found out the issues with the employee's CV.

The court held the finding of a sham dismissal was incorrect as objectively, the employee's misconduct was extremely critical and worthy of dismissal. The finding that the misrepresentation regarding the CA qualification was imma-

terial possessed no justifiable basis in terms of the evidence.

The court held further the finding that the employee had equivalent qualifications, was not reasonable as it omitted to take into account the issue of misconduct, and further did not extend to the commissioner's findings regarding the employee's claim that he was a CA. As such the commissioner's unarticulated examination of factors in mitigation which found in the employee's favour in terms of sanction was unreasonable when considering Labour Appeal Court cases discussed above.

Conclusion

This judgment is important as it highlights that gross misrepresentation of qualifications by an employee in their CV is serious enough to warrant dismissal. Dismissals in these circumstances are substantively fair. Where a commissioner finds differently at arbitration, an aggrieved employer may make application to the LC in terms of s 145 of the LRA to have the award reviewed and set aside.

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By
Tanya
Calitz

What constitutes adequate accommodation (housing) in eviction matters?

Baron and Others v Claytile (Pty) Ltd and Another
2017 (5) SA 329 (CC)

In a recent Constitutional Court (CC) judgment handed down, Pretorius AJ sought to clarify the statutory obligations of an organ of state to provide alternative accommodation in eviction matters.

Baron and Others v Claytile (Pty) Ltd and Another 2017 (5) SA 329 (CC), started out like any ordinary eviction matter. First, the employer, Claytile (Pty) Ltd, followed the correct legislative procedures as envisaged in the Extension of Security of Tenure Act 62 of 1997 (ESTA) to evict former employees prior to their resignation or the termination of their employment contract. Second, an eviction order was granted and subsequent-

ly confirmed by the Land Claims Court. Third, the former employees refused to vacate the units that they were residing in and continued to enjoy free accommodation, electricity and water for almost five years since their right of employment (which was connected to their right of occupation) was terminated.

What makes this matter so significant is the fact that it directly engages and impacts on the application and interpretation of ESTA. Our courts have not had the opportunity to ventilate ESTA as much as they have done with related legislation, such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

In this matter, the City of Cape Town Municipality (the city) indicated on two separate occasions that it did not have the capacity to house the employees and did not foresee having alternative accommodation available in future – contrary to its constitutional obligation in subs 26(1) and 26(2) of the Constitution – which states that:

'(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.

The city further indicated that people who qualified for alternative accommo-

ation were allocated units at its Temporary Relocation Areas, should space become available. In the face of the city's slack conduct, the landlord continued to experience hardship by having to accommodate the employees on the farm. The employees were employed elsewhere and conferred no benefit or advantage of any sort on the landlord.

The city made a tentative offer at a later stage to accommodate the employees at Blikkiesdorp, a Temporary Relocation Area. The employees rejected the offer, because the units at Blikkiesdorp consisted of a one room corrugated iron structure without electricity. The question then arises: How does one strike an equitable balance between employees who are to be rendered homeless on the one hand and employees who are offered alternative accommodation, which are less favourable than what they are used to, on the other hand?

It seldom occurs that people who are the subject of eviction, will reject an offer of alternative accommodation. In the scenario that was created in the *Baron* case, it can be said that the municipality adhered and complied with its constitutional obligations by making an offer of alternative accommodation, which was rejected. How far does the duty of a municipality stretch and when can it

be determined that a municipality complied with its constitutional obligation to provide adequate housing? What exactly should a municipality do to adhere to its constitutional obligation?

The right to access to adequate housing is a fundamental human right that cannot be disregarded, but it is a right that should not be read in isolation. The right to adequate housing is, therefore, more than the mere provision of a roof over one's head or a safe place in the sense that an irrefutable link exists between the right to adequate housing and the right to human dignity; the right to life; and the right to freedom and security of a person. The question as derived from the *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) then is: Does the municipality's offer on alternative accommodation demean the employees' current housing situation or fortify it?


Notably, the city made a second offer to the employees at Wolwerivier days before the matter was set to be heard in the CC. Once again, the employees rejected the offer because the units at Wolwerivier, according to them, were inadequate.

Landlords should caution against interpreting this judgment as 'once-and-for-all' victory in terms of obtaining

eviction orders against employees who remain on their properties. In this matter, the employees' contention that commercially-able private landowners is obligated to provide assistance in obtaining suitable alternative accommodation, is tenable and carries some weight to the extent, where meaningful engagement between the relevant parties plays a pivotal role.

This is not a case where it is justified to impose an obligation on private landowners, as the employees would have it, to provide suitable alternative accommodation to them. It is profusely clear that a constitutional duty vests with the city to provide suitable alternative accommodation, in instances where occupiers are legally evicted and rendered homeless.

In these circumstances, the municipality, albeit it initially held that it did not have the capacity to accommodate the employees complied with its constitutional obligation to provide alternative suitable accommodation to the employees.

Tania Calitz LLB (cum laude) (UFS) is a candidate attorney at MacRobert Inc in Pretoria. 

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

Absolution from the instance and equal pay disputes

The case of *Sethole and Others v Dr Kenneth Kaunda District Municipality* (LC) (unreported case no JS 576/13) (Snyman AJ) concerned a case of absolution from the instance. Snyman AJ found that an applicant would be absolved from the instance if they failed to make out a *prima facie* case. In deciding absolution from the instance, the court had to determine whether the applicant had the onus to make out a case. Thus, absolution from the instance is inextricably linked with the party who bears the onus.

This case concerned a complaint about a differentiation in remuneration between the applicants and employees in another position at the employer. The applicants alleged that they performed the same or similar work to other employees, but were paid less and received lesser benefits. According to the applicants, this difference was based on an unlisted ground. However, it was not apparent from the evidence what this unlisted ground was.

This dispute took place prior to the amendments to the Employment Equity Act 55 of 1998 coming into force. In terms of the amendments, it is clear that if the discrimination is on a listed ground then the onus is on the respondent. However, if the discrimination is on an unlisted arbitrary ground the applicant bears the onus. Snyman AJ considered what the position was prior to the amendments (as these amendments were not retrospective) in order to determine whether the onus was on the applicants in this case to make out a *prima facie* case. Snyman AJ found that the position prior to the amendments is the same as ss 6(1) and 11, together with the introduction of s 6(4), gave written manifestation to the way in which the Labour Court (LC) had already been interpreting and applying ss 6 and 11 prior to the amendments. In Snyman AJ's view, the applicants in this case had the onus to establish the existence of discrimination

on an unlisted ground and were, therefore, required to make out a *prima facie* case in order to escape absolution from the instance.

Snyman AJ referred to a three level inquiry when establishing whether differentiation amounts to unfair discrimination. The first level of the inquiry is to establish whether differentiation exists that could potentially give rise to discrimination. The next level of the inquiry is whether the differentiation amounts to discrimination. Finally, the third stage is whether the discrimination is unfair. Snyman AJ was of the view that in this case the applicants had only satisfied the first level of the inquiry, that is, they had shown that there was differentiation, but they had not shown that this differentiation constituted discrimination and that such discrimination was unfair. The applicants compared their positions to another position that was a specialised position, graded higher and required a degree of speciality and higher qualifications. Furthermore, they contended that this position was an unlawful position. Snyman AJ remarked they could not legitimately use a comparator that they alleged was unlawful.

The court held that the applicants had failed to identify and plead the actual basis of the alleged discrimination. Furthermore, they did not show how their dignity or right of equality or personal attributes and characteristics had been impaired or prejudiced. Thus, it was found that a *prima facie* case had not been made out by the applicants. Snyman AJ concluded that this was a grading dispute, which may be an unfair labour practice but was not an unfair discrimination case. The application for absolution from the instance was accordingly granted. A costs order was made against the applicants as Snyman AJ was of the view that their conduct was opportunistic and aimed at obtaining a re-grading of their positions and a pay increase.

Deductions from remuneration

In *Mpanza and Another v Minister of Justice and Constitutional Development and Correctional Services and Others* [2017] 10 BLLR 1062 (LC), the applicants

refused to accept a re-assignment of their duties and temporary transfer to another unit in accordance with the Public Service Act 103 of 1994 and lodged a grievance. They were informed that they would not be paid if they did not report for duty. The applicants did not report for duty and the employer then advised the applicants that this unauthorised absence would be treated as leave without pay and that the employer intended to deduct the amounts from their salaries in respect of the period in which they did not work. Before making the deductions, the applicants were requested in writing to make submissions as to their unauthorised absence and why deductions should not be made from their salary for failing to report for duty. No representations were received and leave without pay was then implemented and deducted from their salaries.

The applicants argued that the deductions were unlawful and were in breach of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Public Service Act. They sought an order directing the employer to repay the money.

The LC found that the applicants had not reported for duty, which amounted to absconding. Furthermore, the applicants had refused to regularly tender their services even before they were temporarily placed in the new units and thus the failure to attend work was not a reaction to the temporary placement. It was held that the employer was entitled to not pay the applicants in respect of periods during which they refused to work. This is because the applicants had breached their employment contracts by failing to perform their obligations and thus the employer was entitled to implement the 'no work, no pay' principle.

The LC considered s 34 of the BCEA and the requirement to follow a proper procedure. In this case, the employees did not agree to the deductions but they had been given a reasonable opportunity to show why the deductions should not be made and there was no evidence that they had in fact responded with their submissions. Cele J held that the employer had followed a fair procedure in making the deductions and dismissed the application with costs.



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Interpreting a 'reasonable time', in which to file an application

G4S Secure Solutions (SA) (Pty) Ltd v Malinga (LAC) (unreported case no JA68/2016, 15-9-2017) (Landman JA (Davis JA and Phatshoane AJA concurring))

The Labour Appeal Court (LAC) was faced with two primary issues in this matter namely:

- First, whether a court, as a general directive to litigants, can determine a specific time frame in which to make an application, under circumstances where the statute states that the application be made within a reasonable time.
- Secondly, when does it become necessary for a litigant at the Commission for Conciliation, Mediation and Arbitration (CCMA) to apply for condonation when the last day on which to serve an application, respond to an application or refer a dispute that falls within the period 16 December to 7 January.

Background

The employee referred an unfair labour practice dispute to the CCMA whereafter, on 26 November 2013 a default award was delivered in his favour. The award was served on the employer on 13 December 2013. On 7 January 2014 the employer filed an application to rescind the award on grounds that it did not receive the notice of set down.

The rescission application came before the first respondent commissioner who, in a ruling dated 27 March 2014, dismissed the application. Her ruling was informed by an understanding that the employer made the application outside the 14-day period, set out in the CCMA Rules and without an application for condonation, she could not entertain the merits of the rescission application.

On 26 May 2014, the employer filed an application in terms of s 158(1)(h) of the Labour Relations Act 66 of 1995 (LRA) to review and set aside the commissioner's ruling.

On 8 December 2014, the employer

filed a condonation application explaining why it filed its review application nearly two months after the commissioner's ruling.

The matter was heard at the Labour Court (LC) on 14 December 2014.

While accepting that the LRA requires an application under s 158(1) be made within a 'reasonable time', the court relied on the judgment of *Weder v MEC for the Department of Health, Western Cape* (2013) 34 ILJ 1315 (LC), where a 'reasonable time' was interpreted to mean a six-week period, whereafter, the review application must be accompanied by an application for condonation. Following this approach, the court found the delay in filing the application was excessive and without assessing the employer's prospects of success in its review application, dismissed the condonation application.

In the *Weder* case the LC stated:

'What, then, is a "reasonable time" in the context of s 158 of the LRA? It is tempting simply to assume that it should be six weeks, by analogy to the time period provided for in s 145. At the most, it cannot be more than the 180 days provided for in PAJA; in fact, given that PAJA does not apply and that the process is closely aligned to that set out in s 145 and rule 7A, I would suggest that anything more than six weeks should at least trigger an application for condonation.'

On appeal the LAC found this to be the incorrect approach and held:

'It is not permissible for a court to fix a certain time which it regards as a reasonable time; nor is it permissible to insist that an application for condonation should be made after a specific time. An application for condonation must be made when the delay is unreasonable and must be made at the earliest opportunity.'

Reaffirming the correct legal principle, the LAC held that when a statute prescribes that an application be made within reasonable time, as does s 158, a court must first determine whether there was an unreasonable delay in bringing the application and if so found, whether such a delay should be condoned. This, the LAC added is a factual inquiry, which would turn on the circumstances of each case.

Adopting this approach and on this basis the employer filed its review application two months after the commissioner's ruling, the LAC found there was no unreasonable delay in bringing the review application. Having regard to the explanation tendered by the employer as to why it took it two months to file the application, the LAC was satisfied that even if its finding on this issue was wrong; the employer provided a satisfactory explanation which justified its actions be condoned.

Turning to the commissioner's ruling in respect of the employer's rescission application, the LAC found the employer's application was timeously filed and hence there was no need to seek condonation.

CCMA r 3 states:

'(1) For the purpose of calculating any period of time in terms of these Rules -

(a) day means a calendar day; and

(b) the first day is excluded and the last day is included, subject to sub-rule (2).

(2) The last day of any period must be excluded if it falls on a Saturday, Sunday, public holiday or on a day during the period between 16 December to 7 January.'

Therefore, on a proper understanding of the CCMA Rules, the employer's rescission application was filed within the prescribed time frame. The 14-day period in which to file a rescission application ended within the period 16 December to 7 January, which in turn meant that the last day in which to file the application was 8 January 2014.

The employer also provided a plausible explanation as to why it did not attend the arbitration and on its version, had reasonable prospect of success.

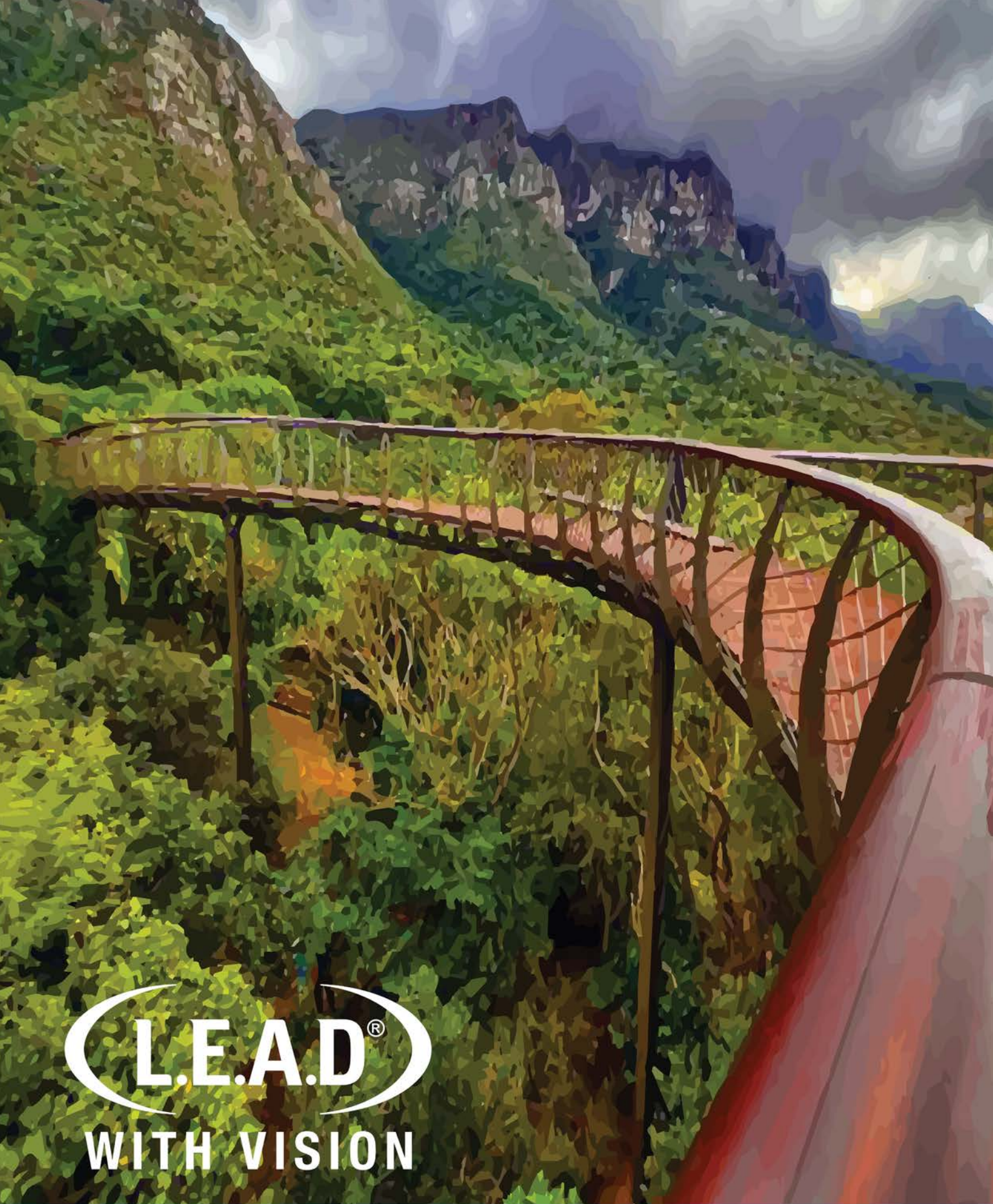
Following these findings the LAC ordered that the appeal succeed and replaced the LC's order with an order setting aside the commissioner's ruling and replacing it with a finding that the default award be rescinded. There was no order as to costs.



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<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of law	(2017) October
<i>Litnet</i>	LitNet Akademies (Regte)	Trust vir Afrikaans Onderwys	(2017) October
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	LexisNexis	(2017) 80.3
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2017) 4

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