

JANUARY/FEBRUARY 2018

RECONSIDERING FINAL JUDGMENTS – THE INJUSTICE IN JUSTICE

Remuneration of benefits from a will:
Who is a 'spouse'?

Dangers inherent in
*Bitcoin and other
cryptocurrencies*

Training obligations
in terms of FICA

**Deemed dismissal
and reinstatement**

**Large law firms
v small law
firms**

**Latest
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**The ABC of
trust audits**

**Dismissed by a foreign
diplomatic mission:**
Are South African locally
recruited employees without
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26 Reconsidering final judgments – the injustice in justice

Ndivhuwo Ishmel Moleya writes that it is widely accepted that there is no such thing as a perfect justice system. Court decisions are not entirely faultless, just as judges are not infallible. For this reason, the law has put procedural filtering mechanisms in place. However, there are instances in which these mechanisms may prove to be inadequate. It is in such circumstances, in which a court of final instance, may be required to reopen its final decision for reconsideration and r 42 of the Uniform rules of Court provides for instances in which a court may reconsider its final decision. But, as will be demonstrated in the article, this does not cater for all cases that may result in injustice.

28 Remuneration of benefits from a will: Who is a 'spouse'?

From time to time testamentary heirs renounce the benefits conferred by a testator in a last will and testament. When this occurs, s 2C(1) of the Wills Act 7 of 1953 may apply. Apart from s 2C(1), the term 'spouse' is used in other sections of the Wills Act (for example, s 2B and s 4A(2)). Hence, for purposes of s 2C(1), and the Wills Act read holistically, it is unclear whether 'spouse' includes persons married under the tenets of religious law (such as, Shari'ah, Judaism or Hinduism), and whether 'surviving spouse' in s 2C(1) includes multiple female spouses who were married to a deceased testator at his death in polygynous marriages. This article written by **Dr Fareed Moosa** discusses the crisp issues arose in *Moosa NO and Others v Harneker and Others* 2017 (6) SA 425 (WCC).

30 Training obligations in terms of FICA

The Financial Intelligence Centre Act 38 of 2001 (FICA) came into effect in 2002 and among others, made provision for the training of employees of accountable and reporting institutions. The objective, thereof, is to ensure proper compliance by the employees with the provisions of FICA. The duty to discharge this obligation rests (or rested) on the accountable institution itself and/or senior management. The accountable institution is required to appoint a person with the responsibility to ensure compliance and discharge this obligation. **Nkateko Nkhwashu** writes that the main objective of this article is not to discuss the role and responsibilities of the accountable institutions or staff appointees, but to question some of the reasons why the statutory obligation or need to offer staff-training has never been seriously implemented.

33 Dangers inherent in Bitcoin and other cryptocurrencies

Cryptocurrencies are not illegal per se and are regularly utilised by consumers to perform highly secure and rapid funds transfers across national borders without being impeded by exchange controls or banking costs etcetera. **Jason de Mink** discusses the inherent dangers with criminals becoming increasingly technically proficient and the benefits of cryptocurrencies are also being exploited to further illegal aims and provide a platform for, *inter alia*, money laundering and the financing of terrorism.

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Legal Practice Amendment Act gazetted

As we enter the year, the Legal Practice Amendment Act 16 of 2017 (LPAA) has been gazetted (GN 33 GG41389/18-1-2018). Published on 18 January, the amendment Act has brought about a few changes. The below is adapted from the Department of Justice and Constitutional Development's notes to the Legal Practice Amendment Bill and is available at www.lssa.org.za.

Section 1 of the LPAA amends s 4 of the Legal Practice Act 28 of 2014 (LPA) which provides for the establishment of the South African Legal Practice Council (LPC), in order to provide that the LPC begins to exercise jurisdiction over legal practitioners and candidate legal practitioners only when s 120(4) comes into operation, to avoid conflicting jurisdiction between the LPC and the statutory provincial law societies.

Section 2 of the LPAA amends s 6 of the LPA which provides for the powers and functions of the LPC, in order to add as functions of the LPC that it must establish, promote, administer or assist in the establishment, promotion or administration of insurance schemes, medical aid schemes, medical benefit schemes, pension funds, provident funds, pension schemes or benevolent schemes for legal practitioners, for employees of legal practitioners, and for officials and employees of the Council.

Section 3 amends s 23 of the LPA which provides for the establishment of Provincial Councils. Section 3(a) amends s 23(1) to provide that the LPC must establish Provincial Councils, the areas of jurisdiction of which must correspond with the areas of jurisdiction of the Divisions of the High Court of South Africa, as determined by the Minister, from time to time, in terms of the Superior Courts Act 10 of 2013. The LPC may delegate to the Provincial Councils such powers and functions which, in the interests of the legal profession, are better performed at provincial level.

Section 4 amends s 33 of the Act which provides for the authority to render legal services. Section 4 amends s 33(1) and (3) of the LPA to provide that only practising legal practitioners may perform certain acts or render certain services by inserting the word 'practising'.

Section 5 amends s 62(3) of the Act to ensure a smooth transfer from the 'outgoing' Board of the Attorneys Fidelity Fund, to the 'new' Board of the Legal Practitioners' Fidelity Fund, by allowing members of the outgoing Board to stay in office for a period of six months, pending the installation of the new Board in terms of s 62(1) of the LPA.

Section 6 amends s 91 of the LPA which provides for the right of banks in respect of trust accounts. Section 6 amends s 91(4) to provide that the Legal Practitioners' Fidelity Fund Board may also determine the period for which a bank statement must be issued. It also

replaces the word 'statement' with the words 'transaction history'. This is deemed necessary because a statement sometimes only reflects the bank balance and details of the transaction history of the trust account may be required in certain circumstances, for instance for purposes of an inspection of the trust account by the LPC or the Board.

Section 8 amends s 96 of the LPA which provides for the establishment of the National Forum (NF) to provide that the NF ceases to exist on the date of the meeting with the LPC as envisaged in s 105(3), which may not be later than 31 October 2018.

Section 9 amends s 97 of the LPA which sets out the terms of reference of the NF. The mandate of the NF was originally intended to be limited to what was thought to be absolutely essential for purposes of preparing for the installation of the proposed new permanent regulatory structures contemplated in the LPA. However, it became clear that the mandate of the NF was not broad enough to ensure a smooth handover of ongoing work carried out by the existing regulatory bodies (the statutory law societies) when the new regulatory bodies come into existence on a particular day. The mandate of the NF in terms of s 97 was limited to certain rules and regulations as an interim measure. Sections 94 and 95 envisaged the making of permanent regulations and rules, respectively once the entire LPA becomes operational. The mandate of the NF has been broadened to advise the Minister on the first set of regulations that must be made in terms of s 94 and to make the first set of rules in terms of s 95. This will ensure that the rules and regulations are in harmony and will avoid a period during which there are no regulations while the Minister would have needed to make the regulations in consultation with the LPC, once the latter had been established and functional. Section 95(1) provided for the LPC to make rules relating to a number of issues, many of them relating to the regulation of legal practitioners. The amendment ensures that, when the LPC takes office on a particular day, there will be rules governing a number of issues for which rules are required. The amendment now places the responsibility for making the first set of rules contemplated in s 95 on the NF. Section 9(e), which amends section 97(2)(a), read with clause 11, is a consequential amendment to s 117, as a result of s 9(e), empowers the NF to negotiate a date on which the law societies will dissolve. The date may not be later than six months after the commencement of Chapter 2 of the LPA.

Section 10 – s 109 of the LPA sets out the role and responsibilities of the NF regarding the promulgation of provisional or interim rules and regulations in preparation for the establishment of the permanent regulatory structures. Since



Mapula Sedutla - Editor

the role of the NF was limited in terms of making these rules and regulations, s 9 has extended the mandate of the NF to make recommendations for regulations as contemplated in s 94 and to make rules as contemplated in s 95(1) and (3) of the LPA. The LPAA s 10 confirms and gives effect to the extension of the mandate of the NF as contemplated in s 9.

Section 11 amends s 114 of the LPA which regulates the position of existing advocates, attorneys, conveyancers and notaries. It looks after vested interests. Section 11 provides that attorneys who had the right of appearance in the High Court of South Africa, the Supreme Court of Appeal or the Constitutional Court in terms of any law before the commencement of the Act, will retain that right after the commencement of the Act.

Section 12 amends s 117 of the LPA which contains transitional provisions relating to the existing statutory law societies. This amendment stipulates that the existing law societies must continue to perform their powers and functions until the date of transfer of assets, rights, liabilities, obligations and staff, from the current law societies to the LPC or Provincial Councils. This will facilitate a smooth hand-over, particularly in respect of the functions currently carried out by the law societies and the staff of the law societies.

Section 13 amends s 120(3) of the LPA to address practical realities and contribute to a smoother transition and commencement of the LPA.



Upcoming deadlines for article submissions: 19 February and 19 March 2018.

Please note that the word limit is 2000 words.

South Africans must defend the independence of its judiciary and value its strength

The Cape Law Society (CLS) held its annual general meeting and conference from 10 to 11 November 2017 in East London. Giving the keynote address, Editor-in-Chief of *City Press*, Mondli Makhanya, said South Africa (SA) finds itself in a position where even though our country is still one of the most vibrant democracies not only in the continent but in the world, we are at a very precarious time. There is a very sustained assault on the rule of law, an assault on the rules of basic decency and a questioning of our constitutional foundations. Mr Makhanya noted that it is time for society to re-think, re-look and re-capture the centre stage of our constitutional development. He said SA can learn from newly liberated countries on the continent, and has seen how things can go wrong when leaders are given too much power and trust.

Mr Makhanya referred to the constitutional ruling on the *Nkandla* matter (see *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC)) as one of the most epic judgments that he believes people should always refer to. He said the judgment re-echoed the values that the founders of our democracy thought about back in the days of the Convention for a Democratic South Africa from 1994 and leading to 1996 when the final Constitution was completed. 'It is up to us, the citizens, to say we own this democracy and we will determine our own way,' Mr Makhanya added.

Mr Makhanya pointed out that the months leading up to the 2019 elections will be eventful. He noted that there will be space for more voices in society, voices



Editor-in-Chief of City Press, Mondli Makhanya was the keynote speaker at the Cape Law Society's annual general meeting held in November 2017.

that should be used, voices that are in the legal profession, which are dedicated to the rule of law. He said there will be space for activism, space to redefine, re-dream and re-create SA going into 2019 and beyond. 'We are at a moment of darkness before the dawn,' Mr Makhanya added.

Mr Makhanya pointed out that there are two particular documents that speak on what needs to be done in SA. He said one of the documents was written by the Save South Africa initiative, entitled 'Minimum demands' (see S Pityana "Minimum demands" will ensure integrity of govt - Save South Africa' www.politicsweb.co.za, accessed 7-12-2017) and it contained six minimum demands. He said one of the demands is to restore credibility to the institutions of the criminal justice system. He added that this

demand woke SA up to what is happening in the criminal justice system, it woke the country up to what is happening with the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Hawks and other institutions, which are supposed to maintain the rule of law. He said that the institutions are captured to a point where there is very little respect for them.

Mr Makhanya said that one particular demand says the people of SA should make sure that those institutions are respected. Mr Makhanya added that he believed that organisations, such as the CLS, should be active in making sure that there is restoration and credibility of the criminal justice system. He noted that another demand was about the affirmation of all political parties and political players, to affirm the independence of the judiciary. 'We are very fortunate in



Professor Pierre de Vos spoke about corruption at the Cape Law Society's annual general meeting held in November 2017 in East London.



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SA that we have [the] kind of judiciary that we have. That there are women and men in our judiciary who have stood up to power, who have not said “we will be cowardly, that we will be comradely, that we will be friendly with power,” he said.

Constitutional law expert, Professor Pierre de Vos said everything that has to do with the fighting of corruption has to do with who decides what needs to happen and when it needs to happen. He added that on paper SA has an excellent legislative framework structure to combat corruption both in the public sphere and in the private sphere. He noted that on paper there is an almost perfect system for combating corruption, but in the real world it does not always work. He pointed out that this is not surprising as there are people with a lot of economic, political and social power and it is not in their interest that corruption be fought effectively.

Prof de Vos said on the Internet statistics showed that since 2009, when the directorate special operations – known as the Scorpions – were disbanded there has been a 60% decline in arrests and an 83% decrease in convictions. He noted that those statistics were difficult to verify and compare as the mandate of the Scorpions and the Hawks are not exactly the same. He pointed out that the Hawks (which was created, when the Scorpions were disbanded) has a very strong mandate to fight corruption.

Prof de Vos noted that in a 2014 judgment the Constitutional Court said it was for the Hawks and for the head of the Hawks to decide on the kind of crimes to pursue (see *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC)). He said the legislation of the South African Police Service Act 68

of 1995 specifically says it has to pursue the national priority offences, which in the opinion of the head of the Hawks, needs to be perused and selected offences that are referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Act). He said if one looks at the Act, it is a brilliant piece of legislation and it is very comprehensive, and added that the framework is quite strong, but the implementation seems to be lacking.

Prof de Vos said two issues arise that can potentially be a problem. The first question that needs to be asked is: Are institutions, such as the Hawks and the NPA, independent? Is the independence of those institutions sufficiently safe guarded? The second question that needs to be asked is: Are the individuals who are appointed to head these institutions, individuals of integrity and people who are fearless and are prepared to act in an independent manner?

Tribute to Nic Swart

CLS's Vice President Ettienne Barnard said that the late Chief Executive Officer of the Law Society of South Africa (LSSA) and Director of Legal Education and Development (LEAD), Nic Swart, had been a director of legal education for 28 years and was the CEO of the LSSA for the past six years. For many Mr Swart was the mentor of mentors and the developer of international leaders. He noted that although Mr Swart was humble and had an impressive career, he always made one realise that he was creating something bigger than himself or his immediate surroundings.

Mr Barnard added that, in addition to Mr Swart's many achievements, he was committed to develop SA's legal profession, to improving briefing patterns, empowering women and developing the



Mariette Swart was presented with a plaque for the memory of her husband Nic Swart, from the council of the Cape Law Society.

youth. He said that Mr Swart influenced many legal practitioners. He added that Mr Swart had spoken at many events and conferences and made contributions at universities and at the Society of Law Teachers of Southern Africa, annual general meetings of provincial law societies, attorneys associations and students associations. Mr Barnard said that Mr Swart was also a loving husband and father, as well as a friend to many in the legal profession. Mr Swart's wife, Mariette Swart, was presented with a plaque in memory of her husband from the council of the CLS.

Update on LPA and transitional body

Member of the National Forum on the Legal Profession (NF) and attorney, Jan Stemmet, said the impact of the amendments to the Legal Practice Act 28 of 2014 (LPA) are as follows: Section 117 of the LPA extends the life of the statutory law societies until the final transfer has taken place from the statutory law societies to the Legal Practice Council (LPC) and that is expected to be by October. He added that s 117 reads that when ch 2 comes to operation the statutory law societies will have to stop functioning. He pointed out that the NF and the statutory law societies must agree on the date of transfer, which should not be later than six months after ch 2 comes to operation.

Mr Stemmet said ch 2 establishes the LPC and that it is structured in that way because the LPA is coming into operation in three phases, namely, the establishment of the NF; then the establishment of the LPC (ch 2); and the remaining chapters will come into operation on later dates.

Mr Stemmet said the NF had tried to keep the levy to be paid by legal practitioners as low as possible. The initial plan provided that practising legal prac-



Cape Law Society Vice President, Ettienne Barnard paid a tribute to the late Chief Executive Officer of the Law Society of South Africa and Director of Legal Education and Development, Nic Swart.



Member of the National Forum on the Legal Profession and attorney, Jan Stemmett, gave an update on the Legal Practice Act's amended sections at the Cape Law Society's annual general meeting in East London.

tioners would pay a levy of R 2 500 (including VAT) and non-practising legal practitioners would pay R 500. Mr Stemmett said the NF was told that they must not expect any intervention regarding cost of the LPC from the government and the NF were compelled to revise the figures to R 3 500 for practicing legal practitioners and R 800 for non-practising legal practitioners.

Mr Stemmett said the NF had completed 80% of its recommendations and s 97(6) of the Act states that the NF must submit the draft recommendations to the Minister of Justice and Correctional Services, Michael Masutha, before ch 2 commences, to give the minister time to consider the regulations and get approval of the regulations by Parliament. He added that the Act says all the recommendations must be approved by Parliament.

Law Society of the Northern Provinces President and the Black Lawyers Association (BLA), Lutendo Sigogo, said that the LSSA called for a special council meeting in March 2017, *inter alia*, to attend to the constitution of the LSSA to cater for the transition of the LSSA into the new dispensation. He added that it was agreed that there should be a Transitional Committee, made up of three members of each of the constituent members of the LSSA, the BLA and the National Association of the Democratic Lawyers (NADEL).

Mr Sigogo said the Transitional Committee has commenced work. The LSSA will be in transition period and it should be given three years with a possibility of giving it a perpetual life span. He pointed out that the issues of governance will also be dealt with and members of the Transitional Committee will draft a pro-

posal on the new governance of the LSSA. This should happen within 12 months from the time the transition starts.

- The Legal Practice Amendment Act 16 of 2017 came into operation on 18 January. See p 3.

President's report

CLS President, Lulama Lobi, said SA lives in a time where society has reached a low level in terms of ethics. He pointed out that it is a problem which is affecting service delivery protests and great job losses in society. He added that it is a matter of great concern that the country finds itself facing one of the biggest problems, namely, corruption and unfortunately leaders in high places are implicated. Mr Lobi said in his view corruption grows in society due to a facade of invisibility and untouchability among those who are within close proximity of the seat of power.

Mr Lobi added that if one goes back to



Black Lawyers Association and outgoing President of the Law Society of the Northern Provinces, Lutendo Sigogo, discussed the Law Society of South Africa's Transitional Committee at the Cape Law Society's annual general meeting.

the golden days, when the ruling party started, when Oliver Tambo, Pixley ka Isaka Seme and former president Nelson Mandela were in charge, they knew the value of ethics and added that he raised those names because those people were lawyers. 'I dare to propose that if members of our profession participate in the public life of our country, ... that our members will contribute in re-instating the moral rectitude in our politics for the sake of our people and our country,' Mr Lobi said.

Mr Lobi also spoke about the CLS specialist committees, and said the council of the CLS was encouraged by the society's specialist committees that are functional and doing the work that they set out to do. He added that the specialist

committees are active in commenting on legislation, participating in structures formed to consult with the legal profession and also assisting members who seek clarity on matters of process and ethics. However, he pointed out that there was a request that members from NADEL and the BLA must avail themselves to serve on the specialist committees so that the demographics in those committees are properly reflected.

With regard to the LPA and the announcement of transfer of assets and staff, Mr Lobi said the interest of the CLS is to make sure that the staff goes through the transition to the LPC without suffering any prejudice. He said the CLS will do everything in its power to make sure that it indeed comes to pass. He added that the image of the legal profession has been suffering due to regular reports regarding the greed of their members when it comes to the Road Accident Fund and medical negligence matters and noted that the CLS has taken the view that those in the profession who breach the rules will be brought to book.

Biggest threat to the democracy of SA

Speaking at the CLS AGM, former ANC member of Parliament, Dr Makhosi Khoza, said the actions of some state organs and government officials in the democratic constitutional dispensation, constitute not only the injustice, but the violation of the country's collective moral signature. She added that the biggest threat to the democracy of SA is the failure of the political system to deliver human dignity. She noted that the man-



Cape Law Society President, Lulama Lobi, said the legal profession must participate in the public life of the country, to re-instate moral rectitude in the country's politics. He was speaking at the Cape Law Society's annual general meeting in East London.



Former African National Congress member, Dr Makhosi Khoza, was the guest speaker at the the Cape Law Society's annual general meeting held in November 2017.

ner in which SA is managing its political system results in a situation where it perpetuates inequality.

Dr Khoza added that she cannot shy away from saying that the failure of the prosecuting authorities to prosecute without fear, favour or prejudice is the biggest threat to the democracy of SA.

'The media reports on [a] daily basis on corruption cases, but how many of those corruption cases are actually prosecuted?' asked Dr Khoza. She said that part of the reason she had resigned from the ANC was due to her recognising that if there was to be a prosecution on the Gupta's leaked e-mails, 85% of the entire ANC leadership would be gone and over 80% of the ministers would be in jail.

Dr Khoza said corruption is not only a victimless crime but it is destabilising and destroying social institutions, such as families, that are important.

Dr Khoza said SA lives in the unprecedented age of disruption. She added that the quality of education in SA appears to be declining at an alarming speed. 'Our brightest students at universities are dropping out, others commit suicide,' she said. She pointed out that the country is in a situation where further education and training and sector educational training authorities are not producing what is required by the economy. She noted that there seems to be more focussed on tertiary education, rather than on vocational training.

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Outcomes of the National Review of the LLB programme released

The Council on Higher Education (CHE) released a report in 2017 on the outcomes of the National Review of the Bachelor of Laws LLB programme. The report stated that in 2012 the CHE and the South African Law Deans' Association (SALDA) extensively deliberated the matter of whether the CHE should undertake a National Review of the LLB programme.

The report added that ultimately, an agreement was reached that a National Review of the LLB programme would be appropriate to strengthen the quality of legal education provision across South African universities. Again, at the LLB Summit held in May 2013, SALDA and the legal professions (General Bar Council (GBC) and the Law Society of South Africa (LSSA)) reiterated the need to conduct a national review of the LLB programme (see 'LLB summit: Legal education in crisis?' 2013 (July) *DR* 8). In 2015/16, the CHE undertook a National Review of the LLB programme.

A National Review is a peer-driven exercise and focuses on the re-accreditation of existing programmes based on the CHE's programme accreditation criteria and the LLB qualification standard.

The report stated that subsequent to the initial publications of the outcomes of the LLB national review in April 2017, the CHE called for the submission of improvement plans with respect to progress made towards improving the quality of the LLB programmes at all 17 participating institutions in South Africa. Following the evaluation of the improvement plans, the revised final re-accreditation outcomes are as follows:

Final re-accreditation outcomes of the LLB National Review as of 9 November 2017:

• Accreditation confirmed (in no particular order) –

- Nelson Mandela University;
- University of KwaZulu-Natal; and
- University of Pretoria.

• Re-accreditation subject to meeting specified conditions (in no particular order) –

- University of Johannesburg;

- University of Venda;
- Rhodes University;
- University of the Western Cape;
- University of Stellenbosch;
- University of Witwatersrand;
- University of Fort Hare;
- North West University;
- University of South Africa; and
- University of the Free State.

• Notice of withdrawal of accreditation (in no particular order) –

- University of Cape Town;
- University of Limpopo; and
- University of Zululand.

• Accreditation withdrawn

- Walter Sisulu University.

Furthermore, in another statement, the CHE said it undertook a review of the LLB programme across the 17 universities, while the process that began in 2013, it culminated in a set of outcomes emanating from the review the CHE had undertaken during 2016, and communicated to the universities in April 2017. A further set of outcomes based on the improvement plans of institutions flowed from decisions by the Higher Education Quality Committee (HEQC) on 9 November 2017.

The statement added that during the process of communicating the outcomes to the institutions, considerable media interest had been ignited in the matter and led to the current tumult, characterised by wanton attacks on the CHE and its quality assurance processes in instances. The CHE said the objective of the statement was to provide a factual basis for reflection and comment on the matter.

The statement stated that the CHE is the Quality Council for higher education in South Africa (SA), deriving its mandate from the Higher Education Act 101 of 1997 and the National Qualifications Framework Act 67 of 2008. While it has a range of functions, the central one is that of quality assurance. In practice, this entails accreditation of all programmes offered at both public and private higher education institutions, quality audits of institutions and national reviews of programmes across the sector.

The statement further stated that quality assurance is vitally important to ensure that students' interests are protected, that they graduate with the required

compendium of skills and capabilities, and that their qualifications have worth and secure them employment, and that the public receives value in terms of its own aspirations and priorities and expectations from higher education institutions.

The statement added that for quality assurance processes to be credible, they must be demonstrably even-handed and fair, and conducted without fear or favour, all institutions generally accept the role and value of sectoral level quality assurance processes and the CHE's quality assurance processes are dependent on peer expertise (mostly drawn from the universities themselves) to conduct evaluations, as peer review is an internationally entrenched mechanism for upholding quality standards in academia. If an institution's programme is found to have shortcomings, it is as a result of a rigorous peer review system adopted by the CHE.

The statement stated that feedback to institutions is critical in identifying weaknesses in programmes and then ensuring that action is taken to improve a programme. In such cases, a programme is given accreditation with conditions – either short or long term. A further review will be undertaken after six months. If it is found that the institution has not addressed the improvement imperatives, the programme will be put on notice of withdrawal and given a further six months to effect the required remedial action.

The statement further stated that should the institution fail to effect such action during the period given, accreditation will be withdrawn, which means that the institution cannot offer the programme anymore and will have to re-apply for accreditation from scratch with a new submission.

The statement said the next step, after the GCB and LSSA reiterated the need for a review, was the development of a national qualification standard for the LLB and this was done by identifying a group of highly experienced and accomplished law academics and experts who drafted the standard for the LLB in wide consultation with the universities and the professions so that it could be used as a credible measure.

The statement further stated that once finalised, the LLB programmes at all 17

institutions offering them, were evaluated by peers from the legal academic community, overseen by the CHE and none of the 17 LLB programmes on offer at South African Higher Education Institutions received full accreditation from the review process, which was concluded in March 2017.

The statement stated that each and every one of the 17 institutions had some improvements to implement to a lesser or greater degree, and were given until 6 October 2017 to attend to them. A selection of the issues identified relate to curriculum design and the compendium of skills and capabilities intended to be developed in the programme, which did not measure up to the standard in some programmes.

The statement added that others were not satisfactory in their horizontal and vertical progression, some offering the programme did not have adequate staffing (or staff of appropriate seniority), sufficient learning resources, or suitable infrastructure and central to the standard against which the individual programmes were evaluated was the ideal of 'transformative constitutionalism', stemming from the premise that legal education, as a public good, should be responsive to the needs of the economy, the legal profession and broader society.

The statement said that from a transformative standpoint, a programme is required to demonstrate how it cultivates the capacity, agency and accountability of the legal practitioner in shaping the legal system, and promoting the social justice goals of fairness, legitimacy and equity in the legal system. All programmes had to effect improvements following the review process and each institution was given a detailed report by the CHE on the shortcomings in their improvement plans that needed attention.

The statement further added that those with a few conditions to meet were re-accredited subject to those conditions being met within the specified period. Those programmes with serious shortcomings were immediately placed on notice of withdrawal and also given a specified time period within which to implement the short term remedies, failing which accreditation would be withdrawn as the next step.

The statement added that longer term remedies would be monitored by the HEQC into the future and if an institution is now put on notice of withdrawal (after having been given conditional accreditation in the March 2017 process), it would signify that it has not demonstrably attended to the short term improvements required. The institution is now given a further six months (until May 2018) to address these.

The statement further added that failure to do so may result in the withdrawal of accreditation and any institu-

tion in this position would be advised to give careful and due attention to the required actions in order to avoid this consequence. The CHE noted that it undertakes its functions in a professional, rigorous and fair manner in both public and private higher education as required by the legislation.

UCT Law Faculty on the National Review

Meanwhile, the University of Cape Town (UCT) Law Faculty released a press statement following the release of the outcomes of the LLB National Review. UCT said it is challenging the CHE report and that it is confident of retaining its LLB accreditation. The statement stated that the UCT Law Faculty is surprised and concerned by the outcome of the National Review of the LLB programme.

UCT pointed out that as a global top 100 law school and as the top law school in SA, it notes that its graduates are in high demand from law firms across the country, and the findings are at odds with the performance of the graduates. This long-standing reputation stands in stark contrast with this first ever accreditation process of law degrees by the CHE, the statement added.

UCT further noted with concern that as the process of the review by CHE is not yet completed, releasing of this information needlessly places the institution in a bad light, which could have been managed with greater sensitivity in these troubled times. The statement added that UCT's Faculty of Law has until May 2018 to respond to the CHE's findings.

The statement said the UCT's faculty is confident that it will be able to respond to the concerns raised, and retain its accreditation and continue to improve on the excellent programmes offered within the faculty, including the LLB programme. The statement added that UCT will be submitting its revised improvement plan and take note of the CHE's particular focus on excellence, ethics and equity, and the critical need for transformation across the industry.

The statement further stated that all issues that the faculty has been deeply immersed in and almost took for granted, it suspects that its initial submission may not necessarily have captured the activities, discussions and reflections. The statement added that UCT will address the concerns raised in the report and look forward to further engage the concerns to continue improving on its excellent LLB programme.

Unisa on the National Review

The University of South Africa (Unisa) is celebrating after it successfully man-

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aged to overturn the findings of the CHE on the matter regarding the withdrawal of the LLB qualification. Deputy Executive Dean of the College of Law at Unisa, Professor Melodie Labuschaigne released a turn-around strategy for the university's LLB.

The report stated that Unisa's College of Law was subsequently requested by the HEQC to put measures in place to address the reasons, concerns and recommendations set out in the Final Review Report. The HEQC further required submission of an Improvement Plan by 6 October 2017 identifying clear targets, resource allocations and milestones to be achieved within a specified timeframe.

The report added that the College of Law submitted its Improvement Plan on the 6 October 2017 and was informed of its successful accreditation on 18 October 2017 and noted that the success for the accreditation was the result of the joint efforts of the entire College of Law. The report added that Unisa's College of Law under the leadership of the then Executive Dean, Professor Rushiella Songca, established a team to manage the process of constructing an all-inclusive improvement plan with the administrative assistance of an LLB Project Manager, Professor Michelle G Karels and Prof Labuschaigne.

LSSA on the National Review of LLB

The LSSA released a media statement, which stated that it took serious issue with statements made by the Higher Education Transformation Network (HETN) that the LSSA pressurised the CHE to withdraw the accreditation of the law faculty at Walter Sisulu University to present the LLB degree. 'Nothing could be further from the truth,' said LSSA Co-chairpersons Walid Brown and David Bekker. 'In fact, the LSSA approached the CHE earlier this year with a request to participate in the process and understand the accreditation system since the attorneys' profession receives 60% of the LLB graduates into its ranks. We, therefore, have a very legitimate interest in developments relating to the LLB degree,' they added.

In the statement, the LSSA said it is also extremely concerned that a university law faculty can be discredited without conscious attempts being made to support the law faculty and assist it to achieve satisfactory standards. 'This disempowers many potential graduates from embarking on the profession of their choice at a law faculty that is accessible to them. Invariably these will be the poorest and most disadvantaged students who are generally not in a position

to attend another university. We need to strengthen opportunities for education, not reduce them,' said Mr Brown and Mr Bekker.

The statement further stated that the LSSA will renew its attempts to engage with the CHE in this regard and through the Attorneys Fidelity Fund (AFF), the attorneys' profession provides bursaries mainly to previously disadvantaged LLB students and also provides grants to university law clinics, which are generally linked to the law faculties. The statement added that between 2014 and 2017 the AFF paid R 21,2 million in bursaries and R 4,4 million in grants to university law clinics. For 2018 the AFF has earmarked R 1 373 880 for university law clinics and R 6 479 920 for LLB bursaries.

For more articles pertaining to the CHE National Review see:

- CHE release full LLB review (2017 (June) DR 3).
- LSSA calls on CHE to consult legal profession on LLB degree issues (2017 (June) DR 19).
- Withdrawal of accreditation-response from universities (2017 (July) DR 4).

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Specialised family courts can reduce stress and trauma to child witnesses

Clarks Attorneys held its fourth annual Family Law Conference in September 2017 in Sandton. Various speakers specialising in many fields of family law spoke at the conference. In his keynote address, Gauteng Division Deputy Judge President Aubrey Ledwaba, said that in his view he does not believe that family courts should be kept in a separate building away from the existing court structures. Judge Ledwaba said in 1996 specialised family courts were proposed in a draft policy development and it was planned that the specialised family law courts would deal with all family matters involving children, families, divorce, domestic violence and maintenance matters.

Judge Ledwaba said specialised family courts were housed in a different building to make it user-friendly to the people who would be attending the court.



Gauteng Division Deputy Judge President Aubrey Ledwaba, gave the keynote address at the Clarks Attorneys fourth annual Family Law Conference in September 2017, in Sandton.

He added that such courts were made to have user-friendly court procedures to avoid rigorous cross-examinations to the parties involved. However, he noted that the court should not be separated from the existing structures, but instead the country should utilise resources that are available to improve and make family courts work in the interest of children.

Judge Ledwaba pointed out that children are the most vulnerable members of society and play a major role in family law disputes. He said that in a specialised family court environment, the focus is more on the child than any other person, which is beneficial to the child. He added that specialised courts can reduce stress and trauma to a child witness or victim and address special needs for families. He said in transferring the adjudication of composed legal issues or factual dispute of High Court to be adjudicated in specialised family court several desirable objectives are attained.

Victimisation of the victim

Researcher and Executive Director of Lawyers Against Abuse (LvA), in Johannesburg, Lindsay Henson, said gender violence is a problem and South Africa (SA) has one of the highest prevalence rates in the world. She added that this rate often multiplies in poor marginalised communities, such as the Diepsloot community. She pointed out that research conducted by the University of the Witwatersrand, found that 56% of men surveyed had admitted to committing some form of physical or sexual violence against a woman between the period of September 2016 to September 2017. One-third used both physical and sexual violence and 60% participated in multiple instances of violence.

Ms Henson added that gender violence rate in Diepsloot, is more than double than in other parts of the country. She said the LvA found out that one reason for the continued violence in SA, is the failure of the criminal justice system on cases of gender based violence. She pointed out that in the environment such as Diepsloot, perpetrators of violence act with impunity and rarely have any kind of accountability for their actions, despite SA having progressive centric laws for the victims of gender based violence. She noted that the LvA believes that there is a gap in the implementation of those laws because of the way victims of violence experience justice is very different in the ways that the laws are written, especially if the victim is a poor black woman.

Ms Henson said it is well-documented that victims routinely experience secondary victimisation when seeking justice, including discriminatory police attitudes, victim blaming and traumatic court room environment for 18% court cases that get to trial. Ms Henson pointed out that LvA by accompanying their clients through the legal integration process, they were able to observe first hand frequent misapplication of the law and poor treatment of the victims by state servants. For example, she noted that domestic gender based violence victims are routinely turned away by police when they want to open a case; or are sent to apply for a protection order; or they are referred to mediation; or they are told that their protection order has 'expired'.

Ms Henson added that despite the beautiful legislation SA has, there is a lack of a support system for the victims who are expected to navigate complex and technical legal processes, while facing institutional challenges. She noted that in most cases, victims do not have anyone they can turn to when the system – that is supposed to protect them – fails them. Furthermore, she said the legislative framework fails to take into account the trauma that is associated with vio-



Researcher and Executive Director of Lawyers Against Abuse, Lindsay Henson, said gender violence in South Africa has one of the highest prevalence rates in the world.

lence, the negative impact of the psychological wellbeing of the victims and to create meaningful access to justice.

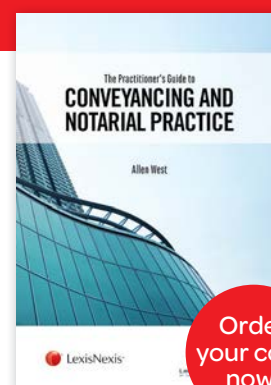
Ms Henson said the LvA believes that legal and support services that are professional and tailored to the specific needs of victims of gender based violence are critical to realise the intention of the legislature. However, she pointed out that very few organisations in SA are still providing these services. She noted that LvA was founded in late 2011 in order to fill the gap, to provide highly specialised and integrated legal and psychosocial support services to gender based violence victims and facilitate structural change through strategic engagements with state actors and the communities they serve.

Crossing the bridge between the law and practice in the Children's Court

Presiding officer of the Children's Court in Cape Town, Herman van der Merwe, said that presiding officer in children's court have to find answers to a range of problems. He added that s 42 of the Children's Act 38 of 2005 sets out to establish that *sui generis* is no longer new, but still a strange phenomenon and envisions, *inter alia*, that matters 'be held in a room which is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court'. He spoke about some key aspects that presiding officers deal with when presiding at children's court.

Mr van der Merwe said that principles and atmosphere are key. He pointed out that the Children's Act is based on prin-

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ciples and guidelines, which are based on yet another set of principles and guidelines, to which the Constitution adds certain international treaties and to which SA is a co-signatory. He added that some of these principles are s 60(3) which states '[c]hildren's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.' He noted that s 6(4) in any matter concerning a child is an approach, which is conducive to conciliation and problem-solving and should be followed. A confrontational approach should be avoided at all costs.

Mr van der Merwe said that the problem in these informal and problem-solving sessions is that inevitably a lot of time is wasted. Such as when telling a party that something is irrelevant, or that a certain document they wish to hand in is not received. He pointed out that presiding officers of the children's court should channel all these aspects into matters placed before them.

Mr van der Merwe also mentioned that the other key is how to listen to a child. He said that s 10 of the Children's Act stated that every child of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. He added that s 61 elaborated on this aspect stating 'a child [must be allowed] to express a view and preference in the matter'. He noted that legal practitioners often lament 'It is time to hear the voice of the child,' Mr van der Merwe said this is a good slogan, but a good slogan is not always good in law.

Mr van der Merwe pointed out that in practice it is a bit trickier than it sounds. 'We distinguish between direct (where the court interviews and/or observes the child), and direct child participation, that is where we rely on the opinion of an expert, typically a social worker, psychologist or the family advocate,' Mr van der Merwe said. He added that in regard of this provision legal practitioners should look at s 29(5)(a) and s 62 of the Children's Act.

A review on lobolo and the Recognition of Customary Marriages Act

Senior Associate at Clarks Attorneys, Sithembiso Mabaso, said in terms of the Recognition of Customary Marriages Act 120 of 1998 (the Act), *lobolo* is defined as property in cash or kind. He added that the Act goes on to list other names in terms of the concept known in different languages or different indigenous



Senior Associate at Clarks Attorneys, Sithembiso Mabaso, discussed lobolo at the firm's conference.

languages. He pointed out that *lobolo* is cash or kind that a prospective husband or head of his family undertakes to give the family of the prospective wife's family in consideration of the customary marriage.

Mr Mabaso added that it is a concept that is widely accepted as the cornerstone of customary marriage and a major factor that is distinguished between civil and customary marriage. He said the Act came into effect in 2000 and it was a brave attempt by the Legislature to regulate customary marriages. He noted that the Act was long overdue and necessary. However, Mr Mabaso said that there are some issues relating to *lobolo* and that the Recognition of Customary Marriages Act has had a dwarfing effect on the importance of *lobolo*.

Mr Mabaso said if one looks at the definition of *lobolo* in the Act, it does not properly capture and explain the concept of *lobolo*. He added that the other issue is that in the entire Act, *lobolo* is only referred to once. He said if *lobolo* is the cornerstone of customary marriages, here is legislation apparently promulgated to give effect to customary marriages that the only cornerstone of the concept referred to in the Act is in the definition.

Mr Mabaso said the definition explains what is given in respect of *lobolo*, but added that the biggest problem he had with the definition is that it fails to understand that when people speak of *lobolo*, it is actually a transaction. He noted that the Act does not recognise that there ought to be some sort of transaction be it cash or in kind. He pointed out that generally the currency used at a *lobolo* negotiation is cattle, although the transaction maybe be in cash, but when negotiators are sitting at a table the prospective wife's family will ask for a certain number of cattle.

Mr Mabaso pointed out that the problem is the definition of the Act does not appreciate or state that there ought to be

a transaction and this follows onto other aspects of the Act. He added that the marriage must have been negotiated or celebrated in accordance to customary law. He said this highlights the problem caused by the inadequacy of the definition. Mr Mabaso pointed out that *lobolo* is a concept that is deeply rooted in cultural beliefs. However, he said over time the courts have grappled with the *lobolo* matter and in several judgments judges have said that payment of *lobolo* is a requirement in customary law. He added that the debate of whether *lobolo* is a requirement must end, but the question that should be asked is: What happens to *lobolo* when a divorce occurs?

Socio-Economic Rights Institute of South Africa Attorney, Thulani Nkosi, noted *lobolo* can be claimed back, but asked from whom will it be claimed back? He said he found that in the old authorities, which came from the traditional courts, the courts made clear that you can never have a customary marriage without either the payment of *lobolo* or at least the tender of *lobolo*. He added that traditional courts further went on to say that if a marriage is dissolved, the word used would not be 'divorce' but 'dissolution', for example, if there is infidelity on the part of each spouse, the family mechanism that deals with the resolution of family disputes were unable to make parties reconcile.

Mr Nkosi said *lobolo* is rendered in respect of a wife but it does not go directly to her, *lobolo* normally goes to the wife's family. He asked that if the wife decided to dissolve the customary marriage, then against whom can the *lobolo* be claimed back? He pointed out that the problem is that the Act does not list *lobolo*, but does define it in a difficult way. He noted that *lobolo* is so important



Socio-Economic Rights Institute of South Africa attorney, Thulani Nkosi, discussed whether lobolo can be claimed back when divorce occurs.

in an African sense, that even those who intend to partake in a civil marriage feel compelled to pay *lobolo*.

Mr Nkosi added that although *lobolo* is not specified there are instances where a dispute arises, where the spouse says 'I have paid *lobolo*', therefore, a customary marriage existed between that person and their spouse. He said further questions that must be asked was the underlying reason for that person to do so? He

pointed out that *lobolo* is important, but said *lobolo* alone does not make a customary marriage even though the Act gives an impression that a customary marriage is a one day event.

Mr Nkosi said that is not the case, because in a customary marriage comes a chain of events that must take place and *lobolo* is a link in that chain of events. He added that if that is not recognised, there is going to be difficulties where people

just do not know what the substance of customary marriage is. He pointed out that without *lobolo*, even though a couple have gone and seen a marriage officer, in the eyes of the community all the couple is doing is cohabiting.

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Deputy Minister of the Department of Justice and Constitutional Development, John Jeffery, said laws are only as good as the people who implement them. He was briefing media in Pretoria about the National Forum on the Implementation of the Sexual Offences Act in November 2017. He added that Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 relies heavily on various role-players, at different stages, within the criminal justice system to make such implementation effective.

Mr Jeffery noted that many different people play different roles at various stages in the process, everyone from the police who register reported sexual offences cases, to the investigation of cases by detectives, to the doctors and nurses who collect forensic evidence and medically treat sexual violence victims, to civil society organisations providing victim support services, and to the prosecutors in the courts, all these role-players are crucial. 'It is, therefore, imperative that we hear from them how the Act is working, what the shortcomings and challenges are, and how to address these,' Mr Jeffery added.

Mr Jeffery pointed out that the Act was enacted in 2007 in response to the view that South Africa's (SA) common and statutory law did not deal adequately or effectively with many aspects of the commission and adjudication of sexual offences. He said the Act changed many things, it reformed and codified the law relating to sexual offences and expanded the definition of rape to include all non-consensual sexual penetration. The Act also equalised the age of consent for females and males to 16 years of age. Mr Jeffery added that the Act sought to provide a uniform and coordinated approach to the implementation of laws relating to sexual offences so as to provide adequate and effective protection to the victims of sexual offences and thus preventing secondary victimisation and traumatisation.

Mr Jeffery noted that the Act provides for various services to the victims of sexual offences, including free post-exposure prophylaxis for HIV, and the ability to obtain a court order to compel



HIV testing of the alleged offender. He said in terms of the Act, national instructions for the South African Police Service (SAPS), as well as national directives for the National Prosecuting Authority (NPA) have been implemented for the practical management of sexual offences cases. He added that the Act came into operation in December 2007 and that now is an opportune time, a decade later, to reflect on the extent to which the Act has succeeded in achieving its objectives.

Mr Jeffery said it is for this reason that the Department of Justice and Constitutional Development, in partnership with the NPA, conducted a two day National Forum on the implementation of the Act at Emperors Palace in Kempton Park on 30 and 31 October 2017. He added that the forum was attended by approximately 250 participants, including 50

organisations from civil society, regional magistrates and officials from the relevant departments that play an important role in the implementation of the Act. Government departments, included, the SAPS, the NPA, the departments of Health, Social Development and Women.

Mr Jeffery said the purpose of the National Forum was to critically evaluate the implementation and impact of the Act since it came into operation, and to identify the challenges that continue to compromise its successful implementation. The focus of the National Forum was on the different phases of the criminal justice system in relation to a sexual offences case:

- reporting/investigation;
- medico-legal/support services to the victims; and
- court processes (prosecution and adjudication of sexual offences).

Mr Jeffery added that stakeholders were requested to identify and propose innovative solutions to identified challenges that would not require additional funding, given current economic realities. The outcomes of the forum were as follows:

- It was noted by stakeholders that the criminal justice system is complex, and involves many role-players and several interlinking stages and factors influencing the outcome of cases. Each role-player, either independently and/or collectively, will have a specific impact on how the people, in the criminal justice system, respond to these matters.
- The National Forum resolved that continuous stakeholder cooperation is paramount in the management of sexual offences. Although performance management is essential, the crucial question is whether the current performance indicators used by government role-players are appropriate and relevant for sexual offences cases. In other words, are the different performance indicators used by the SAPS, prosecutors and health ser-

Sexual Offences Act reviewed

vices providers reflecting an accurate and trustworthy picture of the impact of the implementation of the Act; and are the strategic and operational plans of the different departments complementing each other and working towards common objectives?

- Although there was some agreement that the current legislative framework is sufficient to provide for effective implementation of the Act, the following legislative provisions need to be evaluated and possibly amended, *inter alia*:
 - the competency assessment of children to testify in court, particularly s 164 of the Criminal Procedure Act 51 of 1977; and
 - extending the state's right to appeal cases on matters of fact (currently the state may only appeal cases on a matter of law).
- Stakeholders highlighted the absence of professional skills and sensitive attitudes towards victims on the part of some government officials tasked with managing sexual offences. This highlights the need for ongoing social context training for all role-players.

- In certain instances there is a lack of specific legal knowledge relating to sexual offences laws and procedures. In addition, basic skills in statement-taking and trial advocacy were identified as lacking, indicating the need for ongoing and continuous skills development, including training and mentoring.
- There is a need for adequate protocols and its related application among stakeholders at all levels.
- The development of minimum standards to ensure improved service delivery by all stakeholders is needed.
- Stakeholder engagement at all fora (local, provincial and national) is needed to create a platform to discuss challenges and find solutions holistically.
- The need for specialisation within the criminal justice system when dealing with sexual offences was reiterated and encouraged by all stakeholders. Emphasis should be placed on a victim-centred approach in supporting the seven rights contained in the Victims of Crime Charter, reflecting the rights of victims in the Bill of Rights.

Mr Jeffery said as a way forward the

resolutions of the National Forum are to be included in a National Action Plan, which will be monitored by the National Forum Steering Committee. He added that the Steering Committee will have representatives from all relevant government departments, as well as civil society. 'The National Action Plan aims to address and seek to eliminate the challenges to the implementation of the Act. The recently released crime stats indicate that there were 49 660 reported sexual offences in SA in 2016/17,' said Mr Jeffery. He added that the reported figure belies the true extent of sexual offences, with the real number estimated to be much higher. 'Suffice to say that the prevalence of sexual offences in SA remains unacceptably high. We owe it to the victims of sexual offences to make sure the Act works,' he said.

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Free State Division mourns Justice van Coller

The Judge President of the Free State Division of the High Court, Judge President Mahube Molemela, including the judges and support staff of the division have conveyed their deepest condolences to the family of retired Justice Dries van Coller. The statement released by the Free State Division stated that Justice van Coller passed away after a short illness. Justice van Coller obtained BA and

LLB degrees from the University of the Free State. He practiced as an advocate before he was appointed as a judge in Mthatha in 1980.

Justice van Coller was later transferred to the Free State Division in 1983. He acted as a Justice of the Supreme Court of Appeal on several occasions and retired from active service in 2003. The statement added that Justice van Coller was a humble, kind, conscientious person and was an asset to the legal profession. He

made a significant contribution to the rule of law in South Africa.

Justice van Coller passed away at the age of 84, he was buried in Bloemfontein in November 2017. He is survived by his wife, four children and seven grandchildren.

Kgomotso Ramotsho,
Kgomotso@derebus.org.za

Professional examination dates for 2018

Admission examination:

- 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.

Compiled by Barbara Whittle, Communication Manager, Law Society of South Africa
e-mail: barbara@lssa.org.za

LSSA implores ruling party to respect the rule of law and the judiciary

Following the unwarranted attacks on the judiciary, as a result of the judgment handed down by the Gauteng Division of the High Court in Pretoria in the matter between *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others*; *Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* (GP) (unreported case no 62470/2015, 8-12-2017), the LSSA expressed its serious concern in a press release.

On behalf of the attorneys' profession LSSA Co-chairpersons, Walid Brown and David Bekker, implored the ruling party, its leadership and its structures, to take urgent steps to:

- openly support the judiciary, and re-

spect the courts and their judgments;

- decisively rebuke the African National Congress Youth League and others who unjustifiably attack and criticise the judiciary without proper grounds to do so; including personal attacks on judges and unwarranted accusations of overreaching and partiality with ludicrous threats of impeachment;

- restore the status and dignity of the National Prosecuting Authority, so that it can serve as an independent and trusted light in the search for truth and justice for all persons in our country;

- level with the people of South Africa as to the true intentions behind state of emergency regulations, a media tribunal and our country's withdrawal from the International Criminal Court;

- openly support and strengthen the Chapter 9 institutions;

- show leadership; take responsibility and restore accountability;

- deal decisively with the state of capture that our country has been mired in and, which has affected our economy, as well as our standing and credibility in the region, on our continent and internationally, by implementing the remedial action of the Public Protector in the *State of Capture* report, which has been declared to be binding by the Gauteng Division;

- ensure that any state representative immediately complies with a court order and only wastes taxpayers' funds on appeals when there are overwhelming legal merits to such an appeal (to be certified by an independent senior attorney or counsel); and

- guarantee that the Constitution, rule of law and our constitutional democracy are secure.

Chinese delegation meets with LSSA

At the request of Deputy Minister John Jeffery, the Law Society of South Africa (LSSA) hosted a delegation from the People's Republic of China on 4 December 2017. The delegation was led by Zhao Dacheng, Vice Minister from the Ministry of Justice. The Chinese delegation included Director-General and Deputy Director-General of the Department of International Cooperation, Ministry of Justice; the Director-General, Department of Legal Publicity, Ministry of Justice; the Deputy Director, General Office, Ministry of Justice; the Director-General, Justice Department of Hainan Province; as well as Xie Yancun and Zhang Siqi from the Chinese embassy in Pretoria and a representative of the international affairs section of the South African Justice and Constitutional Affairs Department.

LSSA Management Committee members, Nkosana Mvundlela and Jan van Rensburg, represented the Co-chairpersons at the meeting. Information was shared on the profession in both countries, including changes to be brought about by the Legal Practice Act 28 of 2014 in South Africa this year, the rule



Vice Minister from the Ministry of Justice of the People's Republic of China, Zhao Dacheng, (left), exchanges gifts with LSSA Management Committee members Nkosana Mvundlela and Jan van Rensburg during a meeting in Pretoria in December 2017.

of law and the importance of the independence of the profession.

The LSSA adds its voice to that of its constituent members – the Black Lawyers Association, the National Association of Democratic Lawyers and the Cape Law Society – as well as all other legal practitioners who have committed themselves

to protecting the Constitution and the rule of law, as well as the independence of the legal profession and the judiciary.

The LSSA will be co-hosting the BRICS Legal Forum in South Africa during 2018, which will be attended by representatives of the legal profession from Brazil, Russia, India, China and South Africa.

LSSA saddened at death of former Co-chairperson, Julian von Klemperer

The Law Society of South Africa (LSSA) expressed its sadness in a press release at the untimely passing of Pietermaritzburg attorney and former LSSA Co-chairperson, Julian von Klemperer, on 9 January at the age of 71.

'Julian played a crucial and prominent role in the discussions between 1996 and 1998, which brought the Black Lawyers Association and the National Association of Democratic Lawyers, together with the four provincial law societies, to embark on the transformation of the profession. He was one of the signatories, on behalf of the then Natal Law Society, of which he was president, to the LSSA's constitution and was present at the launch of the LSSA in Parliament in March 1998. His commitment to transformation was also evidenced by his inclusion in the delegation representing the attorneys' profession before the Truth and Reconciliation Commission in October 1997,' said LSSA Co-chairpersons David Bekker and Walid Brown.

Mr von Klemperer served as Co-chairperson of the LSSA from 1999 to 2000 together with the late Judge Jake Moloi, who passed away in July 2017. He represented the attorneys' profession on the Judicial Service Commission from 2003 to 2009.

Mr von Klemperer was admitted as an attorney on 22 January 1969 and practised at his firm, Von Klemperer & Davis,



Julian von Klemperer (second from left) representing the KwaZulu-Natal Law Society at the signing of the constitution of the Law Society of South Africa in March 1998, together with John Anderson (Law Society of the Free State), Piet Langenhoven (Law Society of the Northern Provinces), Silas Nkanunu (National Association of Democratic Lawyers), Jake Moloi (Black Lawyers Association) and Christoff Pauw (Cape Law Society).

until 1994 and then as Von Klemperers Attorneys until his firm amalgamated with Shephstone & Wylie, where he was a

consultant until his death. He served on the then Natal Law Society council, and was its president from 1997 to 1999.

Namibian Law Society Director heads IILACE

The President of the International Institute of Law Association Chief Executives (IILACE), Cord Brügmann, announced that effective 1 February, Director of the Law Society of Namibia, Retha Steinmann, will become President of IILACE.

Ms Steinmann has served as the Vice President of IILACE for the past year and a half and has served on the executive from 2008. Ms Steinmann is the only African serving on the committee.

IILACE is an association of Chief Executive Officers (CEOs) of law societies and Bar associations from around the world. It is a unique forum where CEOs exchange views and information of common interest to the legal profession, locally, regionally and internationally. It supports the role of law societies and Bar associations and promotes the rule of law.



The Executive Committee of International Institute of Law Association Chief Executives (IILACE) from left: IILACE Secretary General, John Hoyles; Association of Danish Law Firms Managing Director, Paul Mollerup; New Zealand Law Society Executive Director, Christine Grice; Washington State Bar Association Executive Director and Vice-President of IILACE, Paula Littlewood; Director of the Law Society of Namibia and President of IILACE, Retha Steinmann; Law Society of Hong Kong's Secretary-General and Secretary/Treasurer of IILACE, Heidi Chu; Outgoing President of IILACE, Cord Brügmann and Federation of Law Societies of Canada Chief Executive Officer, Jonathan Herman.

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

Clyde & Co has three new appointments.



Raizel Davidow has been appointed as a partner in Johannesburg.



Corneli Basson has been appointed as a partner in Cape Town.



Mpumelelo Ngcobo has been appointed as a senior associate in Johannesburg.

Gildenhuys Malatji in Pretoria has four new appointments and one promotion.



Itumeleng Ledwaba has been appointed as an associate in the commercial litigation and insurance law department.



Kagiso Mabotja has been appointed as an associate in the corporate and commercial law department.



Tim Vlok has been promoted as a director in the general litigation department.



Johanna Nashitani has been appointed as an associate in the general litigation department.



Molatelo Mathikithela has been appointed as an associate in the property law and conveyancing department.



Hogan Lovells in Johannesburg has appointed Graham Openshaw as an exchange control consultant in the tax department.

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By the
Practitioner
Support Unit of
the Attorneys
Fidelity Fund

The ABC of trust audits

The funds in an attorney's trust account are susceptible to theft, misuse and/or fraudulent activities. Due to these inherent risks, it is essential that a trust audit or inspection is carried out. The outcome of any trust audit or inspection is either a qualified or unqualified report. The Rules for the Attorneys' Profession (the Rules) in South Africa (SA) prescribe various audits to be conducted as follows:

Opening audit reports (r 35.20)

'A firm which commences practice for the first time shall, within six months of so commencing practice, furnish the Council with a report substantially in the form of the Fourth Schedule to the rules (or in such other form as the Council may determine after consultation with the Independent Regulatory Board for auditors) covering the first four months of that firm's practice.'

Annual audit reports (r 35.23)

'Every auditor or inspector who has accepted an appointment in terms of rule 35.19 shall:

35.23.1 within six months of the annual closing of the accounting records of the firm concerned or at such other times as the Council may require and subject to any conditions that the Council may impose, furnish the Council with a report which shall be in the form of the Fourth Schedule to these rules or in such other form as the Council may determine after consultation with the Independent Regulatory Board for Auditors.'

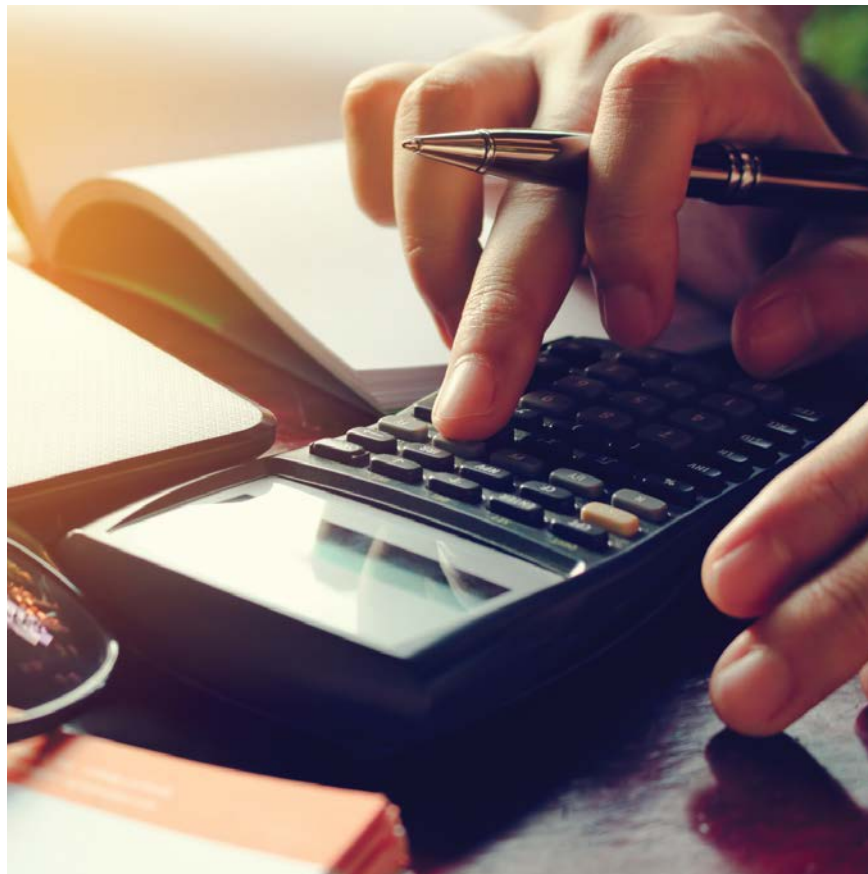
Closing audit reports (r 35.31)

'A member shall be required to submit, within three months of the date that such member ceases to practise:

35.31.1 an audit or inspector's report for any period for which an audit or review is outstanding, up to date of closure of the trust banking account;

35.31.2 a final list of trust creditors as at the date on which the member ceased to practise;

35.31.3 confirmation from the auditor or inspector that all trust creditors have been paid;



35.31.4 in the event of trust creditors being taken over by another firm, a list of trust creditors, signed by the member, after the auditor or inspector confirms that that list is correct, and signed by or on behalf of the partners of the firm taking over the trust creditors, confirming that they accept liability for claims of the trust creditors listed and that they have received the funds;

35.31.5 a certificate of nil balance from the member's bank confirming that the trust banking account was closed.'

This article focuses on how attorney firms can best prepare for their opening, annual and closing audits or inspections. Six months is a relatively limited time from opening a practice, and running it in full compliance with the Attorneys Act 53 of 1979 (the Act) and the Rules. Due to this potential steep curve, the Attorneys Fidelity Fund (AFF) discuss a few pointers below on how to maintain your trust accounting environment, and thus be best prepared for your trust audits or inspections:

- Register with the Financial Intelligence Centre (FIC), and keep proof of registration. All legal firms, through the directors, partners, professional assistants and consultants are regarded as accountable institutions. The purpose of the Financial Intelligence Centre Act 38 of 2001 (FICA) is to combat money laundering activities by, among other things, imposing certain duties on institutions that may be used for money laundering purposes. For further information, visit the FIC website on www.fic.gov.za.
- Ensure that trust funds and business funds are clearly separated in the accounting records.
- Ensure compilation of a list of trust creditors, and balancing to the trust bank account on a monthly basis. A firm is deemed to have complied with r 35.9 if the accounting records are written up by the last day of the following month. Other accounting records to be compiled on a monthly basis are:
 - **Trial balance** - this is a control account. It is a statement of all debits and

credits as at a given date. All trust creditor balances can be listed individually or collectively on the credit side against the cash book balance on the debit side. Any disparities between the debit and credit columns indicate error.

– **Cash book** – this is a bookkeeping record (electronic or otherwise) in which all trust receipts and payments are collectively recorded over the period for which reporting is done. It reflects the opening balance, the transactions (receipts and payments) over the period of reporting, and the closing balance. Payments are recorded on the credit side and receipts on the debit side. The cash book is a mirror of the trust banking account, and the differences between the two are made up by timing differences on transactions. The cashbook is a feeder to the trial balance, and also used for bank reconciliation statements.

– **Bank reconciliation statement** – this is a statement that reconciles the cashbook to the bank balance as it reflects in the trust bank account and explains the difference on a specified date between the bank balance shown on the trust bank statement and the corresponding amount reflecting in the cash book. The bank reconciliation statement assists with identification of irregularities and adds value if done on a monthly basis, or an even shorter periods, in order to follow up timely on any possible and/or identified irregularities.

– **Individual trust creditor ledger** – each entry on the cashbook should be posted to a specific trust creditor's ledger. The total of all the trust creditors' ledgers should equal your cashbook balance. This should give you peace of mind that your trust account is in balance. Should you have opened investment accounts in terms of s 78(2A) of the Act, individual creditors ledgers for those accounts should also be maintained, as they also form part of the trust.

No trust ledger, or any of the trust creditors' accounts should have a debit balance. A debit balance suggests that a payment was made out of an account that did not have sufficient funds. This in turn suggests that another trust creditor's money was in fact used to effect the payment for another trust creditor.

– **Transfer journals and schedule** – transfer journals reflect all transfers for fees earned by the firm from the trust account to the business account. These can be reflected as a total of the amount transferred, which could be made up of various amounts from a number of trust creditors where fees are due and payable. Transfer schedule documents the details of the amounts involved, specifying the various amounts that make up the total transferred from trust to business.

– **Suspense account** – a suspense account records all receipts for money that cannot be allocated, perhaps be-

cause the owners of the funds cannot be identified. This account is susceptible to fraud and should be closely monitored. No payments should be effected out of a suspense account. Should funds that were allocated to suspense be suddenly identified, they should first be reallocated to the rightful trust creditor before any payments can be made. Payments can then be effected out of the trust creditor's account specifically identified.

– **Journal book** – this records all journals passed between two or more trust creditors. Journals should always be checked and approved by a senior person in the firm. Trust journals should occur for related matters, and should be authorised by the trust creditor concerned. For every debit reflecting in a journal, there should be a corresponding credit or credits.

A firm should maintain all supporting documents giving rise to the accounting records listed above. The accounting documents refer to documents like paid cheques returned by the banks, receipt books, deposit books, EFT printouts reflecting the actual account number that was paid, payment requisitions, mandates given by clients. It is important that a firm keeps the original bank statements received from the bank, and not the bank statements printed from the Internet.

- A firm should, within a reasonable time after performance or termination of a mandate, account to its client in writing, and retain a copy of such accounting in the client file. Such accounting shall include, but is not limited to, details of all amounts received, amounts disbursed, fees charged and the amounts owing to or by the client.

- There should be segregation of duties as far as possible, for example, staff that are employed to receive funds should not have access to the entry of such transactions into the accounting system. Where segregation of duties is not practicable, as is the case with most small firms or sole practitioners, compensating controls may be used instead.

- Accounting records, including all supporting documents and client files should be maintained, and kept for a period of five years for each trust creditor.

- A firm should ensure prompt payment of amounts due to a trust creditor or for a trust creditor without any undue delay.

- Trust funds received at the office should be banked intact on the date of its receipt, or the first banking day following its receipt on which it might reasonably be expected that it would be banked.

- All interest earned on trust funds, as per s 78(1) of the Act, should be paid over to the provincial law society on a monthly basis, and records of such payments should be maintained. Interest earned on s 78(2)(a) investments can be paid over annually. In terms of the Legal

Practice Act 28 of 2014, a portion will be levied on interest earned on s 78(2A) investments.

- The rules require of firms running investment practices to maintain accounting records on those investments. The Financial Services Board (FSB) requires of firms running such investment practices to comply with the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act), be registered with the FSB, and have a Financial Services Provider (FSP) number. These firms are further expected to comply with all the reporting requirements as required by the FSB. Readers are encouraged to read this section together with 'In contravention of legislation ...?' 2016 (April) *DR* 13.

For the new firms, we draw your attention to the Compliance Support Program (CSP). This is a program initiated by the AFF, currently rolled out in the KwaZulu-Natal and Free State Law Societies, and came into effect in January 2015. It is a compulsory program targeting newly established legal firms, whereby the AFF conducts inspections and supports practitioners in establishing a compliant operational environment before entering the mainstream external audit processes. The AFF provides these services in terms of the appointment by the respective provincial law societies.

The program, allows new entrants participate in it for a period of two years, and to exit and enter the mainstream external audit processes after two years. The AFF offers this program at no cost to the practitioner. We urge all new firms in the regions where the program is rolled out to make use of the support services embedded in this program, as far as possible, so as to ensure that their practices are run in the most compliant and efficient manner.

For more information on this program, you can visit the AFF's website at: www.fidfund.co.za.

Conclusion

In closing, it is important for a firm to have an unqualified audit as this sends out the message that the firm is run prudently. The pointers provided above, if adhered to consistently throughout, should result in an unqualified audit report for the firm. A qualified audit report on the other hand suggests that one or more activities at the firm are not satisfactorily run, and/or the firm operated in a non-compliant environment.

Having an unqualified audit report based on prudent running of the firm projects a positive image about the firm, and the opposite is true.

The Practitioner Support Unit of the Attorneys Fidelity Fund is situated in Centurion.

By
Emmie
de Kock

Large law firms v small law firms

If you are looking for a romantic partner, you usually have a list of criteria with the qualities you want the person to have. Such a checklist is automatically based on the knowledge you have of yourself, your past experiences and what your interests and needs are. Screening for work or romantic interests is, of course, very different and the job interview process can, on some level, be compared to speed dating. In this regard, the employer usually has a checklist of qualities by which a prospective employee would be scrutinised for an available position. The interview is a focused discussion to try to get to know the personality and intentions of the candidate.

However, very few entry level candidates consider what their own preferences or criteria regarding a work environment are. Like many first-time daters, entry level candidates may feel desperate for any job to start their careers, in which they can earn some money and get work experience. An aspect that impacts a work environment, is the size of the firm. Candidate attorneys (CAs) may think that articles are scarce and they will be happy to find a job at any size firm, but they should be aware of the different traits of law firms, depending on their size. The reason for this is that a job relationship is usually intended to be a long-term decision. Do you know whether you would prefer to work in a large, medium, or small law firm?

There are different positives and negatives following the decision to join a large, medium or small law firm. Below are merely general comments and observations relating to different size law firms.

Large law firms

Large law firms are generally associated with higher salaries. However, in return for a higher salary, management will expect higher targets to be made.

Large law firms usually also have existing clients and large volumes of work, which result in writing higher fees. Marketing in a large law firm is often done by a practice manager (or marketing manager) and attorneys only get to do what they are hired for, namely, to serve clients and write fees for professional services.

If you perform in a large law firm, you are likely to enjoy a good salary and secure employment. However, moving up the corporate ladder in a large law firm can be challenging, due to a great deal of competition. It is generally only when you start moving up in a large law firm, that attorneys are expected to start par-

ticipating in management activities and getting involved in training junior staff and secretaries.

Other positives of a large law firm, include a good and secure infrastructure, an IT management system and established processes.

Large law firms are further often divided into specialist groups or departments. These departments may form 'small firms' within the large law firm, and compete with other 'small firms' in the large law firm. This may set, as well as challenge, inter-personal relationships and social structures at work. Generally, there can be a social division between attorneys, secretaries and support staff. Secretaries will generally also aim to work for the most senior attorneys who can give input on their salaries. Junior attorneys may (if they are lucky) get to work with more senior secretaries. These work and status divisions are usually considered the mix for office politics. It is sometimes best to accept that you will not please everyone, or be supported by everyone at the office while working at a large law firm. Despite attempts to lay low from office politics, you are likely to have some associations in the firm that you will have to be aware of and will undoubtedly have to manage.

Notwithstanding possible social and cultural challenges in a large law firm, the division of expert services in the firm, or department, usually helps make the large law firms more efficient and profitable. The big negative of these separation of services or groups is that some attorneys, especially CAs or very junior attorneys, only develop and learn a single area of the practice of the firm as a whole. They become resources, which can only be applied in a single area of the law practice. This could eventually lead to boredom, which may lead to frustration. If such a qualified attorney then decides to leave the large law firm for a smaller or different firm, they may often find themselves a bit out of their depth and in need of further training to be a profitable and a more diverse attorney.

Small law firms

An aspect that often attracts candidates to smaller law firms is that in a small law firm, a CA or junior attorney is more likely to get exposure to different types of matters and clients. In this regard, on a personal level, attorneys often build better confidence in a small law firm and have greater moral support at the office. This generally makes small law firms cozy work environments.

In a small law firm, management is

generally more accessible and decisions can be made and executed faster.

In a small law firm, if you work hard and perform well, there may also be opportunities to be promoted faster. However, if it is a growing firm, all attorneys in the office are likely to be expected to assist with marketing. With less support staff and office functions, all attorneys in a small law firm are also likely to be expected to assist with some administrative and management tasks. A small law firm is still growing and may experience some growing pains relating to IT systems and changes in general infrastructure.

Staff turnover in a smaller law firm also has a big impact on the firm as a whole. In this regard, depending on how small the boat is, if any one person steps off, it may take a while to get the balance right again, especially relating to work division. However, if the captain decides to step off, the boat may need to be evacuated or handed over. In this regard, if you are working for a sole proprietor, to consider possible risks, it would be best you inquire about succession plans.

It is not accurate to state that all small law firms pay low salaries, as some small law firms pay competitive or even higher salaries than some larger law firms in order to retain talent and value their attorneys.

Middle-sized law firms

A middle-sized law firm is likely to have most of the positives and negatives raised above, but likely less extremely. Middle-sized law firms, which lean more towards the culture and values of small law firms, can be a very supportive work environment.

Conclusion

If you are considering applying for a job in a law firm, it may be good to take note of the positives and negatives of large, medium and small law firms. As an attorney you will spend many hours at work and work will be a big part of your life, as will the people who surround you at the office. As you grow into a more senior position, you will continue to learn about yourself, and you will grow and change. Different work environments may suit you better at different phases in your career. Do you know which work environment best serves you in your current career phase?

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

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 - **Witnesses** of MVA
- Take **photos** of the MVA Scene
- Compile **3-dimensional sketch plan** of the scene
- Obtain **copies** of the
 - **Accident reports** from SAPS or Metro Police
 - MVA **Docket** from the SAPS
 - **Death Inquests** and Post Mortem reports
 - **Ambulance records** of a person that was injured in a MVA
 - **Hospital records** of a person that was injured in a MVA
- Securing the **attendance** of witnesses **at court**
- Complete **Quantum Investigations** relating to persons injured in a MVA
- Obtain:
 - **Statements of relatives** of a person that passed away in a MVA
 - **Employers' certificates** of persons injured/passed away in MVA
 - **Marriage certificates** of people that was injured/passed away in MVA
 - **School records** of children related to people that was injured/passed away in MVA
- Confirm:
 - **Marriages** relating to persons injured/passed away in MVA
 - **Traditional marriages** with statements obtained from relatives on both sides of the people involved



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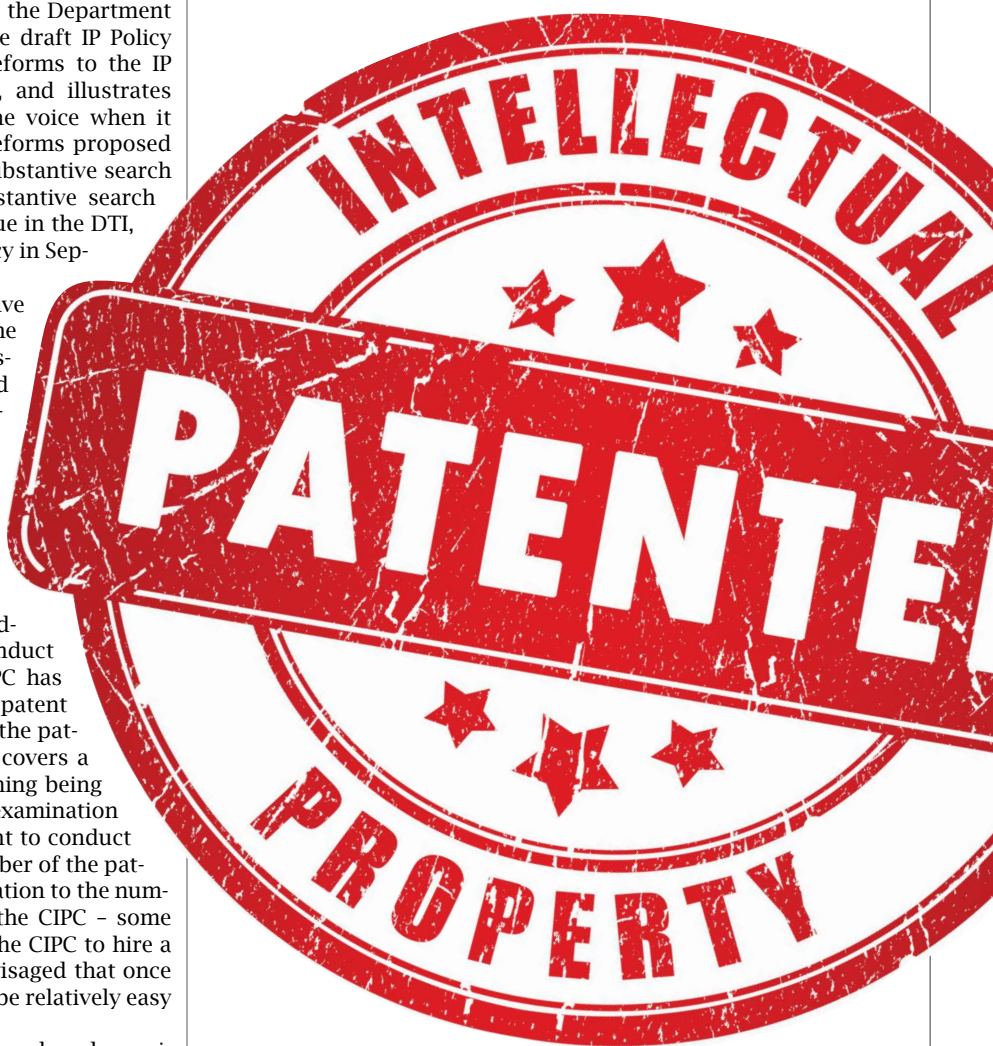
CIPC to introduce Substantive Search and Examination

The much anticipated draft Intellectual Property (IP) Policy has been published by the Department of Trade and Industry (DTI). The draft IP Policy seeks to introduce structural reforms to the IP landscape in South Africa (SA), and illustrates SA's intention to speak with one voice when it comes to IP matters. One of the structural reforms proposed by the draft IP Policy is the introduction of substantive search and examination. Although the idea of substantive search and examination has been a longstanding issue in the DTI, it was first proposed in SA's first draft IP policy in September 2013.

In preparation of the introducing substantive search and examination of patents in SA, the Companies and Intellectual Property Commission (CIPC), has looked at the capacity required for such a system. To examine a patent application, the examiner must be knowledgeable in the technical field to which the invention relates. Currently, patent attorneys draft applications, which are 'supposedly' within the confines of the patent law with a clear defined scope of protection. It can be said that patent attorneys examine applications before such applications are filed with the CIPC. To address the lack of capacity at the CIPC to conduct substantive search and examination, the CIPC has been proactive and is currently training 18 patent examiners. The level of technical expertise of the patent examiners in training is exceptional and covers a number of technological areas. With the training being offered, by the time substantive search and examination becomes law in SA, the CIPC will be competent to conduct substantive search and examination. The number of the patent examiners in training may seem less in relation to the number of patent applications filed annually at the CIPC – some 9 000. However, it would be detrimental for the CIPC to hire a lot of patent examiners at this stage. It is envisaged that once the current examiners are fully trained, it will be relatively easy to train new patent examiners.

The proposed introduction of substantive search and examination of patent applications have already elicited different reactions from different stakeholders in the patent law fraternity. Currently, SA has a depository system whereby patent applications are only examined for formalities. As long as a patent application complies with formality, the applicant will be granted a patent with no regard to the merits of the invention (patentability of claimed invention). The support to the current depository system is fundamentally understood to be based on two aspects, namely, the time it takes to grant a patent (provided the application meets all the required formalities) is faster, and that it is believed that the depository system is cost effective as the number of duplications between the applicant and the CIPC is minimal.

However, the reality is that most patent applications granted using the depository system, lacks certainty as the validity of the invention has not been tested prior to a patent being granted. Validity of granted patents is left to be tested by South



African courts when there are disputes. The process of testing patent validity through the courts is an expensive and time consuming exercise. Generally, it takes a couple of years for the court to hear and decide on a patent matter. The process also includes the services of specialised advocates, which adds to the cost for the interested party to the dispute (including the applicant). On top of that, most judges officiating on the patent matter are not knowledgeable in testing the validity of the patent or in any technical field the matter relates to, which leads to some decisions being reversed on appeal to the Supreme Court of Appeal. All this adds to the costs the applicant and any interested party must consider in order to test the validity of any patent, granted by the CIPC. The cost and complexity of using the court also impacts on innovation in the country, as individuals and small businesses are unable to afford the associated costs. As much as the depository system

is simple and fast, the cost of testing the validity of any invention for which a patent is granted, is very high and is time consuming, which discourages individuals and small businesses to be actively involved in the innovation, as they generally do not possess the financial muscle to pursue a court case.

In that light, the introduction of substantive search and examination seeks to ensure that the invention that the application relates to, meets the patentability requirements as set out in the South African Patents Act 57 of 1978. Substantive search and examination should not be viewed as adversarial. Instead it should be understood to be a cooperative investigation between the examiner and the applicant, which seeks to ensure that the applicant is granted a patent only for that to which the applicant is entitled in accordance with the patent laws. Once competency has been built at the CIPC, administering the substantive search and examination process will be seamless. Currently, 90% of about 9 000 patent applications, received by the CIPC annually are international applications, and in most cases have their corresponding foreign applications in other countries where substantive search and examination gets conducted.

It has become a trend globally for patent offices to share examination practices. Currently the IP5 have established a global dossier, which enables examiners from various offices across the world to share examination reports. These reports are available to other patent offices and enables the CIPC, as a patent office, to access patent information of international applications, including their examination reports. Therefore, examination of those applications in SA will mainly be a matter of ensuring that the invention to which the application relates complies with SA's requirements. The remaining 10% (domestic patent applications) are ordinarily split into applications that become Patent Cooperation Treaty (PCT) applications and domestic National Phase applications. Considering all these factors, the number of fresh patent applications an examiner in SA will have to deal with is very low and achievable. The CIPC will need 18 examiners, each examiner examining one patent application per week, which will result in 864 domestic patent applications examined per year as the statistics stands.

Yes, there will be delays at the early stages, each and every country experiences teething difficulties when implementing substantive search and examination. Some countries that have been conducting substantive search and examination for a long time still experience backlogs, which results in delays and such delays come inherent with the system of substantive search and examination. First world countries like Japan take an average of 15 months to examine a patent application, but third world countries like Brazil, take an average of five years. Expecting SA to deliver examination at the rate done by first world countries is just short of expecting miracles. However, SA aims to introduce substantive search and examination on a phase-in basis, by starting with prioritising certain technology sectors and fully fledged substantive search and examination on local applications, while continuing to build capacity and complying with international treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, which allow for flexibility in patent prosecution. Such an approach has taken well-founded research and has properly benchmarked it by considering what other IP offices – who took similar approaches – on introducing substantive examination have done.

One of the main challenges faced by users or prospective users of the patent system is the cost associated with filing for a patent application. The official filing fee is currently R 590, however, the cost to have the patent application drafted and filed by a competent patent legal practitioner from a law firm normally ranges from R 15 000 to R 30 000. It is worth noting that the high costs involved are not the official filing costs but are costs required to elicit the service of a competent legal

practitioner. The introduction of substantive search and examination will most definitely increase the duplication between the CIPC and the applicant (through patent legal practitioners), which will result in an increase in the costs for the applicant. However, the quality of the patents granted by the CIPC will increase as well. The proposed substantive search and examination of patent applications may result in a change in official filing fees due to introduction of search and examinations fees. The DTI, working together with the industry, is looking at ways to address the potential adverse effect in terms of cost after introducing substantive search and examination.

Another challenge faced by SA is patent law awareness. Patent law is ordinarily viewed by the general public as reserved for the elite due to the cost associated with it. Regardless of the type of system being used, as long as awareness is not addressed and systems put in place to abate certain perceptions, it will always be costly to the general public. Small and medium-sized enterprises and individual inventors are repelled and frustrated from participating in the patent system by the cost, whereas large companies have the resources to pay exorbitant fees to legal practitioners and participate in the system irrespective the type of system.

When all has been said and done, the sun has risen and SA has to brace itself for the changes that come with substantive search and examination.

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Laws change, Quality is timeless

By
Riaan de
Jager

Dismissed by a foreign diplomatic mission: Are South African locally recruited employees without an effective remedy?

Imagine being approached for advice by Ms X, a locally recruited secretary of the Ambassador of Argentina, or by Mr Y, the chauffeur of the Executive Secretary of the African Commission on Nuclear Energy (AFCONe), after they have been dismissed. Will Ms X and Mr Y be able to enforce their employment rights against these foreign missions at the Commission for Conciliation, Mediation and Arbitration (CCMA)?

The Department of International Relations and Cooperation (DIRCO), in particular its Directorate: Diplomatic Immunities and Privileges attached to the Branch: State Protocol and Consular Services, are often faced with these types of scenarios. They mostly involve unfair dismissal disputes that are lodged at the CCMA by former, locally recruited employees against diplomatic and consular missions, representing the sending state (foreign state), and international organisations such as AFCONe or the United Nations (UN).

In order to highlight the apparent shortcomings in the law with which Ms X and Mr Y will be faced, reference will firstly be made in this article to situations where a foreign state is the employer, thereafter the employment disputes involving international organisations will be explained. Lastly, DIRCO's particular role will be examined in an attempt to assist locally recruited employees to resolve their disputes in an informal, amicable and speedy manner.

Foreign states

The procedure to serve legal process on foreign states is regulated by s 13(1) of the Foreign States Immunities Act 87 of 1981 (the Act), as well as r 5(1) of the Uniform Rules of Court and was addressed in more detail in an earlier article (see Riaan de Jager 'Diplomatic law: Service of process on foreign defendants' 2017 (Dec) DR 34).

The question that arises for determination is whether the referral of Ms X's unfair dismissal dispute to the CCMA, under the provisions of the Labour Relations Act 66 of 1995 (LRA) can also be served on the Argentine Government in Buenos Aires in terms of the Act or r 5(1).

In an unanimous judgment, albeit with reference to s 15(1) of the Prescription Act 68 of 1969, the Labour Appeal Court (LAC) held in *Food and Allied Workers*

Union obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd [2016] 12 BLLR 1175 (LAC) at para 55 that a referral is not a 'process ... whereby legal proceedings are commenced', since a referral merely obliges the CCMA to intervene in a dispute, to conciliate and thus avoid legal proceedings. In *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* 2017 (4) BCLR 473 (CC) the Constitutional Court also had an opportunity to determine this issue, again with reference to s 15(1) of the Prescription Act. The court was, however, divided in that Froneman J (with whom Madlanga J, Mbha AJ and Mhlantla J concurred) ruled that a referral under the LRA does constitute a 'process' (see paras 75 and 82), while Zondo J, on the other hand, came to a contrary conclusion (see para 140). However, because of the parity of votes, in which none of the judgments secured a majority, no binding *ratio decidendi* emerged from the court's decision. The LAC's judgment in the *Gaoshubelwe* case thus remains the binding precedent at present.

Since a referral under the LRA has been held not to constitute a 'process', I submit that the procedure prescribed by s 13(1) of the Act and r 5(1) of the Uniform Rules of Court will not apply. Ms X's referral will thus be served on the Embassy of Argentina through the Directorate: Immunities and Privileges of DIRCO under cover of a diplomatic note or *note verbale*, since the embassy represents the interests of the Argentine Government in South Africa (SA).

The proceedings at the CCMA are governed by its Conduct Rules. In terms of r 13(1), the parties must attend a conciliation in person, irrespective of whether they are represented, while r 13(2) states that, if a party is represented at the conciliation but fails to attend in person, the commissioner may either continue with the proceedings, adjourn or dismiss the matter by issuing a written ruling. Rule 13(3) sets out what the commissioner should take into consideration when exercising their discretion.

Rule 14 is of particular relevance since it provides that, if it appears during conciliation proceedings that a jurisdictional issue has not been determined, the commissioner must require Ms X, as the referring party, to prove that the CCMA has jurisdiction to conciliate her dispute.

Rule 25(1)(a) could, however, pose dif-

ficulties, since it provides that parties in conciliation proceedings may only be represented by a director or employee of that party or by a member, office bearer or official of a registered trade union or employer's organisation. Legal practitioners are not allowed to represent a party during conciliation proceedings. This rule was found to have passed constitutional muster in *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of Transvaal)* [2013] 11 BLLR 1057 (SCA).

In con-arb and arbitration proceedings, a party is also required to appear in person. Moreover, legal practitioners may, pursuant to r 17(7), only represent a party in unfair dismissal disputes relating to an employee's conduct or capacity under exceptional circumstances.

It is beyond dispute that Ms X's dispute cannot proceed to arbitration or adjudication if the dispute is not entertained at the conciliation stage. The effect hereof is that the Argentine Ambassador or one of the other diplomats, as the representatives of the foreign state, would technically be required to appear in person at the conciliation proceedings to represent the employer, the Government of Argentina. However, this is in conflict with the immunity from the civil and administrative jurisdiction, which these diplomatic agents enjoy pursuant to art 31.1 of the Vienna Convention on Diplomatic Relations of 1961. It, therefore, follows that the embassy will most likely rightly refuse to partake in the conciliation proceedings.

Under such circumstances, the CCMA commissioner could, in terms of r 30(1)(b)(i), continue with proceedings in the absence of the Argentine diplomats, although they will only issue an advisory award, which is non-binding and unenforceable in terms of s 143(1) of the LRA. This, in effect, leaves Ms X without an enforceable remedy which is a severe shortcoming.

International organisations

What will Mr Y's position be? In terms of international law, service of process cannot be effected on international organisations, since they enjoy immunity from every form of legal process, unless their immunity from suit is expressly waived in a particular case. It is, therefore, not

possible to serve the referral formally on such organisations. For more detail in this respect, refer to De Jager (*op cit*).

Although Mr Y's employment will be governed by the LRA, it is the established practice of international organisations not to appear in local courts or tribunals of member states in order to assert their privileges and immunities. Instead, the assertion of their immunity is done in a written communication to the Ministry of Foreign Affairs of the state concerned, requesting it to take the necessary steps to inform the appropriate office of government (usually the Ministry of Justice) to appear or, otherwise, move the court to dismiss the suit on the grounds of the organisation's immunity. This practice was supported, *inter alia*, by the International Court of Justice in its advisory opinion in the *Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICT, 29 April 1999 referred to as the so-called 'Cumaraswamy case', regarding the UN.

Should Mr Y attempt to involve the CCMA in his employment dispute, DIRCO will be under an international law obligation to alert the CCMA to AFCON's absolute immunity from suit with the result that the CCMA will decline to entertain the dispute due to a lack of jurisdiction. Mr Y will, accordingly, also be without a remedy.

The involvement of DIRCO

DIRCO, in consultation with the Department of Labour, in particular the Director of the CCMA, has implemented a policy regarding the management of diplomatic immunities and privileges (DIRCO's Policy) which, in part 5 thereof, deals with unfair dismissal disputes involving locally recruited employees employed by foreign missions in SA. The Policy is obtainable on DIRCO's website at www.dirco.gov.za.

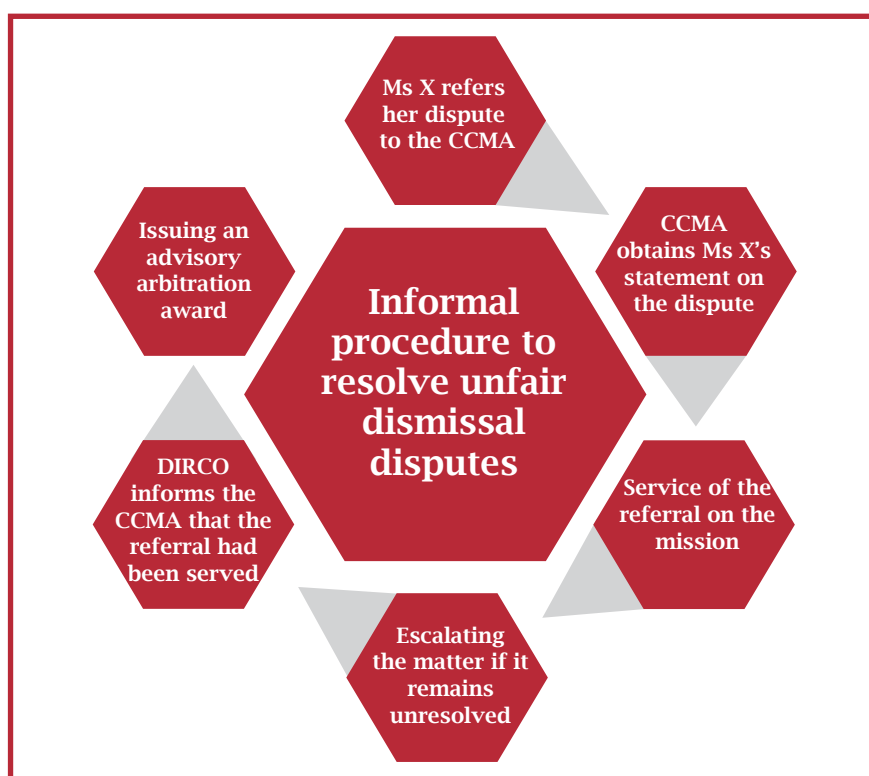
Paragraph 5.2 of DIRCO's Policy provides for the following steps, which Ms X should take under the circumstances – it does not, however, apply to international organisations due to its absolute immunity from all legal process. These steps are:

• Step 1: Referral of the dispute to the CCMA

Ms X should refer her dispute directly to the CCMA and indicate the nature of the dispute without, at this stage, having to submit proof that the referral form has been served on the Argentine Embassy.

• Step 2: Obtaining a statement on the dispute

The CCMA will take down a statement from Ms X and submit it to DIRCO with the referral in the prescribed format to be presented to the embassy.



• Step 3: Serving the referral on the embassy

The Director: Immunities and Privileges of DIRCO, in consultation with the relevant bilateral desk and DIRCO's State Law Advisers (International Law), will summon the Deputy Head of the embassy for consultations and present a diplomatic note or *note verbale* to them to which the referral and Ms X's statement are attached. In the diplomatic note, State Protocol formally brings the dispute to the attention of the embassy with a request to do everything reasonably possible to resolve the dispute amicably in compliance with the law, setting a timeframe (usually 30 days) within which to respond. The CCMA and the relevant bilateral desk will be kept informed.

• Step 4: Escalating the matter

In the event of non-compliance by the embassy, the matter could be escalated to the Chief of State Protocol when a second and final *note verbale* is handed over personally to the Head of the Mission.

• Step 5: DIRCO informs the CCMA that the referral has been served

State Protocol shall provide the CCMA with a written confirmation that the referral had been properly delivered to the Head of the Mission.

• Step 6: CCMA issues an advisory arbitration award

On receipt of the response from the embassy, DIRCO will forward the response

to the CCMA who will evaluate the statements of both parties and, should the CCMA determine that Ms X's claim has merit, an advisory arbitration award will be issued and forwarded to DIRCO for submission to the embassy under cover of a *note verbale*.

Although DIRCO has no authority to become involved in the merits of employment disputes, it mainly plays a facilitating role to ensure proper service of the referral on foreign states. The Directorate: Diplomatic Immunities and Privileges of DIRCO could, if necessary, intervene through the diplomatic channel to attempt to resolve a dispute amicably. These measures have proven to be successful in the majority of cases. However, should a foreign state or an international organisation refuse to cooperate, Ms X and Mr Y will have no other recourse.

It is accordingly evident that being employed by foreign states and international organisations in SA has inherent risks, which most locally recruited employees are not aware of when accepting offers of employment at such institutions.

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Reconsidering final judgments – the injustice in justice

By
Ndivhuwo
Ishmel
Moleya



It is widely accepted that there is no such thing as a perfect justice system. Court decisions are not entirely faultless, just as judges are not infallible. For this reason, the law has put procedural filtering mechanisms in place, such as: Reviews, appeals, condonation for late filing of appeals and/or reviews, all of which are designed to guard against the miscarriage of justice. However, there are instances in which these mechanisms may prove to be inadequate – where more is required. It is in such circumstances, in which a court of final instance, may be required to reopen its final decision for reconsideration. Rule 42 of the Uniform rules of Court (Uniform Rules) provides for instances in which a court may reconsider its final decision. But, as will be demonstrated in this article, this does not cater for all cases that may result in injustice. The case of *Molaudzi v S* 2015 (8) BCLR 904 (CC) is proof of this fact. This article analyses this decision and the seemingly unnoticed, but fundamental positives, it brought forth.

Powers of the CC to reopen its final decisions before the *Molaudzi* case

The jurisprudence of the Constitutional Court (CC) on its powers to reconsider its final decisions is borrowed from that of the then Appellate Division. The Appellate Division followed the well-known principle that once a court delivers a final judgment it becomes *functus officio* and is divested of the jurisdiction to reconsider the decision subject to few exceptions relating to accessory or consequential matters. The principle first came under judicial microscope in the case of *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173, where the court stated that a judge is divested of the power to amend his final judgment subject to certain exceptions. The principle was reiterated in the case of *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 503 – 4. Similarly, in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G, the court pointed out that ‘once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it’ subject to certain exceptions.

In *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC), the

CC found the approach followed in the above cases to be ‘consistent with the Constitution’.

Rule 42 of the Uniform Rules permits a court to rescind or vary its order or

judgment –

- if it was erroneously sought or granted;
- if the order is granted as a result of a mistake; and
- where the order or judgment has ambiguities, patent errors or omissions.

This rule also applies to the CC. In *Daniel v President of the Republic of South Africa and Another* 2013 (11) BCLR 1241 (CC), the CC stated that ‘[t]he general principle is that once a court has duly pronounced a final order, it becomes *functus officio* and has no power to alter the order’ but that ‘rule 42 of the Uniform Rules creates exceptions to this principle.’

It is notable that the exceptions developed in case law relate to incidental or consequential matters. Similarly, r 42 appears to follow the same route, albeit in a strait-jacketed manner. Accordingly, this approach does not permit the court to correct any injustice that would occur as a result of an error, which falls outside r 42. It is thus an untenable position that prompted the question whether the court may, under special circumstances, reconsider its final decision based on grounds outside the strictures of r 42 (see *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (7) BCLR 629 (CC)). The question was left undecided in several decisions of the CC.

The case of *Molaudzi* and its impact on the CC's power to reconsider its final decision

The case of *Molaudzi* brought an end to a spell of uncertainty about whether the court may reopen its final decision on grounds outside of r 42. The facts of the case are as follows: Mr Molaudzi, together with seven other co-accused, were convicted of murder, robbery with aggravating circumstances, attempted robbery, unlawful possession of firearms and unlawful possession of ammunition. They were each sentenced to life imprisonment for murder, 15 years' imprisonment for robbery and three years' imprisonment in respect of each of the other charges. Dissatisfied with both the conviction and sentence, Mr Molaudzi applied for leave to appeal to the CC in 2013. This, he did without legal representation. The court dismissed the application on the ground that it did not raise proper constitutional issues and had no prospects of success (see *Molaudzi v S* 2014 (7) BCLR 785 (CC) at para 2).

A year later, two of Mr Molaudzi's co-accused appealed to the CC against their convictions and sentences in *Mhlongo v S; Nkosi v S* 2015 (8) BCLR 887 (CC). They challenged the constitutional validity of the differentiation between the admissibility of admissions and confessions of an accused person against their co-accused in a criminal trial. They argued that there is no logical basis in accepting evidence in the form of an admission of an accused person against their co-accused and not confessions since both have the same effect of self-incrimination. They argued that the differentiation is 'unjustifiable, rigid and arbitrary' and violates s 9(1) of the Constitution. The court upheld the argument. It found that the differentiation could not be lawfully sustained as it is not designed to achieve any legitimate purpose. It further found that the distinction was not justifiable. It accordingly held that extra-curial admissions are, like confessions, inadmissible against co-accused persons. The court upheld the appeal, overturned their convictions and sentences and ordered their release from prison.

Mr Molaudzi filed a second appeal and raised the same arguments as those of Mr Mhlongo and Mr Nkosi. There were two questions for determination, one of merits and another of procedure. The former had already been decided in the *Nkosi* case. The fundamental issue was whether the court could consider Mr Molaudzi's application for the second time. This raised the question of whether the second application was *res judicata*. If answered in the affirmative, Mr Molaudzi would have been barred from having a second bite at the cherry. To surmount

this hurdle, Mr Molaudzi argued that the application raised issues that were different from those raised in the first application. He argued that while the first application attacked pure factual findings of the lower court, the second application was mounted on pure constitutional grounds.

The CC pointed out that the underlying rationale of the doctrine of *res judicata* was to give effect to finality of judgments. It further stated that the second application ought to be considered *res judicata* as the merits of Mr Molaudzi's appeal were considered by the CC and ruled on before. However, the court found that as a common law principle, the doctrine of *res judicata* may be developed or relaxed in the interests of justice. It pointed out that in doing so, a delicate balance must be struck between the need to ensure certainty and finality in litigation on the one hand, and the need to vindicate constitutional rights of the vulnerable and unrepresented on the other. Most importantly, the court stated that where injustice would otherwise occasion, the court should be permitted to reconsider its final decisions on grounds outside r 42. It, however, cautioned that this must only be done in exceptional circumstances. In the end, the court found that a grave injustice would have been prompted if the appeal was dismissed on the basis of *res judicata* and that it was, therefore, necessary to relax the doctrine to avert injustice.

The case of *Molaudzi* is lauded for declaring the distinction between the admissibility of admissions and confessions against co-accused unconstitutional. Little has been said about its invaluable clarification of the nearly decade old question of whether the CC has the power to reopen its final decisions based on grounds outside r 42. But, it does more than just that. It provides principled guidelines on how the court should – going forward – reopen finalised decisions on grounds outside r 42. This case stands as a beacon of change in the court's approach to reconsider cases. The case fostered a jurisprudential shift from an approach that seemed to unnecessarily venerate the principle of finality of judgments, to an approach that champions the attainment of justice. The approach allows the court greater latitude in the pursuit of justice and ensures that the attainment of justice is not sacrificed at the altar of rigid compliance with adjectival law. The approach allows the court the necessary leeway to actively discharge its mandate as the ultimate dispenser of justice and custodian of the Constitution. This approach rightly acknowledges that there may be other compelling exceptional circumstances outside r 42 warranting the reopening of a finalised case.

The need to ensure finality of judgments argument

Reopening a concluded case without doubt upsets the principle of finality of judgments. To simply allow appellate courts to reopen concluded cases may lead to endless litigation and cause uncertainty in law. This may also unnecessarily inundate the court's roll with unmeritorious and frivolous applications, which may result in an abuse of court process. However, there are also equally important considerations in favour of reopening concluded cases. There is no doubt that unwavering protection of the principle of finality of judgments may result in denial of justice to deserving litigants who, for some reason, may not have been able to put their cases properly in the first instance. Further, the public may lose confidence in a judicial system that seeks to sanctify decisions.

What is, therefore, required is an approach that strikes a delicate balance between these equally important considerations. An approach that confines the court's powers to reopen its final decisions to the few instances adumbrated in r 42 undoubtedly fails to strike this happy balance. This is so because injustice comes in different forms and the circumstances that may cause it cannot be exhaustively enumerated. Such an approach steadfastly protects the principle of finality of judgments, paying little regard to the fact that there may be other circumstances that can give rise to injustice residing outside of the strictures of r 42. The principle of finality of judgments cannot be advanced to deny justice to deserving litigants. Indeed, rules of practice 'should be used to assist, and not to hamper, an appellate court to do justice to the case before it' (see *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC)).

Conclusion

As once stated, '[j]ustice is a virtue which transcends all barriers' and '[n]either the rules of procedure nor technicalities of law can stand in its way' (see *S. Nagaraj and Others vs. State of Karnataka and Another* 1993 Supp (4) SCC 595). It is, therefore, worth celebrating that the case of *Molaudzi* ushered in an approach, which places judicial premium on the attainment of justice as the ultimate purpose of law. The approach undoubtedly resonates with the spirit of our Constitution, which commands justice, respect and protection of fundamental human rights.

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Remuneration of benefits from a will: *Who is a 'spouse'?*

By
Dr Fareed
Moosa



Picture source: Gallo Images/Stock

From time to time testamentary heirs renounce the benefits conferred by a testator in a last will and testament. When this occurs, s 2C(1) of the Wills Act 7 of 1953 (the Wills Act) may apply. It reads:

'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the *surviving spouse*' (my italics).

Apart from s 2C(1), the term 'spouse' is used in other sections of the Wills Act (for example, s 2B and s 4A(2)). Hence, for purposes of s 2C(1), and the Wills Act read holistically, it is unclear whether 'spouse' includes persons married under the tenets of religious law (such as, Shari'ah, Judaism or Hinduism), and whether 'surviving spouse' in s 2C(1) includes multiple female spouses

who were married to a deceased testator at his death in polygynous marriages. These crisp issues arose in *Moosa NO and Others v Harneker and Others* 2017 (6) SA 425 (WCC).

The material facts emerge from the judgment of Le Grange J. The deceased testator, married two women, namely, the second and third applicants, by Shari'ah law in 1957 and 1964 respectively. In 1983, and in order to secure finance from a banking institution to purchase land, the deceased married one wife under the civil law of South Africa. By agreement with both wives, the deceased married the second applicant in community of property. The finance raised was then used to purchase land in Athlone where the deceased, until his death in 2014, lived with both wives and certain children of both polygynous marriages. In terms of the deceased's will, his estate devolved on his heirs in terms of Shari'ah. This meant that both spouses inherited part of his estate in equal

shares, and the remainder devolved on the deceased's children born of his marriages to both wives.

At his death, the common marital home was an asset in the deceased's estate, which his Executor sought to transfer into the joint names of both wives in accordance with the deceased's will as read with a Redistribution Agreement concluded by his children born of both marriages. That agreement recorded that the children renounced their testamentary benefits *in toto*. This triggered the application of s 2C(1) of the Wills Act. The effect hereof is that their inheritance devolved on the deceased's 'surviving spouse'. Although s 2C(1) refers to 'surviving spouse' in the singular, the Executor accepted both wives as a 'surviving spouse'. The Executor interpreted s 2C(1) through the prism of the Bill of Rights and took the view that the benefits renounced by the second and third applicant's children vested in them respectively. This construction of s 2C(1)

was endorsed by the Master of the High Court for purposes of the Administration of Estates Act 66 of 1965.

On this basis, the Executor sought, under the Deeds Registries Act 47 of 1937, to transfer to both spouses their respective shares of the immovable property. However, the Registrar of Deeds, Cape Town refused to effect registration. While the Registrar recognised the second applicant as a 'surviving spouse' because of her lawful civil marriage to the deceased, it did not recognise the third applicant as such for purposes of s 2C(1), since she was only married to the deceased under the tenets of Shari'ah. In reaching its decision, the Registrar relied on the fact that no court had hitherto interpreted 'spouse' or 'surviving spouse' for any purpose arising from the Wills Act. It further reasoned that since s 2C(1) was enacted during SA's pre-constitutional era, it must be presumed that Parliament intended 'spouse' therein to bear its common law meaning, namely, persons of the opposite sex who are lawfully married to each other in a strictly monogamous union. The Executor, together with both wives, challenged the validity of the Registrar's decision on the basis that, *inter alia*, it was discriminatory against the third applicant thereby violating her right to equal treatment and/or benefit of the law. Also, they contended that the dignity of spouses to Muslim polygynous marriages cannot be less than that of parties to a civil marriage. Le Grange J agreed.

As a point of departure, the court acknowledged that the Wills Act gives no express indication that, in its context, references to 'spouse' is intended to be confined to husbands and wives whose marriages are formalised under the Marriage Act 25 of 1961, Recognition of Customary Marriages Act 120 of 1998 or Civil Union Act 17 of 2006. Le Grange J held (at para 23) that since s 2C(1) harks back to the dark days under Apartheid, it must be accepted that Parliament intended the term 'spouse' to be informed by the common law concept of marriage applied at that time, namely, monogamous unions. This narrow construction excluded the third applicant. This raised the question whether the exclusion, which the Registrar of Deeds sought to enforce, violated the equality clause of the Bill of Rights (s 9).

Le Grange J, in explaining the process when embarking on an analysis in terms of s 9 of the Constitution, relied, at para 26, on the *dictum* per Moseneke J (as he then was) in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 27, namely, that it is 'incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it

ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution'.

Le Grange J held, at para 28, that 'surviving spouse' in s 2C(1) differentiates between surviving spouses married under the Marriage Act and those married in terms of Shari'ah. This is so because, firstly, whereas s 2C(1) confers benefits on the former group, it does not for the latter. Secondly, s 2C(1) differentiates between a surviving spouse in a monogamous civil marriage and those in a polygynous Muslim marriage. The former group falls within the remit of s 2C(1), the latter not. Thirdly, to the extent that s 2C(1) confers benefits on surviving spouses in polygamous customary marriages by reason of the Recognition of Customary Marriages Act, s 2C(1) differentiated between surviving spouses in polygamous customary unions and those in polygynous Muslim marriages. Whereas the former group is covered by s 2C(1), the latter not.

Although not every instance of differentiation is tantamount to discrimination (see *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC) at para 23), Le Grange J concluded, at para 29, that the differentiation encompassed by 'surviving spouse' in s 2C(1) is patently unfairly discriminatory on the grounds of marital status and religion, which is prohibited by s 9(3) of the Constitution. To this end, the judge emphasised that the discriminatory nature and effect of the term 'surviving spouse' is evident on the facts *in casu*. This is so because, first, the second applicant is included as a 'surviving spouse' only by reason of the fact that she married the deceased under a lawful civil marriage and the third applicant is excluded by reason only that she married the deceased testator by Muslim rites only. Secondly, surviving spouse in s 2C(1) includes 'within its ambit widows and widowers in a monogamous civil marriage and excludes any surviving spouse from a polygynous Muslim marriage (such as the third applicant) and it may also be interpreted to include within its ambit spouses in a lawful and legally recognised polygamous customary marriage, but excludes women in a polygynous Muslim marriage' (at para 31).

Le Grange J held further that the differentiation encompassed by 'surviving spouse' in s 2C(1) bore no rational connection with any legitimate governmental purpose. This is so because the differentiation 'exists simply because at the time s 2C(1) was enacted, polygynous unions solemnised under the tenets of the Muslim faith was void on the grounds of it being contrary to accepted norms and customs prevailing at the time' (at para 30). This approach is not sustainable in our society that subscribes to democratic values, social

justice, and fundamental rights. See also *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at para 54. In the light hereof, Le Grange J concluded that the meaning of 'surviving spouse' in s 2C(1) was constitutionally offensive insofar as it excludes persons married by Muslim rites and multiple spouses who were married to a deceased testator.

In view of the foregoing, and in accordance with s 172(1)(a) of the Constitution, Le Grange J declared s 2C(1) of the Wills Act to be inconsistent with the Constitution and invalid only to the extent that (i) 'surviving spouse' in s 2C(1) excludes persons married by the tenets of Shari'ah, and (ii) 'surviving spouse' in s 2C(1) excludes multiple female spouses who were married to a deceased testator under polygynous Muslim marriages. Le Grange J also held that, since the term 'surviving spouse' as used in the Wills Act is incapable of being construed in a manner that encompasses multiple female spouses to Muslim marriage, the appropriate just and equitable remedy to cure the constitutional defect is a reading-in. Thus, Le Grange J held that the following words are to be read into s 2C(1) at the end thereof: 'For purposes of this sub-section, a "surviving spouse" includes every husband and wife of a *de facto* monogamous and polygynous Muslim marriage solemnised under the religion of Islam'.

In conclusion, the decision in *Moosa* must be welcomed as it brings into line the meaning of 'spouse' under the Wills Act with that in other legislation affecting the laws of intestate succession (such as the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990) (see also, for example, *Laubscher NO v Duplan and Others* 2017 (2) SA 264 (CC)). Moreover, as pointed out per Le Grange J at para 34, the decision brings about parity and equal treatment of polygynous marriages under our law and will ensure that the same benefit and protection is accorded to women married to the same husband in polygynous marriages under Islamic Law. It bears noting, however, that the orders granted per Le Grange J are suspended pending confirmation by the Constitutional Court.

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Dr Moosa was the first applicant in the case. □



Training obligations in terms of FICA

By
Nkateko
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The Financial Intelligence Centre Act 38 of 2001 (FICA) came into effect in 2002. FICA, among others, made provision for the training of employees of accountable and reporting institutions. The objective, thereof, is to ensure proper compliance by the employees with the provisions of FICA. The duty to discharge this obligation rests (or rested) on the accountable institution itself and/or senior management. The accountable institution is required to appoint a person with the responsibility to ensure compliance and discharge this obligation. More often than not, the appointed person is a compliance officer or a money laundering reporting officer. The wording of s 43(b) of FICA used to be a source of confusion and uncertainty as it was open to different interpretations. For example, some argued that FICA placed an onerous responsibility

The appointed person's role is only to 'assist' the accountable institution (and/or top management) in complying with the provisions of FICA. I submit that this is in line with international best practice and the Generally Accepted Compliance Practice Framework of South Africa (SA).

The purpose of the paragraph above was simply to ascertain and show where the responsibility to ensure compliance with the provisions of FICA lies. It should, however, be noted that both FICA and the Amendment Act do not exempt the appointed person from personal legal liability where there is non-compliance with the law. An interesting case, with regard to personal liability, is the 2014 judgment in the case of the *United States Department of the Treasury v Thomas E Haider* Civ. No. 14-9987 (S.D.N.Y Dec. 18, 2014).

The main objective of this article, however, is not to discuss the role and responsibilities of the accountable institutions or staff appointees, but to question some of the reasons why the statutory obligation or need to offer staff-training has never been seriously implemented. Banks seem to be the biggest culprits in this regard, especially when dealing with the training of tellers. One only needs to step into a bank and ask a teller why there is the need to provide documentation when transacting (the often quoted FICA process). A typical response will be to say that that is how it has always been done or that is what the policy says.

Arguably tellers are the 'first line of defence' in the banks and as a result they are supposed to be able to know the intention behind certain legislative requirements. It is worrying to note that this has been happening under the rules-based or 'tick-box' prescriptive framework wherein all the relevant requirements have been spelled out by law. One then wonders what is going to happen under the new Risk-Based Regulatory Framework ushered in by the Amendment Act. Under the new regime, accountable institutions are given the discretion to choose how they will identify and verify customers. I submit that exercising such a discretion will need some form of continuous training and expertise. Furthermore, under the Amendment Act, failure 'to provide training to ... employees in accordance with Section 43' is considered to be 'non-compliant and is subject to an administrative sanction'. This should be considered within the context of ss 45C and 77(2)(c). The former makes provision for what constitutes an administrative sanction together with the relevant penalties. While the latter, (and most importantly) increases the prison term, as well as the financial penalty, under the Amendment Act, which are to be paid for any contravention or failure to comply with the regulations. Previously the

prison term was six months and has now been increased to three years and the financial penalty was R 100 000 and has now been increased to R 1 million.

In order to understand some of the reasons why accountable institutions (bank tellers specifically) have little or limited knowledge of what the entire FICA process aims to achieve, one needs to look at some of the training programmes being offered to employees. Employees are offered the following programmes:

- Awareness programmes, for example, videos, presentations and messages aimed at raising awareness regarding employee obligations. More often than not, employees are required to simply attend or undergo such programmes.
- Formal training programmes - here there are clear training objectives and, on completion of the programme, employees are then assessed. Employees are required to attain an acceptable level of knowledge before they can be deemed to have successfully completed the programme.

Unfortunately, many accountable institutions opt for the first type of training programmes. Professor Louis de Koker (*South African Money Laundering and Terror Financing Law* (Durban: LexisNexis 2016)), who is an expert in the field of anti-money laundering and counter terrorist finance, seems to agree that one of the reasons why employees have limited knowledge of FICA, and thus are unable to discharge their obligations properly, is because 'many institutions offer only awareness programmes' (L de Koker (*op cit*) at 250). He further concedes that some of these comprehensive awareness programmes suffice to ensure compliance with the obligations of FICA, however, it becomes difficult to gauge whether the employees understand what is expected of them in terms of the law where no assessment is done at the end thereof. He also observes that 'FICA does not prescribe the nature of the training that has to be offered' or 'the format of the training that has to be provided' (L de Koker (*op cit*) at 250).

In addition to the observations and concerns raised above, it should be noted that in terms of FICA, accountable institutions (banks specifically), are regulated and supervised by both the Financial Intelligence Centre (FIC) and South African Reserve Bank (SARB), respectively. It is then worrying to note that this lax or limited compliance has been taking place under this dual 'oversight' or supervisory scheme.

I submit that one way to ensure that the statutory obligation to offer staff-training is taken seriously by accountable institutions is by way of touching on the nature or format of training that is to be provided, in either primary law itself or relevant secondary legislation.

ity on the appointed person as they were to 'ensure' compliance with FICA and not the accountable institution itself. This position has now been changed by the Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act). The wording of the Amendment Act makes it clear that the responsibility to 'ensure' compliance rests with the accountable institution (and/or top management) itself and not its appointee.

Increasing penalties for contravention of and/or failure to comply with the law is but one step in this process. For instance, the recently issued Anti-Money Laundering Draft Guidance for the Accountancy Sector (in the United Kingdom (UK), August 2017), makes provision for matters, which specifically speaks about training. On the other hand SA's recently issued Guidance Note 7 on The Implementation of Various Aspects of The Financial Intelligence Centre Act, 2001 (Guidance Note 7) (www.fic.gov.za, accessed 15-1-2018) is silent in relation to training or matters connected therewith. The Amendment Act does, however, provide for on-going training of employees, which is good and in line with international best practice and standards. The UK's draft guidance goes on further to talk to the frequency of training while also noting some of the reasons or factors, which may influence the frequency of such training including 'changes in legislation, regulation, professional guidance, case law and judicial findings (both domestic and international), as well as by changes in the business's risk profile and procedures'.

The UK draft guidance further goes on to state that '[i]n addition to training, businesses are encouraged to mount periodic [anti-money laundering] awareness campaigns to keep staff alert to individual and firm-wide responsibilities'. It should be noted that this guidance has been drafted within a risk-based environment and though high-level and not too detailed (as it should be) it provides some level of certainty and direction to those who are required to comply with the law. It further goes on to show that in the UK awareness campaigns or programmes are supplementary to the training obligation provided for in the law as opposed to the current situation in SA wherein accountable institutions may choose whichever method of training to use. Furthermore, in an environment wherein a risk-based approach is being introduced for the first time, in SA for instance, it would surely be helpful to have

something similar in place (eg, within Guidance Note 7) in order to ensure the effectiveness of the entire framework.

Advantages of training employees

Before looking at some of the few advantages, which emanate from complying with the statutory obligation of training employees, it is important to note the following quote from the UK's draft guidance which bears resemblance to the South African position:

'The overall objective of training is not for "relevant individuals" to develop a specialist knowledge of criminal law. However, they should be able to apply a level of legal and business knowledge that would reasonably be expected of someone in their role and with their experience, particularly when deciding whether to make a report to the [Money Laundering Report Officer] MLRO.'

Complying with the statutory training of employees is advantageous to both the accountable institution and employees themselves. In general, training employees is good for the accountable institution in that it then complies with the law and 'limits its risks of being abuse[d] for money laundering purposes and its general exposure to fraud' (L de Koker (*op cit*) at 250). For senior management and the appointed compliance officer, on the other hand, it protects them from exposure to personal liability where an administrative fine is imposed against the accountable institution by the relevant authorities. Where training is offered only through awareness programmes without assessments at the end thereof, it is in an employee's best interest that they endeavour to really understand what is expected of themselves. The reason for this is there are legal risks, which an employee may be exposed to, for instance, 'if an employee fails to identify and report a suspicious or unusual transaction, the contents of the programme may serve as evidence against him' (L de Koker (*op cit*) at 250).

Furthermore 'in terms of POCA [Prevention of Organised Crime Act 121 of 1998] and FICA a person's knowledge, skill, training and experience is considered as part of the test to determine whether he or she acted negligently' (L de Koker (*op cit*) at 250).

Conclusion

Training is regarded as one of the '7 pillars of compliance' within FICA. I, however, submit that this obligation has not been implemented with the seriousness it deserves under the previous rules-based or 'tick-box' regulatory framework. One of the key reasons for this lax or limited compliance has been the fact that many accountable institutions always opted to offer awareness programmes with no assessments done at the end thereof in order to ascertain whether the trained employees have attained an acceptable level of knowledge in relation to their duties and obligations. Furthermore, the law together with relevant legal instruments offered little, to absolutely no guidance on this issue. The new ss 42A, 43 and 62 are a step in the right direction. However, Guidance Note 7, should have made provision (and elaborated a bit) on this obligation as well. Now with the coming into effect of the risk-based regulatory framework wherein accountable institutions and employees will be required to exercise discretion when implementing certain provisions of the law, the need for on-going training is more distinct than ever.

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Dangers inherent in Bitcoin and other cryptocurrencies

Picture source: Gallo Images/Stock

By
Jason de
Mink

Cryptocurrencies are not illegal *per se* and are regularly utilised by consumers to perform highly secure and rapid funds transfers across national borders without being impeded by exchange controls or banking costs etcetera.

However, with criminals becoming increasingly technically proficient, the benefits of cryptocurrencies are also being exploited to further illegal aims and provide a platform for, *inter alia*, money laundering and the financing of terrorism (see 'South African Reserve Bank Position Paper on Virtual Currencies' www.resbank.co.za, access 1-12-2017 at 5).

Inherent dangers

Cryptocurrencies are, therefore, attractive to both legitimate and illicit individuals and groups, and present the following risks for law enforcement agencies and governments:

- **Ease of process:** The traditional money laundering phases of placement, layering and integration can be merged with ease via information technology/electronic channels. At the placement phase cryptocurrencies provide a vehicle for a sender to transfer funds anonymously and directly to a recipient, without needing to meet any requirements for identification of the parties or monitoring of transaction types or volumes.

- **Anonymity:** Bitcoin transactions provide a far greater degree of anonymity than traditional payment methods (KV Tu and MW Meredith 'Rethinking virtual currency regulation in the Bitcoin age' (2014) 90 *Washington Law Review* 271 at 298 (<https://digital.law.washington.edu>, accessed 1-12-2017)). A user's personal information is not connected with the transaction and the only information that identifies a Bitcoin user is a randomly generated Bitcoin address (Tu and Meredith *op cit*); Federal Bureau of Investiga-

tion Intelligence Assessment (2012) 'Bitcoin Virtual Currency: Unique Features Present Distinct Challenges for Detering Illicit Activity' at 5, www.wired.com, accessed 1-12-2017).

Bitcoin, therefore, appeals to users by promising high-level cryptography-based security and enhanced protection from identity theft, but also allows a mechanism to bypass the traditional anti-money laundering systems such as 'know your client'.

- **No effective central control:** As a decentralised payment method, Bitcoin has no central repository and value or payment can be facilitated through peer-to-peer (peer-to-peer refers to transactions conducted directly between users without the intervention of a third party, usually a bank in the traditional payment model) movements without reliance on intermediaries (eg, banks) and with no organisation or institution responsible for maintaining customer records (Federal Bureau Of Investigation Intelligence Assessment (*op cit*); B Nigh and CA Pelker 'Virtual Currency: Investigative challenges and opportunities' <https://leb.fbi.gov>, accessed 1-12-2017).

A major factor exacerbating the risks associated with a cryptocurrency-based payment system is the decentralised nature of the operation, meaning that they may be located in/operated from jurisdictions with inadequate AML/CFT controls.

There is a fear that criminals may deliberately seek out jurisdictions with weak AML/CFT regimes in order to enhance their capacity to either directly launder their own funds or to provide money-laundering services.

- **Cross-border operations:** Cryptocurrencies are an excellent vehicle for transmitting value across national borders, free from government interference. The speed of the transfer means that even if a transaction is detected, the proceeds of

an illicit activity are difficult to sequester.

Rapidly moving proceeds of illegal activities between jurisdictions also eliminates the usual volatility inherent in cross-border currency transfers, which results in lower exchange risk and reduced loss due to inflation and transaction costs. Criminals, after all, want to make a profit and want access to the profit – they have identified cryptocurrency as an efficient and desirable means to transmit and store wealth for illicit purposes (J Mari, and P Warrack 'Blockchains and Money Laundering' <https://slidelegend.com>, accessed 13-11-2017).

Each jurisdiction is required to take into account its own geo-political circumstances and challenges when establishing an approach to regulation of Bitcoin.

- **Lack of record-keeping:** The lack of transactional record keeping becomes a problem when trying to reconstruct illicitly performed transactions. In the case of Bitcoin, all relevant information is published only in the software code itself and attempting to trace the identities of individuals and locations without cooperation from the parties becomes difficult.

- **Speed:** Transactions can be done with increased speed and sometimes even instantaneously (Tu & Meredith *op cit* at 282). Once the funds are transferred they can be conveniently withdrawn, converted, mixed and/or transferred without the 'red-tape' of the traditional payment channels.

- **No limit to sums transmitted:** Due to current lack of regulation there is no set limit to the amount of money that can be transferred without limit or oversight using Bitcoin (United Nations Office on Drugs and Crime 'Basic Manual on the Detection and Investigation of the Laundering of Crime Proceeds using Virtual Currencies' at 47, www.imolin.org, accessed 1-12-2017).

- **Transaction obfuscation:** Even once an

attempt to launder funds has been detected, one has to deal with 'tumbling', a process which provides the ability to mask the trail by the mixing together of cryptocurrency transactions to make them harder to trace.

- **Irreversibility:** Once transactions are recorded, they are irreversible (Tu and Meredith (*op cit*) at 283). Accordingly, to recover or interdict illicit financial outflows will be difficult or impossible.

- **Jurisdictional issues:** There is no common or internationally-accepted framework regulating cryptocurrencies. Co-ordinated attempts at regulation are hamstrung by the international nature of the challenges facing each jurisdiction, with both internal and external political, financial, social and economic forces affecting the viability and integrity of regulation, legislation and enforcement.

Cryptocurrency transactions occur online directly between users, who may be present in different countries. Records relating to customer identification and transactions may be held by different entities, across different jurisdictions, hampering or restricting access by law enforcement agencies and regulators. (FATF Report 'Virtual Currencies Key Definitions and Potential AML/CFT Risks' 2014 www.fatf-gafi.org, accessed 1-12-2017). This makes detection extremely difficult.

Even identifying whether any relevant laws have been broken can in itself become a monstrous task. The necessary gathering of evidence can also be beset by jurisdictional pitfalls as any attempt to investigate criminal use of a cryptocurrency is often reliant upon international cooperation, creating investigative challenges and jurisdictional obstacles.

- **Terrorism:** There is a view that Bitcoin's cross-border capacity can give rise to an increased burden in combating terrorism (MP Ponsford 'A Comparative Analysis of Bitcoin and Other Decentralised 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 1-12-2017)) as it can be accessed from anywhere via the Internet and can be used to make instant payments and funds transfers (FATF Report (*op cit*)).

Potential remedies

Effective prevention and prosecution strategies for those engaged in money-laundering and terrorist-financing using cryptocurrencies will encompass the following:

- **Do not discount traditional methods of detection and investigation:** As a start, due to the relative infancy of the concept of cryptocurrencies, and the fact that they are not accepted as widespread payment methods, criminals will generally wish or need to convert cryptocurrency to 'hard' currency. Accordingly, traditional institu-

tions will still be required as 'onboard' and 'offboard' conduits between fiat- and crypto-currencies.

- **Preserve the public nature of the transaction:** While cryptocurrencies are pseudo-anonymous and traded directly between users in a peer-to-peer network, all Bitcoin transactions are recorded. The Bitcoin system operates a 'ledger', known as the 'blockchain' (Ponsford (*op cit*)). Bitcoin transactions are entered chronologically just the way bank transactions are. 'Blocks' in the 'chain' are like individual bank statements and can thus provide invaluable details of value, origins, etcetera of each transaction associated with particular a Bitcoin address (www.investopedia.com, accessed 1-12-2017).

- **Install and regulate gatekeepers:** Requiring registration and bringing 'dealers' and exchanges within the ambit of legislation like Financial Intelligence Centre Act 38 of 2011 will compel reporting of suspicious financial transactions and provide a starting point to collect and verify personal information.

- **Force cross-border compliance:** Dealers and exchanges servicing customers in South Africa (SA) without a base of operations or principal place of business in SA should be compelled to register and failure to do so would be illegal.

This transfers a portion of the responsibility for monitoring dealer/exchange-registration to the financial institutions who benefit by providing financial services to these businesses in the first place.

- **Make transactions reversible:** Bitcoin was the first digital currency to successfully use cryptography to keep transactions secure and pseudonymous, making conventional financial regulation difficult. The security of the transaction lies in the fact that, with blockchain, unchangeable records can be created. This means once data has been written to a blockchain no one, not even a system administrator, can change it, rendering it 'immutable'. While beyond the scope of this article, there are mechanisms whereby the blockchain can be altered and transactions theoretically reversed.

Recent trends, case law and legislation

• United States

Recent cases in the United States (US) seem to accept a wider definition of money into which cryptocurrencies can fall, although divergent views still exist.

In the high-profile 2015 case of *United States v Ross William Ulbricht* 14 Cr 68 (KBF), confirmed on appeal by the United States Court of Appeals in May 2017 (*United States v Ulbricht* No 15-1815 (2d Cir 2017) United States Court of Appeals), the head of the now-defunct online black market, Silk Road, was convicted on charges of computer hacking, drug trafficking, money laundering and

engaging in a criminal enterprise and sentenced to life imprisonment.

Silk Road was an online marketplace whose users primarily purchased and sold drugs, false identification documents and computer hacking software. Payment was made exclusively in Bitcoin.

The judge in *United States v Ulbricht* 31 F. Supp. 3d 540 (SDNY 2014) rejected the argument that Bitcoin is not money, saying 'Bitcoins carry value - that is their purpose and function - and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it US dollars, euros, or some other currency.'

In the 2014 case of *United States v Faiella* 39 F. Supp. 3d 544 (SDNY 2014) operators of an unlicensed money transmitting business were charged with supplying Bitcoins to Silk Road users.

The accused also pleaded that Bitcoins are not money and that the money transmission charges should, therefore, be cleared. In rejecting this argument, the court ruled that:

'Money in ordinary parlance means "something generally accepted as a medium of exchange, a measure of value, or a means of payment". Bitcoin clearly qualifies as "money".'

In 2016 in *United States v Murgio* No. 15-CR-769 (AJN) (SDNY 2016) the accused was sentenced to five and a half years imprisonment for running an unregistered Bitcoin exchange that sold Bitcoins used in illegal online transactions, including, payment in ransomware attacks carried out by a group of internet hackers.

Murgio used the same defense as Mitchell Espinoza in *The State of Florida v Mitchell Espinoza* Criminal Division Case no. F14-293, (Fla. 11th Cir.Ct 2016) (see J de Mink 'The rise of Bitcoin and other cryptocurrencies' 2017 (Dec) *DR* 30), saying Bitcoin does not qualify as a currency but the judge rejected this defense, stating: 'Bitcoins are funds within the plain meaning of that term Bitcoins can be accepted as a payment for goods and services or bought directly from an exchange with a bank account. They therefore function as pecuniary resources and are used as a medium of exchange and a means of payment.' (*Murgio* (*op cit*) at 6).

On 25 May 2017 a wide-ranging Bill entitled *Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2017* was introduced in the US Senate. In the context of cryptocurrencies it seeks to include funds stored in a digital format within the definition of monetary instruments.

• Europe

In 2016, Europol, Interpol and the Basel Institute on Governance formalised the establishment of a tripartite partnership for a working group on money laundering with digital currencies.

Also in 2016, ten men were arrested

in the Netherlands as part of an international raid on online illegal drug markets. The men were caught converting their Bitcoins into Euros in bank accounts using commercial Bitcoin services and then withdrawing millions in cash from ATM machines. The trail of Bitcoin addresses allegedly links the money to online illegal drug sales tracked by the Federal Bureau of Investigations and Interpol.

In April 2017 prosecutors in the Czech Republic indicted Thomas Jirikovský, the owner of the Sheep Marketplace, who made off with around 40 000 bitcoins, worth approximately US\$ 40 million at the time, from the accounts of users and vendors ('Sheep Marketplace owner indicted and face years prison' www.deepdotweb.com, accessed 23-1-2018).

In September 2017 the European Commission declared its intent to introduce a new directive focused on digital crimes, citing recent ransomware attacks in the region and abroad (State of the Union 2017: The Commission scales up its response to cyber-attacks <http://europa.eu>, accessed 23-1-2018).

In the United Kingdom, the latest trend is for drug dealers and gangsters to pump their profits into bitcoin cash machines to launder the dirty money. Detectives say they have seen an explosion in the use of digital currency by criminals who are strolling into cafes, newsagents and corner shops to dump their ill-gotten gains in virtual currency ATMs.

The cash machines, found in 93 locations in London and other cities, allow anyone to deposit sterling in exchange for bitcoin and other cryptocurrencies. The funds can then be transferred across borders to criminal associates who can withdraw them in any currency or spend them on the dark web, without being traced (R Camber and C Greenwood 'Drug dealers using bitcoin cashpoints to launder money: Police warn of explosion in use of digital currency by criminals to offload ill-gotten gains' www.dailymail.co.uk, accessed 23-1-2018).

Greece's Supreme Court has ruled in favor extraditing a Russian cybercrime suspect to the US to stand trial for allegedly laundering billions of dollars using the virtual currency bitcoin. Vinnik is the subject of a judicial tug-of-war between the US and Russia, which is also seeking his extradition on lesser charges, and is one of seven Russian suspects arrested or indicted worldwide last year on US cybercrime charges (Associated Press 'US, Russia compete to get hands on Bitcoin fraud suspect' www.cbsnews.com, accessed 23-1-2018).

In Japan, 170 cases of suspected money laundering linked to cryptocurrencies were reported by currency exchange operators in Japan in the last six months of 2017.

French Chief Executive Officer, Mark Karpelès, was charged *in absentia* in the

US with fraud and embezzlement of US\$ 390 million from the now shuttered Bitcoin currency exchange Mt. Gox. He was arrested in Japan in 2015 and his trial for transferring 341 million Yen (US\$ 3 million) from a Mt. Gox account holding customer funds to an account in his name is currently ongoing.

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.

There are very few jurisdictions where cryptocurrencies have been declared unlawful (for example, the State Bank of Vietnam has announced a ban on the use of cryptocurrencies, as well as fines and possible prosecution for violators. The measures have been put into effect from 1 January 2018). Most countries have accepted their inherent benefits and are willing to treat their use as lawful. Outright prohibition is not likely to be effective, with regulation the favoured model.

However, there is no common or internationally-accepted framework regulating cryptocurrencies. 'Although the Financial Action Task Force (FATF) Recommendations and Guidance on virtual currencies have provided a global response, they are limited to AML/CFT' (The Commonwealth Cybercrime Initiative Presentation (2016) www.cepal.org, accessed 4-12-2017).

However, despite the clear problem areas it is evident that Bitcoin is not currently feasible as an effective instrument for carrying out extensive criminal activities.

Firstly, the technology is nascent and not sufficiently widespread. Money laundering is a mechanism whereby 'dirty' cash is lost in a mixture of legitimate transactions. The Bitcoin pool is simply not 'big enough or messy enough to be a useful place to launder money' at present (K Mangu-Ward 'Are Bitcoins Making Money Laundering Easier?' www.slate.com, accessed 4-12-2017). Only about US\$ 8 billion worth of transactions were conducted in Bitcoin from October 2012 to October 2013, while during 2012, the Bank of America processed US\$ 244.4 trillion in wire transfers and PayPal processed US\$ 145 billion. Therefore, the potential for 'hiding' or 'losing' funds in the (comparatively) small Bitcoin market is restricted (Mangu-Ward *op cit*), while other instantaneous or online vehicles are available.

Secondly, despite Bitcoin's association with various illegal marketplaces and less-than-legal business deals (L Trautman 'Virtual Currencies: Bitcoin & What Now after Liberty Reserve, Silk Road, and

Mt. Gox? (2014) 20.4 *Richmond Journal of Law & Technology* at 108), all of these schemes have been shut down by authorities. The reason for this is simple: Bitcoin is not a totally anonymous form of money, as every transaction can be publicly tracked through the blockchain (<http://insidebitcoins.com>, accessed 4-12-2017).

In fact, the EU's law-enforcement agency, Europol, raised alarms three months ago, writing in a report that 'other cryptocurrencies such as Monero, Ethereum and Zcash are gaining popularity within the digital underground' (O Kharif 'The Criminal Underworld Is Dropping Bitcoin for Another Currency', www.bloomberg.com, accessed 23-1-2018).

Thirdly, research has shown that cryptocurrencies are currently not a method by which terrorists raise or move money, although they remain a viable method for doing so.

Fourth, the ordinary criminal simply does not have the capacity to disguise or hide movements of large amounts of money. The largest launderers of funds would appear to be governments with corrupt heads of state, their cronies and supportive or 'captured' public officials having access to vast wealth.

Fifth, the law may already have caught up. Although the publicity surrounding the arrest and subsequent trial of Michell Espinoza seemed noteworthy at the time, it is unlikely the court's decision will have a dramatic impact outside of Florida. Many US states already place Bitcoin under the definition of 'monetary value' (see *Espinoza* case) and it is evident that most jurisdictions are carefully monitoring developments in this area. In fact, it is theorised that Bitcoin is losing its appeal with some of its earliest and most avid fans, criminals, giving rise to a new breed of virtual currency. Privacy coins such as Monero, designed to avoid tracking, have climbed faster over the past two months as law enforcers adopt software tools to monitor people using Bitcoin.

It is accepted that criminals are inclined to exploit services with weak or non-existent 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 *op cit*).

Law enforcement agencies will need to develop an entirely new knowledge base while still remaining vigilant on a traditional level to identify the illegal use of cryptocurrency to transfer, disguise or hide the proceeds of criminal enterprise or terrorist acts.

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THE LAW REPORTS

November 2017 (6) South African Law Reports (pp 1 – 330); [2017] 3 All South African Law Reports October (pp 1 – 294); 2017 (9) Butterworths Constitutional Law Reports September (pp 1089 – 1224); 2017 (11) Butterworths Constitutional Law Reports November (pp 1357 – 1496)

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

Banking law

Function of Central Bank:

The decision in *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP); [2017] 4 All SA 269 (GP) turned on a controversial report by the Public Protector (the PP) (Report 8 of 2017/18 (the Report)). Two issues were raised in the Report. The first issue was the finding and remedial recommended for government to recover 'misappropriated public funds' after the South African Reserve Bank (SARB) in 1985 extended a 'lifeboat' involving millions of rands to Bankorp (which has since been usurped by ABSA).

The second issue was the PP's direction to the Portfolio Committee on Justice and Correctional Services to initiate a process that would result in the amendment of s 224 of the Constitution. In terms of this directive, s 224 must be amended to change the primary function of the SARB from 'protecting the value of the [South African] currency', to 'promot[ing], [balance and sustaining] economic growth in the Republic'.

The application by the SARB was solely concerned with the second issue, namely the PP's order to Parliament to amend s 224 of the Constitution (our discussion too, will be restricted to the second issue). The SARB sought urgent relief to set aside the PP's order to amend s 224 of the Constitution.

Murphy J made the following findings: First, the PP's direction to amend s 224 of the Constitution was illegal and *ultra vires* for the following reasons: The PP illegally broadened the scope of her investigation regarding the alleged 'misappropriation of public funds' to include an investigation into the primary function of the SARB and a directive to Parliament to amend the Constitution.

The PP's order that the Constitution be amended to strip the SARB of its primary function of protecting the value of the currency fell outside the powers granted to the PP in terms of s 182(1)(a) of the Constitution, which empowers the PP to investigate improper conduct in state affairs or in the public administration. Because the Office of the PP derives its powers from the Constitution, the PP has no power to recommend that the Constitution be amended.

The PP's recommended remedial action was set aside in terms of s 6(2)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), because she was not authorised by s 182(1) of the Constitution to make such an order.

Secondly, the PP's direction to Parliament to amend s 224 of the Constitution was also irrational and unreasonable. Based on expert evidence adduced by the SARB, it is a generally accepted principle of economics that the primary function of central banks world-wide is to protect the value of the local currency.

The protection of a country's currency has a close bearing to aspects such as the inflation rate and ensuring the competitiveness of South African goods and services in export markets. These aspects are crucial, also for the marginalised and the poor. The PP's order to amend the Constitution would change all this and was both unscientific and irrational and thus also, for this reason, invalid.

Thirdly, the PP's direction to amend s 224 of the Constitution was *procedurally unfair* and had to be set aside in terms of s 6(2)(c) of PAJA because she failed to honour an agreement with the SARB in terms of which she undertook to make her report available to it before making it public.

The PP's order to Parliament to amend the Constitution was thus set aside with costs.

Minister's limitation of power to intervene in contractual relationship: The facts, which led to the application in *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v The Director of the Financial Intelligence Centre* [2017] 4 All SA

150 (GP) were as follows: A decision in December 2015 by the 15th to 18th respondents, which were the four main commercial banks (the banks) to close the bank accounts of the first 14 respondents of the Oakbay group of companies (Oakbay). The banks alleged that they did so in compliance with their obligations in terms of the Financial Intelligence Centre Act 38 of 2001.

Oakbay approached the Minister of Finance (the minister) to intervene and assist Oakbay in having its banking facilities restored on the basis that it was in the national interest that there would be no job losses in Oakbay if it became unbanked.

The minister obtained legal advice and resisted Oakbay's request.

The minister then applied to the court for declaratory relief regarding his lack of powers in this regard. The first main application (the application for declaratory relief, which turned out to be the only relevant application for present purposes) was brought by the minister in the public interest, against the first respondent (Oakbay) and its associated entities (respondents two to 14).

Mlambo JP, Ledwaba DJP and Modiba J in a joint judgment held that the basis for the relief that the minister sought was s 21(1)(c) of the Superior Courts Act 10 of 2013. It deals with the aspect of persons over whom and matters in relation to which the High Court has jurisdiction.

It provides that a court has jurisdiction over all persons residing in or being in, and in relation to all causes arising within its area of jurisdiction, as well as all other matters, which it has the power in terms of its discretion to have jurisdiction over.

The court held that this involved a two-legged inquiry. First, the court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation. Secondly, the court must then decide whether the case is a proper one for the exercise of its discretion.

The first stage of the inquiry relates to whether the minister is authorised or obliged by law to intervene in the dispute between Oakbay and the banks.

In answering the first stage of the inquiry the court held that state organs or officials, in this case the Minister of Finance, are only empowered to act to the extent that their powers are defined and conferred by the Constitution and/or by statute. Neither the Constitution nor any other statute empowers the minister to intervene in a private bank-client dispute.

In answering the second leg of the s 21(1)(c) inquiry, the court referred with approval to the decision in *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) in which the court held that the bank-client relationship is contractual in nature. The bank may terminate the relationship at its discretion, on reasonable notice to the client, provided the reasons for terminating the account do not violate public policy or constitutional values.

The court refused to grant the declaratory relief sought by the minister on the basis that it would serve no purpose. Oakbay conceded both in its papers and in argument to the legal position that the minister sought confirmed by way of a declaratory order.

The application by the minister was, therefore, clearly unnecessary in the circumstances of this case.

Finally, the court held that the circumstances mentioned

in the second leg of the s 21(1)(c) inquiry do not warrant that the court exercises its discretion to grant the declaratory relief by pronouncing itself on an undisputed legal question, which has previously been confirmed in judgments.

The application for declaratory relief was dismissed with costs.

Class action: Prior certification required

Requirements for certificate: The decision in *National Union of Metalworkers of South Africa v Oosthuizen and Others* 2017 (6) 272 (GJ) turned on a technical aspect regarding the time of application for a certificate when instituting a class action.

The applicant, National Union of Metal Workers of South Africa (NUMSA), applied for leave, as a class representative, to continue as a class action – a pending action – which it had already instituted. This raised the issue of the timing of an application in a class action for a certificate. The crisp question was whether a party seeking to represent as class must apply to court for authority to act as class representative before summons is issued.

Van der Linde J referred with approval to the decision in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) in which the court held that a prospective class representative ought first to apply to court for class certification before they would have the right to litigate on behalf of a class. In that case the SCA also concluded that a number of substantive requirements would generally have to be met in class certification applications. It was in regard to the latter finding – not the timing of the application – that the CC in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) held that the 'substantive requirements [for a class action certificate] should only be considered as factors that assist in determining whether the interests of jus-

tice require certification. But on the requirement that the application should precede the summons, the CC clearly approved the approach laid down in *Children's Resource Centre*.

Even assuming that *ex post facto* certification in the interests of justice were permissible, the circumstances of the case did not justify the relaxation of the requirement of prior certification on that basis. Therefore, prior class certification was required, and the already pending action could not now be certified *ex post facto* as a class action.

The application for class action certification was, therefore, dismissed with costs.

• See Nurina Ally and Andrew Konstant 'Difficulties in regulating class action litigation: Is there a need to articulate the rules?' 2014 (May) *DR* 35 for a discussion on the *Children's Resource Centre* case.

• See law reports 'Class action' 2013 (May) *DR* 44 for the SCA judgment of *Mukaddam* and 'class action' 2013 (Nov) *DR* 51 for the CC judgment of *Mukaddam*.

Constitutional law

Transferability of municipal debts: The decision in *Jordaan v City of Tshwane Metropolitan Municipality* 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) combined a number of cases in which the constitutionality of s 118(3)

of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) was at stake. Section 118(3) provides that 'an amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property'.

The central issue in dispute was whether the provision permits a municipality to claim debts, which a predecessor in title incurred, from a new owner of the property and whether such an interpretation of the section can survive constitutional muster.

The applicants were all relatively new owners who complained that the municipalities suspended municipal services or refused to conclude the consumer services agreement for services with them until the historical debts relating to the property had been cleared.

The municipalities argued that they relied on their by-laws and debt collection policies to justify their refusal to open consumer agreements until historical debts had been settled, even though they invoked s 118(3) to refuse new owners municipal services.

In *BOE Bank v City of Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA)

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the court held that s 118(3) operated independently from the embargo provision in s 118(1) and, therefore, was not limited to the current owner, could be transferred and was also not restricted to the debts of the previous two years, but can go back 30 years.

Cameron J held that for a proper interpretation of s 118(3) one must consider the origins of the phrase 'charge upon the property' in South Africa. History shows that two distinct mechanisms were imported into statute law to help municipalities in collecting debts due to them. The first one is the embargo on the transfer of property with unpaid debts. The second mechanism was added to give municipalities a preferent claim in the debt-collecting process. Based on the history of the predecessors of s 118(3), the charge and embargo did not survive the transfer of the property.

Before the enactment of s 118(3) historical debts were never imposed on new owners. If the interpretation that the municipalities propose should stand, it would be a radical departure from the legal landscape.

It is important to understand what 'charge upon a property' and limited real rights of security in property for indebtedness mean in terms of the common law. In the common law 'charge upon the property' means that the debt may be recovered by execution on the property, and that municipal debts that have not prescribed, are secured by the property and that the property may be sold in execution and the proceeds used to pay the debts.

An enactment that makes a debt a 'charge' on the property does not necessarily make the charge transmissible. The claim cannot be enforced against the successor in title. The benefit of it being a charge against the property is that municipalities can immediately execute on the property, subject to an order of court, without a long debt collection enforcement procedure.

The fact that the Systems Act does not require some form of note on the register

of deeds also indicates that the charge does bind third parties, and is only applicable to the current owner and not successors in title.

On a proper interpretation of s 118, the charge does not survive transfer and cannot be enforced against the subsequent owner. The municipality's duties to provide services to the communities are important and dependent on the proper collection of fees. However, historical debts only exist because municipalities do not recover them effectively, even if they have all the mechanisms to do so. Municipalities do not have to rely solely on s 118(3) for this. Enforcement can and should take place before transfer. Importantly, so the court reasoned, an interpretation that finds that the charge is not transferable does not impede municipalities from collecting debts from the previous owner.

The interpretation of s 118(3) proposed by the municipalities would also be a deprivation of the property of the new owner. This deprivation could be fairly severe because it could bar an owner from transferring property until the debts incurred by the previous owner have been cleared. The fact that there is no connection between the historical debt and the current owner would make the deprivation arbitrary, and unconstitutional.

Section 118(3) was declared unconstitutional to the extent that it provided for the transferability of the debt.

- See law reports 'Property law' 2017 (May) *DR* 45 for the GP judgment.

- See editorial 'New property owners not liable for historical debt' 2017 (Oct) *DR* 4.

Contract law

Scope of a cancellation clause: The facts in *GPC Developments CC and Others v Uys and Another* [2017] 4 All SA 14 (WCC) were as follows: The first appellant, GPC, as owner of certain immovable property occupied by the first respondent, Uys, sought the eviction of Uys and all those occupying under him, from

the property. The dismissal of its application led to the present appeal.

Suffice it to mention here that in July 2012 GPC and Uys concluded a written deed of sale in terms whereof GPC sold certain immovable property to Uys. Uys was to procure finance to pay the purchase price but in the interim was allowed to occupy the property. At some later stage they added an addendum to the contract. Both the main agreement and the addendum contained a cancellation clause (*lex commissoria*).

Failure by Uys to comply with his contractual obligations led to the eviction application being brought. The application was based on the allegation that the occupation of the property had become unlawful in light of the purported lawful cancellation of the sale by GPC. The application for eviction was dismissed by the court *a quo*.

On appeal against the dismissal of the eviction application, the only issue before the present court was the question whether Uys unlawfully occupied the property on the relevant date.

Gamble J held that where a contract specifies a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective. The court *a quo* found that in the absence of a tender to repay the purchase price, the cancellation was a nullity.

The court pointed out that the term *lex commissoria* has acquired a somewhat flexible meaning in our law of contract. The phrase denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but it has also acquired a wider and more general meaning, to wit, a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right.

Clause 10 (in the main agreement) constituted a classic *lex commissoria*. It af-

forded GPC the right to cancel in the event of default on the part of Uys after the latter had been given notice to remedy within 10 days and had failed to do so. In such event, GPC could claim, *inter alia*, forfeiture of the amounts already paid to them by the purchaser.

However, clause 10 was not the only *lex commissoria* available to the parties as clause 3 (in the addendum) fell into the same category. At the time the addendum was concluded, GPC had a right to rely on clause 10 at that stage and resile from the contract. But that did not happen. On the contrary, the parties took positive steps to keep the agreement alive by concluding the addendum. Clause 3 thereof had its own election breach provisions as regards notice and included a term, which was the complete antithesis of a forfeiture clause – an obligation on GPC to repay the purchase price paid in defined circumstances. Thus, on the breach by Uys, GPC made an election to pursue a particular remedy, and so were bound by the contractual terms implicit in that choice. Having opted to invoke the *lex commissoria* incorporated in clause 3, GPC was bound to observe the cancellation requirements of that clause, which required a tender to repay the purchase price paid, and did not permit a claim for forfeiture.

The court *a quo* was correct in finding that the cancellation was not lawful, and the appeal had to be dismissed.

Local authorities

Unauthorised structure encroaching on public street:

The application in *Escherich and Another v De Waal and Others* 2017 (6) SA 257 (WCC) concerned a dispute between adjoining landowners regarding whether a road on one such property has been unlawfully blocked off and diverted and, secondly, whether certain structures erected on that road without planning approval had to be demolished.

The first and second applicants and the first respondent

ent owned neighboring plots in an estate. A public road (the road) passed through the estate, giving access to the first applicant's property (portion 29) before proceeding through the first respondent's property (portion 20) and continuing, through other land, to the second applicant's property (portion 28), giving access to it.

The first respondent, without any building plans being approved, erected two structures on the road, completely obstructing it. He also built a gate across the road where it entered his property. The effect was that, without his consent, no one could use the road from the point where it entered his property.

Apart from the loss of physical access to portion 28 previously provided by the road, the applicants complained that the location of the diversion road meant that their rights to privacy were impaired. The applicants brought an application in the High Court to restore access to the road, seeking an order directing the first respondent to demolish the structures erected, clear the road of other obstructions, and remove the gate.

The first respondent, in turn, argued that the road was not a public road and that nothing thus prevented him from erecting the gates and structures.

The first respondent further denied the *locus standi* of the applicants. He argued that, in terms of s 21 of the National Building Regulations and Building Standards Act 103 of 1977 and s 127(1) of the Divisional Councils Ordinance 18 of 1976, respectively, only a local authority (with jurisdiction) had *locus standi* to approach a court to seek the demolition of unauthorised structures, or the removal of an encroachment on a public road.

The court was thus asked, first, to decide the legal status of the road and, secondly, whether the first respondent was entitled to obstruct it by erecting a gate and structures on it.

Based on the evidence of the Surveyor-General, Bo-

zalek J held that the road was indeed a public road. In terms of s 121 of the Ordinance, the ownership of the road accordingly vested in the relevant local authority. It followed that the first respondent had no right to unilaterally close or obstruct the road. The fact that he had established a diversion road and offered to register servitudes of way was irrelevant in the present dispute.

The court confirmed that in terms of the common law the applicants had *locus standi* to pursue the relief they sought. This finding by the court was based on the applicants' general interest in ensuring the system of public streets on the estate was maintained and not unilaterally changed (except by lawful procedures), as well as their direct interest in the encroachment due to its impact on their rights.

The first respondent was accordingly ordered to restore access to the road by demolishing the structures so that it might be used as a road again. He was further ordered to pay the applicants' cost of suit.

Medical schemes

Legal nature of relationship between a medical scheme and its members: The appeal in *Genesis Medical Scheme v Registrar of Medical Schemes* 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164 (CC) concerned the legal nature of the relationship between a medical scheme and its members.

The crisp facts in *Genesis* were that the Registrar of Medical Schemes rejected the Genesis Medical Scheme's (Genesis) annual statements because Genesis had listed the funds it had allocated to their members' personal medical savings accounts (PMSA) as an asset on their statements.

In *Registrar of Medical Schemes v Ledwaba NO* (GP) (unreported case no 18545/06, 30-1-2007) (Du Plessis) (*Omnihealth*) the court held that a medical scheme was the trustee of all the funds it held, including the PMSA funds. A PMSA is a portion of the contributions

the scheme receives from those members who select benefit options that include savings accounts. The court in *Omnihealth* thus held that the PMSA funds constituted trust property under the Financial Institutions (Protection of Funds) Act 28 of 2001 (the FIA).

In the *Genesis* case the High Court held that a medical scheme was the rightful holder of all the funds it holds, including funds which it had allocated to PMSAs. The High Court thus rejected the reasoning in *Omnihealth*.

The SCA in *Genesis* rejected the reasoning of the High Court and confirmed the decision in *Omnihealth*.

On appeal to the CC, Cameron J held that from the definition of the 'business of a medical scheme' in the Medical Schemes Act 131 of 1998 (the MSA) it is clear that the parties in terms of a medical scheme, that is, the scheme

and its members, are in a contractual relationship: The scheme undertakes a liability in return for payment of a premium or contribution.

The relation between a medical scheme and its members is commercial, not fiduciary.

A trust relationship must be deliberately constituted. It cannot arise unintentionally. A trust can come into existence only by way of testamentary disposition, by statute, or by contract between living persons.

Neither the MSA, nor the FIA imposes a trust relationship on a medical scheme. The scheme receives a member's premium or contribution in respect of the liability it undertakes to provide a service in return for the premium it receives. The scheme thus receives its members' contributions for or on behalf of its own business and not as trustee on behalf of



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the members. The funds thus enter the medical scheme's bank account without being impressed by a trust or fiduciary relationship.

This principle applies to both the premiums which medical schemes receive, and the funds which the scheme allocates to a PMSA. The medical scheme, and not its members, is the rights holder of the PMSA funds. As a result, and in terms of s 26(1) (c)(ii) of the MSA, a medical scheme may keep the interest accruing in PMSAs in its bank account.

The appeal was thus allowed with costs.

• See law reports 'medical aid schemes' 2017 (Jan/Feb) *DR* 40.

Suretyship

Defences by sureties: The crisp facts in *Nedbank Ltd v Zevoli 2008 (Pty) Ltd and Others* 2017 (6) SA 318 (KZP) were as follows: Nedbank made a loan to Zevoli (the principal debtor) and the three defendants stood surety for the loan. The sureties bound themselves as sureties and co-principal debtors for due performance of all Zevoli's obligations. Zevoli breached the terms of the loan agreement.

Zevoli then voluntarily resolved to commence business rescue proceedings. Nedbank sued the sureties for an amount of some R 14,8 million, being the outstanding amount of the loan. The sureties unsuccessfully raised both substantive and technical defences. I will deal only with the substantive defences. The court granted summary judgment against the sureties.

Madondo DJP dealt as follows with the substantive defences:

• First defence – business rescue proceedings: Nedbank is precluded to proceed against Zevoli (the principal debtor) in terms of s 133 of the Companies Act 71 of 2008. The court referred to *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) and held that it is clear that this is a defence that is available to the principal debtor only and not to the sureties (personal defence).

• Second defence – the waiver breach: It was contended that one of the sureties entered into an agreement with Nedbank in terms of which the arrears of the principal debtor's account were paid together with the next instalment. By concluding such an agreement and accepting payment, the bank waived its right to rely on the principal debtor's breach of the loan agreement.

In terms of the suretyships the bank was entitled, without affecting its rights under the agreement, to 'make any other arrangements with the [principal] debtor and any other surety for the discharge of any obligations owing under the facilities as it may deem fit.' Here no waiver occurred.

• Third defence – no letter of demand: The sureties claimed that the bank did not send a letter of demand to the principal debtor to remedy its breach before the bank issued summons. The failure to give notice offended the requirement of good faith. In terms of the contract the bank was not required to give such notice. In the absence of an allegation of extortion, oppression or fraud a court may not simply interfere with a contract between parties dealing at arm's length on the mere allegation of a breach of good faith.

• Fourth defence – conduct prejudicing the sureties: The bank afforded the principal debtor the opportunity to sell certain properties. This indulgence prejudiced the sureties and as a consequence the bank released them as sureties. It was agreed between the bank and the sureties that the bank would be entitled to grant the principal debtor extensions of times for payment or to make any other arrangements with the principal debtor.

• Fifth defence – no opportunity to remedy: The bank was obliged to call on the sureties to remedy the principal debtor's breach and the failure to do so released the sureties. The court held that there is nothing in the suretyships or in law which obliged the bank to call on the sureties to remedy the principal debtor's default.

• Sixth defence – additional affidavits not allowed: The bank proffered an additional affidavit in support of their claim and this was against the rules of the court. The additional affidavit simply sought to clarify the amount outstanding because some payments were made subsequent to the issue of summons and was, therefore, permissible.

• Seventh defence – faulty certificate of balance: The contract provided that the outstanding amount could be proved by means of a 'certificate of balance'. The amount stated in the certificate differed from the amount stated in the summons. The suretyship contract precluded the sureties from challenging the certificate of balance and the bank offered an adequate explanation for the discrepancy.

The claim succeeded with costs.

Wills and trusts

Application to amend trust deed: The facts in *Harper and Others v Crawford NO and Others* [2017] 4 All SA 30 (WCC) were as follows: In 1953, a trust deed was executed by Louis John Druiff (the donor). The income and capital beneficiaries of the trust were the donor's four children (one of whom was the first applicant) and any of their children. The first applicant was the only surviving child of the donor. Accordingly, her one-fourth share of the capital of the trust and its income therefrom remained to be distributed on her death in terms of the trust deed. She had no biological children, but in 1955 and 1957, had lawfully adopted the second and third applicants respectively. The remaining children of the donor (the first applicant's siblings) had biological children.

The applicants sought an order declaring that the words 'children', 'descendants', 'issue' and 'legal descendants' used in the trust deed included the second and third applicants. Put differently, the aim of the application was to amend the trust deed so that it did not discriminate against the second and third applicants on

the basis that they were not the biological descendants of the donor.

The three grounds for the application were found to all be based on the equality provisions of s 9 of the Constitution.

Dlodlo J held as follows: First, the principle that the courts will refuse to give effect to a testator's directions, which are contrary to public policy is a well-recognised common-law ground. The right to equality is a core value of our Constitution. The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is indicative of public policy and the community's legal convictions. The current statutory position of adopted children is indicative of the legislature's aim to place adopted children on the same footing as biological children. The Children's Act 38 of 2005 presently regulates the rights of children, including that of adopted children. The legislature, by introducing s 242(3) of the Children's Act (which equalises adoptive children with natural children) has been mindful of the constitutional imperative placed on it. However, because of its interpretation of the word 'descendant' (see below) the provision contained in s 242(3) did not assist the applicants.

Secondly, the applicants argued that if the terms of the trust deed were interpreted only to include the donor's biological descendants, the exclusion of the second and third applicants would amount to unfair discrimination falling foul of s 9(4) of the Constitution.

The court held that in interpreting a trust deed, the point of departure is the grammatical or ordinary meaning of the words used. Those words must be read within the context of the trust deed as a whole. Having regard to the accepted meaning of the words 'descendant', 'progeny' and 'issue', the court held that the trust deed under discussion had the effect that only the biological descendants of the donor's children were capital beneficiaries of the trust. That was the clear intention of the donor.

Thirdly, the court dealt with the issue of freedom of testation. Section 25 of the Constitution protects a person's right to dispose of their assets as they wish on their death. Inroads into freedom of testation are not made lightly. Such discrimination

as might exist in this case, was found not to be unfair. Courts have no competency to vary the provisions of the donor's trust deed just as they would have no power or authority to change any testator's will. Effect should always be given to the wishes

of the testator.

The application was, accordingly, dismissed with costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material

under review also contained cases dealing with: Administrative law, attorneys, civil procedure, criminal procedure, electricity, *fideicommissum*, freedom of religion, hate speech, privilege, procurement, tax and unlawful arrest.



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Civil procedure

Effect of making a settlement agreement an order of court: The facts in the case of *Big Five Duty Free (Pty) Ltd v Airports Company South Africa Ltd and Others* [2017] 4 All SA 295 (SCA) were that in 2009 the first respondent, the Airports Company South Africa (ACSA), awarded a tender contract to the appellant Big Five, entitling it to operate duty-free shops in three of its international airports. A competitor, the second respondent, Flemingo, was aggrieved by the award of the tender and approached the GP for relief in the form of urgent interdict precluding ACSA from implementing the lease as per the tender award

December 2017 (6) South African Law Reports (pp 331 – 650); November [2017] 4 All South African Law Reports (pp 295 – 604); 2017 (6) Butterworths Constitutional Law Reports – June (pp 675 – 814); 2017 (10) Butterworths Constitutional Law Reports – October (pp 1225 – 1356)

and also for a review and setting aside of the award. Both remedies were granted by Phatudi J who held that the tender award was unlawful as it took into account irrelevant considerations and was not transparent or fair. The appellant took the matter on appeal to the Full Court, where ACSA did not take part in the proceedings but opted to abide the decision of the court. However, after hearing and before delivery of judgment, the appellant and Flemingo reached a settlement agreement, which was made an order of the Full Court. In terms of the settlement agreement Flemingo abandoned judgment granted in its favour by Phatudi J, withdrew review application proceedings and ACSA was free to implement the award of its tender to the applicant.

Thereafter, a dispute arose about the interpretation of the settlement agreement. ACSA took the view that it was not bound by the agreement as it was not a party to it and could as a result start the tender process afresh. To resolve the problem the appellant approached the High Court for an order declaring that ACSA was bound by the settlement agreement and had to sign the anticipated lease agreement within 30 days of the granting of the enforcement order. Hughes J dismissed the application, holding that the order of Phatudi J, being a 'public remedy', could not be set aside by private parties. Moreover, she held that she was not bound by the settlement agreement

before the Full Court as it was wrong, as well as 'at odds with the Constitution, the law and public policy'.

An appeal to the SCA against the order of Hughes J was upheld with costs. Lewis JA (Ponnan, Mathopo JJA, Lamont and Mbatha AJJA concurring) held that the court making the agreement an order of court did not enter into the merits of the litigation. The court had to do no more than satisfy itself that the agreement related to the litigation between the parties and that it was not contrary to policy or law. The agreement had to be construed in the light of the circumstances attendant on it, being the factual matrix or context. The purpose of the withdrawal of review proceedings and abandonment of the order of Phatudi J, coupled with the settlement agreement, was to set aside that order. The argument that the Full Court did not, independently of the parties, intend to set aside the order of Phatudi J could not be accepted.

The court held further that it was not necessary to determine whether Hughes J was entitled to decide that the Full Court had erred in making the settlement agreement an order of court. It was not open to Hughes J to do so as she was bound by the doctrine of *res judicata* and her finding in relation to the doctrine of precedent was misplaced.

Fundamental rights

Deprivation of property and right to practise a trade, oc-

cupation or profession: The Diamonds Act 56 of 1986 (the Act) was amended on 1 July 2007 with the introduction of s 20A, which provides that: 'No licensee may be assisted by a non-licensee or holder of a permit ... during viewing, purchasing or selling of unpolished diamonds at any place where unpolished diamonds are offered for sale in terms of this Act, except at a diamond exchange and export centre [DEEC]'. Before the amendment unlicensed persons were actively involved in the viewing, purchasing or selling of unpolished diamonds, something which created room for illegal activities in the unpolished diamond trade.

In *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC); 2017 (10) BCLR 1303 (CC), the applicant, the South African Diamond Producers Organisation, a voluntary association acting in the interest of its members, producers and dealers in diamonds, obtained a court order from the GP, per Van der Westhuizen AJ declaring s 20A inconsistent with the Constitution and, therefore, invalid. The High Court held that the section violated s 25 of the Constitution, which prohibits deprivation of property except in terms of a law of general application and also that it violated s 22 of the Constitution dealing with the freedom to exercise any trade, occupation or profession. The present application was for confirmation of the order of

invalidity of the section as required by s 172(2)(a) of the Constitution. The applicant also cross-appealed against the High Court costs order, seeking the costs of three instead of two counsel. The confirmation application was dismissed with no order as to costs. Also dismissed was the cross-appeal against the High Court costs order.

Reading a unanimous decision of the CC, Khampepe J held that there was no deprivation of property, the applicant's members suffered no loss while there was no restriction on its members to join the trade of unpolished diamond trade or continue therein. There could be deprivation only where interference with another's rights in property was substantial, meaning that the intrusion had to be so extensive that it had a legally relevant impact on the affected rights. On the facts before the court it was not possible to quantify the loss that the applicant's members had suffered as a direct result of s 20A. The alleged 30% drop in the price of diamonds as a result of the section in fact referred to lost commission opportunity rather than the fair market value of the diamonds. The limitation imposed by the section did not constitute a substantial interference with licensees' rights of ownership in their diamonds while there was no deprivation of property. Diamond producers and dealers had not been deprived of property in their diamonds. There was accordingly no infringement of s 25(1).

A law prohibiting certain persons from entering into a specific trade or providing that certain persons would no longer continue to practise that trade would limit the choice element of s 22 as there would be a legal barrier to choice. Section 20A did not limit applicant's members to choose their trade, profession or occupation. Not only did the section not impose a formal legal barrier to choosing to practise the trade of diamond dealer or producer but no case had been made out that the section presented an effective bar to choos-

ing to practise those trades. All that the section did was to prohibit licensees from being assisted by unlicensed persons when viewing, purchasing or selling unpolished diamonds, except at a DEEC. Producers and dealers were still able to obtain assistance if they so wished but that had to be rendered by a licensed person (outside a DEEC) or, if they specifically sought the assistance of a person who was not so licensed, that assistance could be rendered only at a DEEC. That could not, without more, render trading as a diamond producer or dealer so unprofitable as to obviate choice.

Gender

Alteration of gender of a married person: In *KOS and Others v Minister of Home Affairs and Others* 2017 (6) SA 588 (WCC); [2017] 4 All SA 468 (WCC), the six applicants were three couples married in terms of the Marriage Act 25 of 1961 (the Marriage Act). Three of the applicants, namely, KOS, GNC and WJV were husbands who, sometime after their respective marriages, underwent surgical and/or medical treatment to alter their sexual characteristics from those of a male to those of a female, after which they applied for an altered birth certificate to reflect their new gender and appearance in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 (the Alteration Act). The altered birth certificate was required to apply for a new identity document, driver's licence, passport and also operate a banking account so as to correctly reflect their new gender and appearance, including their altered feminine forenames in order to avoid the inconvenience and embarrassment, which they were going through on an almost daily basis. In the case of KOS and GNC the Department of Home Affairs, represented by the second respondent Director-General, effectively denied them the altered birth certificates on the ground that the computer system did not allow a change of their gender from male to female as they

were married in terms of the Marriage Act, which because of the common law definition of a marriage as a union between a man and woman, did not allow same-sex marriage. The Department accordingly recommended that the parties should divorce and marry afresh in terms of the Civil Union Act 17 of 2006 (the Civil Union Act). However, as there was no irretrievable breakdown of marriage relationship between them and their spouses, a decree of divorce was not possible. In the case of WJV an altered birth certificate was granted, but unknown to him that only took place after his marriage in terms of the Marriage Act was deleted from the records and a new marriage, concluded in terms of the Civil Union Act, was registered.

The applicants approached the High Court for a number of orders, the main ones being that in the case of KOS and GNC, the conduct of the respondent in refusing to issue them with altered birth certificates was inconsistent with the Constitution and unlawful. In the case of WJV he sought a declaration that the deletion of his marriage from the respondent's records was unlawful. The orders sought were granted with costs. The second respondent was ordered to process the altered birth certificates of KOS and GNC within 30 days of the granting of the order, such certificates not to refer to their marital status in terms of either the Marriage Act or the Civil Union Act. In the case of WJV the second respondent was ordered to reinstate the deleted marriage within 30 days of the granting of the court order.

Binns-Ward J held that the manner in which applications by transgender spouses were treated manifested a regrettable lack of compliance by the respondent with its constitutional obligations in a number of respects. The Marriage Act did not contain anything prohibiting a party to a marriage duly solemnised in terms of the formula prescribed in terms of s 30(1) thereof from undergoing a sex-change or obtaining an altered birth certificate in terms of the Altera-

tion Act. There was nothing in the Marriage Act that prohibited amendment of records to take account of subsequent name and/or gender details of persons whose marriages were duly solemnised under the Marriage Act. The minister could not rely on any shortcomings in the regulatory record-keeping mechanisms of the Marriage Act to deny transgendered persons their substantive rights under the Alteration Act or to frustrate the substantive requirements of the Identification Act 68 of 1997. Both the Marriage Act and the Civil Union Act treated marriage as 'a union of two persons, to the exclusion, while it lasts, of all others'. There was no parallel system of civil marriage, but only a parallel system for the solemnisation of marriages, one in terms of the Marriage Act and the other in terms of the Civil Union Act.

Government procurement

Locus standi to set aside the award of a tender to a competitor: The facts in the case of *Areva NP Incorporated in France v Eskom Holding Soc Ltd and Others* 2017 (6) SA 621 (CC); 2017 (6) BCLR 675 (CC) were that after tender bids had been invited by the first respondent, Eskom Holdings Soc Ltd (Eskom), a state owned corporation and, therefore, an organ of state, for the replacement of steam generators at Koeberg Nuclear Power Station in the Western Cape. Two competitors emerged, namely, the applicant Areva and the second respondent Westinghouse Electric Belgium Société Anonyme (WEBSA). The tender, valued at an approximate R 5 billion, was awarded to Areva. As a result the second respondent instituted High Court proceedings to set aside the tender and have it awarded to it.

The GJ per Carelse J held that the applicant had *locus standi* to seek relief but dismissed the application on the merits. An appeal against that order was upheld by the SCA per Lewis JA (Ponnan, Theron, Petse and Mathopo JJA concurring). A further appeal to the CC was upheld with costs,

which were limited to those of two and not three counsel as sought in the cross-appeal.

Reading the majority judgment Zondo J (Moseneke DCJ dissenting, with whom Bosielo AJ concurred) held that the second respondent WEBSA did not have *locus standi* to seek an order setting aside the award of the tender to the applicant Areva and have the tender awarded to it. That was so as the tender that was submitted to the first respondent Eskom was not one coming from WEBSA but a different and separate company, namely, Westinghouse USA. Although WEBSA averred that it was a bidder, which lost the tender to Areva, it had been shown by attached documentation that the bid had been submitted by it on behalf of Westinghouse USA and not in its own right. That being the case the statement by WEBSA that it had submitted a bid in respect of the tender and lost to Areva had to be rejected. The statement that it made the bid in its own right was plainly wrong.

WEBSA and Westinghouse USA were two separate legal entities and each one of them bore its own separate rights and incurred its own separate obligations. When each one of the two separate entities acted in its own right, no obligations or rights attached to the other simply by virtue of the fact that they both belonged to the same group of companies. Just because company A belonged to the same group of companies as company B did not give any one of them *locus standi* to institute court proceedings in its own right in a matter that only directly affected the other company. Therefore, if company A submitted a bid for a certain tender and lost to company C, company B could not institute review proceedings in its own right to set aside the award and seek an order that the tender be awarded to it just because it belonged to the same group of companies.

It followed, therefore, that WEBSA did not have *locus standi* to institute review proceedings in its own right to have the award of the tender to Areva set aside. It would have been entitled to do so

as an agent of Westinghouse USA but did not do so.

Income tax

Retrospective operation of an amendment and deprivation of property: The facts in *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another* 2017 (6) SA 435 (GP); [2017] 4 All SA 175 (GP), were that in March 2007 a certain company, Serurubele Trading (ST), entered into an amalgamation agreement with Pienaar Brothers (Pty) Ltd (PB), in terms of which, ST acquired all the assets of PB. Two months later and on 3 May 2007 ST declared a dividend of R 29 500 000 out of its 'share premium account'. Subsequently the ST company changed its name to Pienaar Brothers (Pty) Ltd, a company whose assets it had taken over. In terms of the law of the time that dividend distribution was tax free, the assumption being that when income was of a revenue nature in the hands of the transferor company, such as PB, it would always retain that nature in the hands of the transferee company, ST in this case, and would accordingly be taxable in due course. However, the authorities learned the hard way and came to realise that the nature of the income could change from revenue to capital, and thereby become tax free, in the hands of the transferee, as happened in this case when what was originally taxable income became a tax free dividend distributed out of 'share premium account'.

To deal with the problem of tax avoidance the law was amended in August 2007 when s 34(2) of the Taxation Laws Amendment Act 8 of 2007 (the Amendment Act) was passed to make a dividend distributed out of 'share premium account' taxable. The amendment was made to apply retrospectively to 21 February 2007, the date on which in his budget speech the Minister of Finance made an announcement of the intention to make - among others - share premium account dividend taxable.

Aggrieved by taxation of a

dividend, which at the time of its declaration was tax free, PB approached the High Court for an order declaring that s 34(2) of the Amendment Act was inconsistent with the Constitution and, therefore, invalid because of its retrospective operation. In the alternative, the applicant sought an order declaring that the Income Tax Act 58 of 1962 did not apply to the dividend and that taxation thereof was impermissible deprivation of property. The application was dismissed with no order as to costs as the case involved important constitutional issues.

Fabricius J held that the amendment was clear, its purpose was rational and further that it applied to all transactions including completed ones. A precise warning of retrospective operative amendment did not have to be given in each and every case nor was there a need for a warning, of whatever ambit, to be given in all cases. A proper approach was to decide the legality of retrospective amendments on a case-by-case basis, having regard to the various considerations. The Constitution itself did not prohibit retrospective legislation in civil law (ie, outside criminal law sphere). It followed, therefore, that there was nothing in the Constitution that prohibited Parliament from passing retrospective legislation.

The fact that a law created a civil liability did not in itself deprive the taxpayer of property unlawfully. If it were otherwise, every tax, levy, fee, fine and administrative charge would constitute deprivation of property for the purposes of s 25(1) of the Constitution. It could not, therefore, be argued that all taxes involved a deprivation of property. A state could not exist without taxes and they were not penalties. Neither could taxes, without qualification, be regarded as unjust deprivation of property use.

Prescription

Prescription of claim to re-transfer property to seller if conditions of sale not met: In *Bondev Midrand (Pty) Ltd*

v Puling and Another and a Similar Case 2017 (6) SA 373 (SCA), two similar cases, one against Mr and Mrs Puling and the other against Ramokgopa, were heard together. In both cases the appellant, Bondev Midrand, was a property developer, which developed a security estate known as Midstream Estate. One piece of land was sold to the respondents Mr and Mrs Puling while another was sold to Ramokgopa, both on similar terms. In each case the title deed had a clause containing a provision to the effect that a residential dwelling would be erected on the property within 18 months of the transfer of the property to the buyer. The second clause provided that should the buyer or successor in title fail to erect a dwelling as required the seller had a right, but was not obliged, to claim re-transfer of the property against repayment of the purchase price free of interest. In the case of Ramokgopa the dwelling was to have been erected by May 2008 while in the case of the Pulings that was by March 2007. As no dwellings were erected the appellant instituted proceedings for re-transfer of the properties to it in early 2014, which was long after the expiration of a period of three years since the cause of action arose, namely failure to erect the dwellings.

The GP dismissed the appellant's claim in both instances. The appeal that followed was also dismissed with costs by the SCA. Leach JA (Tshiqi, Seriti JJA, Tsoka and Ploos van Amstel AJJA concurring) held that the condition in the deed of transfer had two clauses. The first clause obliged the transferee or his successors in title to erect a dwelling on the property within a period of 18 months. The second clause provided that in the event of a dwelling not being erected within that period, the appellant would be entitled, but not obliged, to have the property re-transferred to it against return of the purchase price.

The first clause reflected an intention to bind not only the transferee but also his successors in title. Moreover, the requirement that

a dwelling be erected on the property resulted in encumbrance on the exercise of the owner's right of ownership of the land. Accordingly, the first clause gave rise to a real right. On the other hand, the right of the appellant to claim re-transfer of the property against repayment of the original purchase price as set out in the second clause did not amount to such an encumbrance. It was a right which could only be enforced by a particular person, the appellant, against a determined individual and did not bind third parties. Not only was that the hallmark of a personal right, but it was a right which the appellant could exercise at its sole discretion. If that clause had been standing alone, it would not have carved out a portion of the respondent's dominium and would therefore be regarded as creating a personal right.

Section 63(1) of the Deeds Registries Act 47 of 1937 provided that no condition in a deed purporting to create or embody any personal right would be capable of registration. Although only real rights and not personal rights should be registered against a title deed, the fact that a personal right became registered did not, by itself, convert that right into a real right. The appellant accepted that if its right to claim re-transfer of the immovable property were to be regarded as a personal right, not only would prescription have begun to run on the date by when the title deed reflected a dwelling had to be erected, but that the appellant's claim in each case had prescribed before proceedings were commenced.

Wills

Freedom of testation trumps right to equality: Very briefly a *fideicommissum* is a testamentary provision in terms of which a fiduciary heir (*fideicommissary beneficiary*) is allowed to possess, use and enjoy the property but is not permitted to dispose of it. The purpose of the arrangement is to keep the property within the family until a later stage.

In *King and Others NNO v De Jager and Others* 2017 (6) SA 527 (WCC); [2017] All SA 57 (WCC), a joint will executed in the year 1902 created *fideicommissa* over several properties, including commercial farms in Oudtshoorn in the Western Cape. The properties were bequeathed to the testators' children, both male and female. However, clause 7 of the will limited second and third generation *fideicommissary* beneficiaries to grandsons and great grandsons only, to the exclusion of granddaughters and great granddaughters. Moreover, at the termination of *fideicommissa* after the third generation of great grandsons, only their male descendants would inherit the properties free of *fideicommissa*.

The first applicant, one King, an executor in the deceased estate, together with other co-executors, sought an order amending the will so that all the descendants of the testators, both male and female, could inherit. The attitude of the executors was that by discriminating against female descendants the will was against public policy and contrary to equality provisions of the Constitution.

The application was dismissed with no order as to costs. Bozalek J held that freedom of testation, according to which testators were free to dispose of their assets in a will in any manner they saw fit, was a basic principle of the law of succession. The principle of freedom of testation was, however, not completely unrestricted since the law allowed for limitations based on social and economic considerations some statutory, others founded in common law principles. One such restriction was that courts would not give effect to testamentary provisions if they offended against public policy.

The general principle was that courts would not authorise the variation of the provisions of a will, which were capable of being carried out and were not contrary to law or public policy, save in exceptional circumstances or under statutory authority.

That was so no matter how capricious, unreasonable, unfair, inconvenient or even absurd the provisions could be. It was important to note that the instant case was not one of a testamentary trust, let alone one with a public character and an indefinite life, containing provisions which discriminated against one or more sectors of society as was the case in other matters. It was rather a case of disinheritance of certain descendants.

The constitutionally protected right to property included a right to freedom of testation, with qualification that this was not absolute. Testation was a field where the courts proceeded from the starting point that a testator had maximum freedom to dispose of their property on their death as they saw fit, subject to the existing rules set out in case law or any statutory constraints.

The present matter could be seen as involving a choice between the lesser of two evils, namely, perpetuating gender discrimination or undue interference with the right to freedom of testation. While the terms of the *fideicommissa* discriminated against the testators' female descendants simply on the ground of their gender, allowing the right to equality to trump the right to freedom of testation in the present case, although superficially equitable, would produce an arbitrary result. At the same time it would present a broad incursion into a vital corollary of the right to property, a fundamental constitutional right.

Even if it was assumed in favour of the female descendant of the testators that they notionally had a right to be treated equally with the male descendants in the exercise by the testators of their freedom of testation, the limitation on the female descendants' right to equality in the form of discrimination against them effected by clause 7 of the will was reasonable and justifiable, particularly given the importance accorded to the right to freedom of testation. Furthermore, the disputed provisions of the clause were

not contrary to public policy. The general public would not regard the testators' decision to impose the *fideicommissary* condition discriminating against female descendants as so unreasonable and offensive that the provisions should be considered as offending against public policy.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Access to information held by a private body, application for a visa or permit by an asylum seeker, common purpose in the commission of crime, condonation for late submission of review application, demolition of building, derivative action under Companies Act 71 of 2008, exhaustion of internal remedies before approaching court, full and reasonable explanation to explain delay for institution of review application, invalidity of an elective conference of a political party, lack of jurisdiction of Advertising Standards Authority over non-members, permanent stay of prosecution as a result of unreasonable delay, power of Minister of Finance to legislate amendments to customs tariffs, prevention of organised crime, private funding of political parties to be disclosed, rape of complainant with mental difficulties, remittal of arbitral award to arbitrator, requirements for leave to appeal, review of municipality's approval of rezoning of residential property, sale of fuelling station site licence, sequestration of estates of two or more individuals in a single application not being permissible, surviving spouse including husband and wife in monogamous and polygynous Muslim marriage, tariff for supply of bulk water by municipality and validity of official act until it is set aside by court order.



By
Yashin
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Deemed dismissal and reinstatement

Ramonetha v Departments of Road and Transport Limpopo and Others
(LAC) (unreported case no JA104/2016, 1-11-2017)
(Savage AJA) (Coppin JA, Sutherland JA)

Section 17(3)(a)(i) of the Public Services Act 103 of 1994 (the Act) provides:

'An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.' Section 17(3)(b) of the Act provides:

'If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.'

Facts

The appellant was employed by the first respondent since 7 April 1993. On 10 February 2011, the appellant left work to consult with a doctor and remained absent for four months without permission. He returned to work on 17 June 2011.

Despite being requested to provide a medical certificate, the appellant failed to do so. Three days after returning to work, the appellant provided a letter from a traditional healer as opposed to a medical certificate.

The appellant continued to work for more than seven months since his return to work and was remunerated for his services. However, on 16 February 2012 the appellant was notified of a misconduct hearing, on the basis that he had committed a contravention of Resolution 1 of 2003 in that he absconded from work for 84 days.

On 29 March 2012, the chairperson found that, as the appellant had been absent for more than a month, he had in terms of s 17(3)(a)(i) of the Act been deemed to have been dismissed from his employment with the first respondent by operation of law.

On 21 May 2012 the appellant received a letter from the Head of the Department stating that due to the magnitude of his unauthorised absence from work his contract of employment was terminated by operation of law.

The appellant then forwarded representations to the second respondent (the MEC) in terms of s 17(3)(b) of the Act. On 3 September 2012, the appellant was informed that the MEC had rejected his representations, that his employment was terminated by operation of law and there was no dismissal as contemplated by s 186 of the Labour Relations Act 66 of 1995 (LRA).

The appellant then referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council (GPSSBC) for determination. On 29 October 2012, the GPSSBC found that it lacked jurisdiction to hear the matter given that the appellant had not been dismissed from his employment as contemplated in s 186 of the LRA.

The appellant, thereafter, made application for review to the Labour Court (LC), in terms of s 158(1)(h) of the LRA, of the MEC's refusal to reinstate him. The LC, accepted that it had jurisdiction under s 158(1)(h) to determine the review application, however, found that the appellant's employment had terminated by operation of law. The appellant then appealed the LC's decision in the Labour Appeals Court (LAC).

Issue

The main issue before the LAC was whether the appellant was deemed to have been dismissed by operation of law or whether he was reinstated as the first respondent continued to accept his services and remunerated him for same when he returned to work despite the fact that he had been absent for more than 30 days.

Judgment

The court held an employment contract

is an agreement where an employee works for an employer in return for payment. By accepting the appellant's tender of performance and paying him for his work, the sole conclusion from the facts was that on his return to work, the first respondent implicitly reinstated the appellant to his employment. This was even though the appellant's deemed dismissal took effect by operation of law in terms of s 17(3)(a)(i) on the date immediately succeeding his last day of attendance at his place of duty and not on any subsequent date decided by the first respondent. As such, it was no longer possible to consider the appellant to be deemed dismissed after he had been reinstated.

The court further held, that the first respondent was – after the appellant's reinstatement – not thereafter entitled to rely on his deemed dismissal when no further period of unauthorised absence from work had arisen after the appellant had returned to work. As a result of the reinstatement, it was not correct for the first respondent under s 17(3)(a)(i), to provide, in its letter of 21 May 2012, 11 months after the appellant's return to work, that his contract of employment had been terminated by operation of law.

The LAC accordingly upheld the appellant's appeal.

Conclusion

This judgment is important as it highlights employees employed in the public sector depending on the facts of each case, may not be deemed to have been dismissed where they return to work after an absence of more than 30 days, where their employer allows them to carry on working and remunerates them for their services rendered. Allowing an employee to carry on working essentially amounts to reinstatement. An employee who is dismissed in these circumstances may make application to the LC in terms of s 158(1)(h) of the LRA to have the deemed dismissal reviewed and to be reinstated.

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Bills

Legal Practice Amendment Bill B11A of 2017.
 Legal Practice Amendment Bill B11B of 2017.
 Traditional and Khoi-San Leadership Bill B23A of 2015.
 Traditional and Khoi-San Leadership Bill B23B of 2015.
 Labour Relations Amendment Bill B29 of 2017.
 Basic Conditions of Employment Amendment Bill B30 of 2017.
 Minimum Wage Bill B31 of 2017.
 Insurance Bill B1A of 2016.
 Insurance Bill B1B of 2016.
 Labour Relations Amendment Bill B32 of 2017.
 Refugees Amendment Bill B12C of 2016.
 Refugees Amendment Bill B12D of 2016.
 Films and Publications Amendment Bill B37A of 2015.
 Films and Publications Amendment Bill B37B of 2015.
 Adjustments Appropriation Bill B25A of 2017.
 Adjustments Appropriation Bill B25B of 2017.
 Marine Spatial Planning Bill B9A of 2017.
 Marine Spatial Planning Bill B9B of 2017.
 Political Party Funding Bill B33 of 2017.
 Choice on Termination of Pregnancy Amendment Bill B34 of 2017.
 Electronic Deeds Registration Systems Bill B35 of 2017.
 Repeal of the Overvaal Resorts Limited Bill B36 of 2017.
 International Crimes Bill B37 of 2017.

Commencement of Acts

Justice Administered Fund Act 2 of 2017. *Commencement:* 1 April 2018. Proc R38 GG41273/24-11-2017.
Judicial Matters Amendment Act 8 of 2017, s 24. *Commencement:* 1 December 2017. Proc R39 GG41280/27-11-2017 (also available in Afrikaans).
Judicial Matters Amendment Act 14 of 2014, ss 2, 3 and 6. *Commencement:* 1

December 2017. Proc40 GG41287/1-12-2017.

Financial Services Laws General Amendment Act 45 of 2013, ss 95, 109(e), 109(k), 109(l), 114(d) and 135. *Commencement:* 1 January 2018. GN1438 GG41334/15-12-2017.

Maintenance Amendment Act 9 of 2015, ss 2, 11 and 13(b). *Commencement:* 5 January 2018. Proc R44 GG41352/21-12-2017 (also available in Afrikaans).

Promulgation of Acts

Rates and Monetary Amounts and Amendment of Revenue Laws Act 14 of 2017. *Commencement:* 14 December 2017. GN1426 GG41323/14-12-2017 (also available in Afrikaans).

Division of Revenue Amendment Act 10 of 2017. *Commencement:* 14 December 2017. GN1427 GG41324/14-12-2017 (also available in Setswana).

Adjustments Appropriation Act 12 of 2017. *Commencement:* 14 December 2017. GN1428 GG41325/14-12-2017 (also available in Sesotho).

Tax Administration Laws Amendment Act 13 of 2017. *Commencement:* 18 December 2017, unless other dates are provided for in the Act (see s 80 of this Act for more information). GN1450 GG41341/18-12-2017 (also available in Afrikaans).

Taxation Laws Amendment Act 17 of 2017. *Commencement:* 18 December 2017. GN1451 GG41342/18-12-2017 (also available in Afrikaans).

Refugees Amendment Act 11 of 2017. *Commencement:* This Act comes into operation immediately after the commencement of the Refugees Amendment Act 33 of 2008 and the Refugees Amendment Act 12 of 2011. GN1452 GG41343/18-12-2017 (also available in Afrikaans).

International Arbitration Act 15 of 2017. *Commencement:* 20 December 2017. GN1454 GG41347/20-12-2017 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983

Amendment of the control measures set out in the schedules to the Act in order to prevent and combat the spreading of certain prohibited pests. GN R1271 GG41257/17-11-2017.

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out in the schedules to the Act: Fees. GN R1416 GG41322/15-12-2017.

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Allied Health Professions Act 63 of 1982

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Animal Identification Act 6 of 2002

Amendment of regulations. GN1456 GG41350/22-12-2017.

Basic Conditions of Employment Act 75 of 1997

Amendment of sectoral determination 11: Taxi sector. GN1153 GG41218/1-11-2017.

Amendment of sectoral determination 7: Domestic Worker Sector. GN1429 GG41326/15-12-2017.

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Codes of good practice: Amendment of the Financial Sector Code. GN1325 GG41287/1-12-2017.

Codes of good practice: Amendment of the Construction Sector Code. GenN931 GG41287/1-12-2017.

Codes of good practice: Amendment of the AgriBEE Sector Code. GN1354 GG41306/8-12-2017.

Memorandum of Understanding between the Broad-Based Black Economic Empowerment Commission and the Companies and Intellectual Property Commission. GN1414 GG41321/15-12-2017.

Child Justice Act 75 of 2008

Amendments to the regulations relating to the Child Justice Act. GN R1337 GG41288/1-12-2017 (also available in Setswana).

Determination of persons or category or class of persons competent to conduct evaluations of the criminal capacity of children and allowances and remuneration. GN R1338 GG41288/1-12-2017 (also available in Setswana).

Civil Aviation Act 13 of 2009

Amendment of Regulations: Irrevocable de-registration and export request authorisation. GN1423-GN1425 GG41322/15-12-2017.

Companies Act 71 of 2008

Practice note 9: Service of subpoenas and other court documents on the CIPC. GN1211 GG41224/3-11-2017.

Practice note 8: Requirements for re-instatement of companies and close corporations. GN1213 GG41224/3-11-2017.

Regulations in terms of s 15. GN1164 GG41224/3-11-2017 (also available in Afrikaans).

Practice note 3: Business rescue filing procedure. GN1210 GG41224/3-11-2017.

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Best practice project assessment scheme: Standard for contract participation goals for targeting enterprises and labour through construction works contracts. GN1239 GG41237/10-11-2017.

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Amendment of the Alternative Dispute Regulations. GN1246 GG41237/10-11-2017 (also available in Afrikaans).

National e-strategy: Digital society South Africa. GenN887 GG41242/10-11-2017.

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Amendment of regulations: Fees. GN1400 GG41321/15-12-2017.

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Regulations relating to qualifications for the registration of radiographers. GN1457 GG41350/22-12-2017.

Higher Education Act 101 of 1997

Policy for the Post-School Education and Training Central Application Service. GN1224 GG41226/2-11-2017.

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Long-term Insurance Act 52 of 1998

Amendment of regulations made under s 72. GN1437 GG41334/15-12-2017.

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Salaries, allowances and benefits of magistrates. GN1391 GG41313/8-12-2017.

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Amendment of regulations. GN1341 GG41291/1-12-2017.

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Norms and standards for the Inclusion of Private Nature Reserves in Register of Protected Areas of South Africa. GN1157 GG41224/3-11-2017.

Cultural heritage survey guidelines and assessment tools for protected areas in South Africa. GN1356 GG41306/8-12-2017.

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Draft Land Survey Amendment Bill, 2017. GenN976 GG41350/22-12-2017.

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Amendment of regulations in terms of the Construction Industry Development Board Act 38 of 2000 for comment. GN R1229 GG41236/10-11-2017.

Draft determination in the schedule to the Act that sets out when a person or long-term insurer would not be complying with the principle of 'equivalence of reward' in terms of the Long-term Insurance Act 52 of 1998. BN181 GG41237/10-11-2017.

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Proposed levies on medical schemes issued in terms of the Council for Medical Schemes Levies Act 58 of 2000. GenN899 GG41259/17-11-2017.

Amendment of the End-user and Subscriber Service Charter Regulations, 2016 in terms of the Electronic Communications Act 36 of 2005 for comment. GenN901 GG41263/17-11-2017.

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Draft financial reporting pronouncement 2 and 3: Accounting for Black Economic Empowerment transactions under international financial reporting standards in terms of the Companies Act 71 of 2008. GN1447 and GN1448 GG41338/18-12-2017.

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Guidance for issuing of licences for pharmacy premises in terms of the Pharmacy Act 53 of 1974. GN1476 GG41354/22-12-2017.



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

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Deemed dismissal

In *Gangaram v Member of the Executive Council for the Department of Health, KwaZulu-Natal and Another* [2017] 11 BLLR 1082 (LAC), the applicant sought to review an alleged 'decision' by her employer not to reinstate her after she was purported to have been dismissed by operation of law in terms of s 17(3) of the Public Service Act 103 of 1994 (PSA).

The applicant, an emergency care practitioner, suffered a back injury, which made it difficult to perform her duties. The employer advised her to see a neurosurgeon who recommended that she be confined to office duties at the employer's head office. She later sustained a further injury and her back condition deteriorated. Notwithstanding her condition, the applicant was instructed to resume her normal duties because another employee, who was allegedly ill, refused to perform her own duties and had cited the applicant in support thereof. The applicant informed her employer that she was unable to perform her normal duties.

The employer then decided that the applicant would only be allowed to perform office duties if she accepted a reduction in pay. The applicant launched an urgent application in the Labour Court (LC) to interdict her employer from reducing her pay, which application was dismissed on the grounds that she had alternative remedies available to her. The applicant then referred an unfair labour practice dispute relating to demotion to the relevant bargaining council (the council).

Pending the unfair labour practice hearing, the employer gave notice to the applicant informing her that since she had been absent from work for more than 30 days without permission, she had been deemed to be dismissed in terms of s 17(3) of the PSA. Section 17(3) of the PSA provides that an employee who absents themselves from their official duties without permission for a period exceeding one calendar month shall be deemed to have been dismissed from the public service on account of misconduct.

The applicant objected to the notice, but, having received no response from her employer, referred an unfair dismissal dispute to the council. At the hearing of the unfair dismissal dispute, the employer argued that the council lacked jurisdiction to entertain the dispute because the applicant had not been dismissed but was deemed dismissed in terms of s 17(3) of the PSA. The arbitrator upheld the jurisdictional point and dismissed the referral. The applicant 'appealed' to the Head of Department of the employer (the HOD) to be reinstated. Again, no response from the employer was forthcoming.

The applicant finally launched an application in the LC for an order of reinstatement. In this regard, the employer argued that the matter was premature as no decision had been taken by the HOD regarding the applicant's appeal for reinstatement and, accordingly, there was no 'decision taken' to review. The LC agreed and found that the relief, which the applicant ought to have sought, should have been an order that the HOD be compelled to deliver a decision on her appeal for reinstatement.

On appeal, however, the Labour Appeal Court held that the first inquiry should have been whether the employer had properly invoked s 17(3) of the PSA to 'deem' the applicant dismissed. A deemed dismissal can only occur if an employee is absent from work without permission for a period exceeding one calendar month. Since the deemed dismissal takes effect by operation of law, the jurisdictional requirements prescribed by s 17(3) of the PSA must be met before an employee can be said to be dismissed.

The applicant had not reported for duty during this period. However, the uncontroverted evidence was that she was sick and continued, during her absence, to complete sick leave forms with medical certificates attached. In the absence of any response from her employer, the applicant was entitled to assume that her sick leave had been approved. The employer knew of the applicant's condition and whereabouts, and had continued to pay her salary. In these circumstances, the court held that it would be wrong to conclude that the applicant was absent from work without permission and thus that the jurisdictional re-

quirements prescribed by s 17(3) of the PSA had been satisfied. It would appear that the deeming provision was applied as an afterthought when nothing had been done by the employer to address the applicant's situation.

The appeal was accordingly upheld and the employer was ordered to reinstate the applicant with retrospective effect.

Applications to interdict disciplinary proceedings

In *Magoda v Director-General of Rural Development and Land Reform and Another* [2017] 11 BLLR 1149 (LC), the employee, a high-ranking civil servant, was subject to a disciplinary hearing chaired by a senior counsel at the Cape Bar at which she was facing charges of serious misconduct. After testifying for several hours, the employee claimed that she had fallen ill and sought a postponement. The chairperson refused the postponement and ruled that the matter would be decided on the evidence led by the employer and the employee to date. About a week later, the employee sought to continue with her evidence. The chairperson, however, stood by his previous ruling.

The employee launched an urgent application in the LC seeking a review of the chairperson's procedural rulings and for an order interdicting the disciplinary hearing pending the outcome of the review. After noting that a worrying trend was developing – where the urgent court roll was being clogged up with applications to interdict disciplinary hearings from taking place – the court held that to succeed, the employee was required to show that she had a legal right to review the procedural rulings and to interdict the disciplinary hearing, that she would suffer irreparable harm if the relief was not granted, that the balance of convenience was in her favour, and that she had no adequate alternative remedy.

The employee sought to rely on s 158(1)(h) of the Labour Relations Act 66 of 1995 (the LRA), which provides the LC with jurisdiction to review any decision taken by the state in its capacity as employer. Or, insofar as the decision constituted an exercise of a public power, the employee sought to rely on the doctrine of 'legality review'. In this

regard, the court found that the main difficulty with the employee's case was that it assumed that the procedural rulings constituted the exercise of a public power, which is a prerequisite for the legality review. While the dismissal of a public servant involves the exercise of public power, the court was not persuaded that the procedural rulings involved the exercise of public power. Moreover, s 158(1)(h) reviews, including the legality review, are only permissible where there is no other remedy available under the LRA. In the circumstances, the employee had labelled a complaint about proce-

dural fairness as one of unlawfulness in order to mount a legality review. This was impermissible.

The court held further that it would in any event only intervene in uncompleted disciplinary hearings in exceptional circumstances, such as where a grave injustice would result. A gross error in disciplinary proceedings is not in itself sufficient to warrant an interdict. In addition, applications to interdict part-heard disciplinary hearings are at odds with the dispute resolution scheme established by the LRA. The applicant had not pleaded facts from which a grave

justice could be inferred and in the event of her being dismissed, she could plead her case and lead evidence that may have been excluded at the disciplinary hearing as a result of the rulings at any subsequent arbitration.

In the circumstances, the court held that the employee had failed to establish the existence of a right to the relief sought and, alternatively, failed to meet the test of exceptional circumstances for intervention by the court in a part-heard disciplinary hearing. The application was accordingly dismissed with costs.



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Question:

I am a stock controller/driver. I would like to ask a question about my work and how they calculate their time. I have to work a total of 196 hours a month. When I have only worked, for example, 180 hours, may my employer take my overtime hours work and 'fill up' the 16 hours that is short?

I feel that it is wrong because I get paid double time for overtime and then they just take my overtime hours to fill my normal hours, so I do not really get paid for overtime at all.

How many hours am I supposed to work per month? Can they add my overtime to normal hours?

Answer:

Assuming you fall under the jurisdiction of the Basic Conditions of Employment Act 75 of 1997 (BCEA), s 9 of the BCEA is instructive to your query.

Under the heading 'Ordinary hours of work' the relevant portion of s 9 reads:

'(1) Subject to this Chapter, an employer may not require or permit an employee to work more than -

- (a) 45 hours in any week; and
- (b) nine hours in any day if the employee works for five days or fewer in a week; or
- (c) eight hours in any day if the employee

works on more than five days in a week.'

While the BCEA does not stipulate how many hours an employee should work in a month, this figure can be calculated by taking the weekly ordinary hours and multiplying it by 4.333 to get a monthly quota of 195 hours.

Any work performed outside ordinary hours of work is considered overtime.

In terms of s 10(1)(a) of the BCEA, overtime work can only be performed through an agreement between an employer and employee. This section reads;

'Subject to this Chapter, an employer may not require or permit an employee to work -

- (a) overtime except in accordance with an agreement.'

An 'agreement' referred to in the section can be entered into verbally each time the employer requests the employee to work overtime, alternatively the agreement can be contained in an employment contract or collective agreement which binds the employee and employer.

Let us assume an employee, who works a five-day week and nine hours a day, agrees to work two hours extra on a particular day. Irrespective of whether that employee works the remainder of the week or not, the employee has worked two hours overtime and is legally entitled to being remunerated at the overtime rate for those two hours. Put differently and to answer the second part of your query; if an employee works overtime they must be remunerated at the overtime rate.

The overtime rate is one and one-half the rate of an employee's normal rate of pay as per s 10(2) of the BCEA.

An employee who works overtime, but who is not remunerated in accordance with the prescribed overtime rate, has recourse by approaching the Department of Labour and lodging a complaint with a labour inspector.

A labour inspector has the authority to ensure employers comply with the provisions of the BCEA and does this either by

securing an agreement with the employer to abide by the prevailing laws and/or to issue a compliance order, which if not adhered to, can be made an order of court.

An employee, who falls under the scope and jurisdiction of a bargaining council and who faces the same or similar difficulty as described above, can approach the bargaining council to lay a complaint. The council will send its agents to investigate the complaint who, like an inspector from the Department of Labour, has the authority to issue compliance orders. Should an employer disregard a compliance order, the council can schedule an enforcement arbitration in terms s 33A of the Labour Relations Act 66 of 1995, the relevant portions of which reads:

'33A Enforcement of collective agreements by bargaining councils -

(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council.

(2) For the purposes of this section, a collective agreement is deemed to include -
(a) any basic condition of employment which in terms of section 49(1) of the Basic Conditions of Employment Act constitutes a term of employment of any employee covered by the collective agreement ...

(3) A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period.

(4)(a) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council.'



By
Meryl
Federl

Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
<i>Litnet</i>	LitNet Akademies (Regte)	Trust vir Afrikaans Onderwys	(2017) November
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2017) November
<i>SACJ</i>	South African Journal of Criminal Justice	Juta	(2017) 30.2
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	LexisNexis	(2017) 80.4

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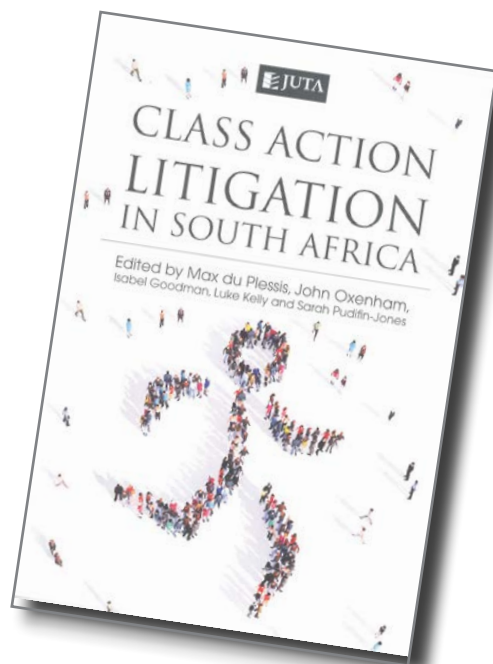
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Price R 435 (incl VAT)
272 pages (soft cover)



The class action, an established feature in many common-law jurisdictions, has finally found a home in South African law.' With these words the authors introduce a book that is the first comprehensive treatment of class actions in South African law. As Supreme Court of Appeal Justice Malcolm Wallis remarks in the foreword, the Law Commission considered class actions, recommended the introduction thereof and drafted a bill, but Parliament has allowed it to gather dust. It thus fell on our courts to introduce class actions in practice. The aim of the book, as set out by Max du Plessis in ch 1, is to:

- dissect and discuss the early class action judgments;
- provide practical guidance in relation to questions associated with its implementation from judicial, procedural, economic and social perspectives; and
- offer the reader first-hand exposure to lessons learned, both locally and internationally.

I dare say that these goals have been met.

The book is a collaboration by more than 20 authors, which include insights from legal practitioners who have been involved in the landmark cases discussed in the book, as well as other practitioners well-positioned to engage with the topic. A number of contributors are from jurisdictions where class actions have a longer history, offering insight

into lessons learnt there. Overall the book is very accessible to the reader, and care has been taken to harmonise different styles across the entire text.

A lot of ground is covered in this book. Chapter 2 deals with the certification process, while ch 3 considers potential causes of action and how they could be dealt with in the context of a class action. No book on this topic will be complete unless it deals with class action within the context of the Bill of Rights, and ch 4 does this topic justice. Apart from practical and procedural aspects of litigating the class action (ch 8), other important aspects are also canvassed in detail, namely, settlement (ch 5), the ways and means of distributing monetary awards (ch 6) and the costs involved in and the funding of class actions (ch 7).

The latter part of the book (chs 9 to 13) takes a closer look at class action litigation in a number of jurisdictions, which include, Australia, Canada, the United States and the United Kingdom. It also considers developments in Europe. Most of these chapters conclude with a summary of lessons that we can learn from the experience in the particular jurisdiction.

If there was to be a criticism of the book, it would be that it does not contain a bibliography. This would hopefully be corrected in the inevitable second edition.

The need for this publication cannot be doubted. The foresight of the editors and contributors to present an early

contribution to the development of this area of the law is to be commended. There is still some distance to travel to a well worked out and smooth-running procedural framework for class actions in South Africa (SA). As pointed out in various chapters of the book, the earlier cases have in some instances identified more questions than answers. This work will go a long way in assisting those who will shape the future of class actions in SA in their thinking.

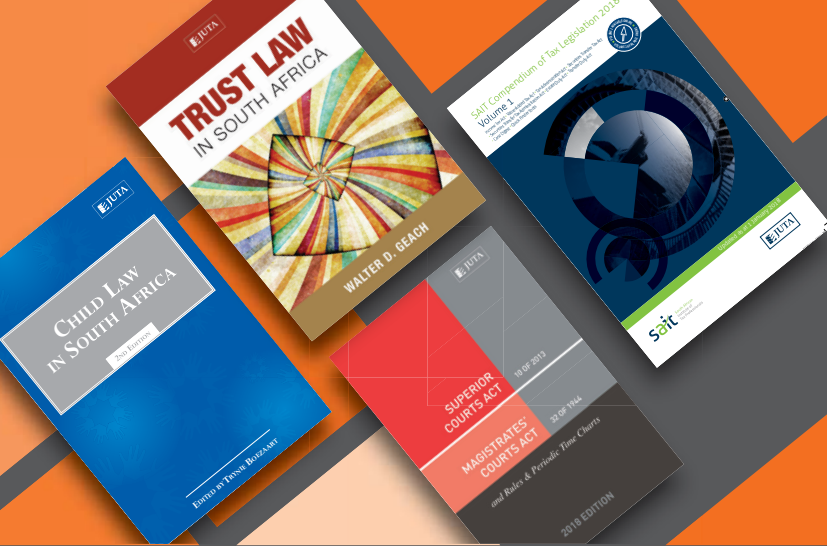
No lawyer involved in litigation or teaching law can afford not to be familiar with the terrain of class action litigation. This book provides the necessary guidance, and is a hard act to follow.

Andy Bester is an advocate at the Johannesburg Bar.



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SAIT Compendium of Tax Legislation 2018 (Volumes 1 and 2)

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This annual Compendium incorporates all promulgated and proposed amendments as published in the 2017 Amendment Bills, aided by Juta's prelex and pendlex, as at 1 January 2018. A useful digest of tax cases from 2007 to 2017 is also included. Furthermore, the Quick Finder Tools section allows readers to easily navigate content within the different tax Acts. Related supplementary material such as Regulations, Notices, Interpretation Notes, Practice Notes and Binding Rulings have been incorporated in Volume 2. Available in print (volume 2 online) and Web PDF.



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W Geach

This book comprehensively, yet succinctly, covers the use and administration of trusts in South Africa. It deals with the relevant legislation and highlights and discusses the case law which has been an essential part of the development of the law of trusts.

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RISKALERT

FEBRUARY 2018 NO 5/2017

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RISK MANAGEMENT COLUMN

A NOTE FROM THE EDITOR

Welcome to the first edition of the *Bulletin* in 2018. We wish all practitioners the best for 2018 and a claim free year.

As you plan for 2018, you must consider the appropriate risk management measures to be incorporated into your practice in line with your strategic plan for the year. It is imperative that you take time to assess the internal and external environment applicable to your firm, scan the environment and assess all the risks applicable within your own unique circumstances. Should any of the risks materialise, these could have an impact on the achievement of your strategy and business goals for the year. The potential impact of each risk must be assessed and appropriate response measures documented. The risks, the potential impact thereof and the response measures can be listed in a risk schedule/ matrix which may include:

- a description of the risk;
- its potential impact;
- the value of the inherent risk;
- the likelihood description;
- whether or not controls are present in the firm to address the risk;
- a description of the controls that can be implemented;
- the effectiveness of the controls;
- the value of the residual risk; and



Thomas Harban,
Editor

- any other information you may consider relevant.

We will gladly give our assistance to any law firm requiring assistance in developing a risk matrix and risk management plan. The risk management plan must address the unique circumstances of the law firm. In order to gain the maximum value from a risk management plan, this should not be treated as 'tick-box' exercise. The risk management plan must be cascaded to all levels of staff and included in the firm's training regime. Remember that not all risks are negative and that some may have positive (upside) implications for the firm.

Thomas Harban

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DISCLAIMER

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



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RISK MANAGEMENT, PRACTICE RULES AND THE LEGAL PRACTICE ACT 28 OF 2014

The practice rules which came into operation on 1 March 2016 include a number of provisions requiring attorneys to develop and implement risk management measures in their firms. These include rule 35.13.7 which provides that:

35.13.7 A firm shall ensure:

Internal controls

35.13.7.1. that adequate internal controls are implemented to ensure compliance with these rules and to ensure that trust funds are safeguarded; and in particular to ensure –

35.13.7.1.1 that the design of the internal controls is appropriate to address identified risks; 35.13.7.1.2 that the internal controls have been implemented as designed;

35.13.7.1.3 that the internal controls which have been implemented operate effectively throughout the period ;

35.13.7.1.4 that the effective operation of the internal controls is monitored regularly by designated persons in the firm having the appropriate authority.

Though this rule relates specifically to accounting to clients, the internal controls referred to therein can be extended to all areas of the practice. These internal controls must be documented (for example in the minimum operating standards/ standard operating procedures) and all staff in the firm should be trained thereon. Needless to say, appropriate sanctions should be put in place for non-compliance with the internal controls. Failure by a practitioner to comply with the rules of professional conduct will amount to unprofessional and/or dishonourable conduct (see rule 39).

Engagement management

In previous editions of the *Bulletin* (accessible at <http://www.aiif.co.za/risk-management-2/risk-management/>) engagement management and the use of letters



of engagement have been extensively addressed. In preparing letters of engagement, practitioners should also have regard to section 35 (7) to (12) of the Legal Practice Act and incorporate those considerations into the letter of engagement. These include:

- On receipt of the first instruction or as soon as practically possible thereafter, providing the client with a written cost estimate notice specifying all particulars relating to the envisaged costs of the legal services (the terms of a contingency fee agreement could be included-see section 35(12))
- Verbally explaining to the client every aspect contained in the notice, as well as any relevant aspect relating to the costs of the legal services to be rendered
- The client must, in writing, agree to the envisaged legal services and the incurring of the estimated costs
- Non-compliance with section 35 constitutes misconduct

Rules 36 to 38 of the practice rules list the specific rules applicable to investment

practices. These could also be included in the letter of engagement, where applicable. It must be noted that clause 16 (e) of the AIIF policy excludes claims:

e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in:
(i) the Banks Act 94 of 1990;
(ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
(iii) the Agricultural Credit Act 28 of 1996 as amended or replaced;
(iv) any law administered by the Financial Services Board and or the South African Reserve Bank and any regulations issued thereunder;
(v) the Medical Schemes Act 131 of 1998 as amended or replaced;

Remember that a proper record of the engagement will assist you and your clients in properly understanding your relationship and also recording your respective expectations and obligations and will assist in the event of a dispute.

RISK MANAGEMENT RESOURCES

In response to request from practitioners, we are republishing the file audit template and the risk management self-assessment questionnaire. It will be remembered that annual completion of the risk management self-assessment questionnaire is compulsory in terms of the AIIF policy (see clauses XXIV and 23).

RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

IMPORTANT NOTES AND FAQ'S

NB: If you have already completed one of these questionnaires in the year prior to notifying us of a claim/circumstance, you may submit that document and need not complete a new one.

WHEN MUST I COMPLETE THE QUESTIONNAIRE?

As from 1 July 2016, the questionnaire MUST BE COMPLETED AT LEAST ONCE PER YEAR. The AIIF will not provide indemnity when you have a claim, until you provide it with a copy of a questionnaire which has been completed within the past year.

You may complete the questionnaire at any time, even if your firm does not have any claims pending. In order to make it easier and save time, you might wish to complete it at the time when you complete your top-up insurance proposal or Fidelity Fund Certificate application. That way, you will have much of

the information at your fingertips.)

WHERE DO I GET A COPY OF THE QUESTIONNAIRE?

1. You can complete a hard copy and send it to us. (You can obtain a copy from the AIIF or download it from our website (www.aiif.co.za);
2. You can complete it online (www.aiif.co.za).

WHAT IS EXPECTED OF MY FIRM?

1. Every practice MUST properly complete this assessment every year and must submit it together with the claim form to the AIIF before indemnity can be provided.
2. It must be completed by a SENIOR PARTNER/SOLE PRACTITIONER/RISK and/or COMPLIANCE OFFICER or MANAGER/CHAIR OF THE RISK COMMITTEE.
3. When answering certain ques-

tions, you will come across the following request:

"If no, see Risk Management Tips on Website www.aiif.co.za." If you do not have access to the internet and would like a copy of these tips, we can send you one by e-mail on request.

SOME OF THE QUESTIONS DON'T REALLY APPLY TO ME AS I AM A SINGLE PRACTITIONER WITH NO STAFF/FEW STAFF. WHAT SHOULD I DO?

The questionnaire is aimed at practices of all sizes and types. Inevitably, there will be some questions that are not applicable to your practice. If that is the case, by all means answer "n/a".

NB: If you have already completed one of these questionnaires in the year prior to notifying us of a claim/circumstance, you may submit that document and need not complete a new one.

Please read the following before the self-assessment is done:

RISK MANAGEMENT RESOURCES continued...

WHY DO YOU WANT THE INFORMATION?

The information which we ask for in this assessment will be treated as strictly confidential. It will not be disclosed to any other person, without your practice's WRITTEN permission. It will also not be used by the AIIF in any way to affect your practice's claims records or individual cover. An analysis of information and trends revealed by your answers may be used by the AIIF for GENERAL underwriting and risk management purposes. I elaborate below:

- To assist the insurer when setting and structuring deductibles and limits of indemnity for the profession as a whole, deciding on policy exclusions, conditions and possible premium setting.
- To raise awareness about risk management and to get practitioners thinking about risk management tools/procedures for their practices.
- To obtain relevant and usable general information and statistics about workloads, staff numbers, types of matters dealt with, stress levels, risk management/practice management and claims history.
- To gain insight into which risk management/practice management procedures are in place/need to be in place in practices.

- To assist in the selection and formulation of the most effective risk management interventions.
- To assist in formulating a strategy to improve risk management/practice management at all levels.

Thomas Harban
Risk Manager, AIIF
thomas.harban@aiif.co.za
(012) 622 3928

Practice Self-Assessment Form

THIS ASSESSMENT MUST BE COMPLETED ANNUALLY BY ONE OF THE FOLLOWING:
A SENIOR PARTNER/SOLE PRACTITIONER/RISK MANAGER/COMPLIANCE OFFICER/CHAIR OF THE RISK COMMITTEE

SECTION 1

1. General practice information:

- I. Name under which practice is conducted
- II. Practice number
- III. Law Society membership
- IV. Is your practice a Sole Practice/Partnership/Incorporated Company?
- V. Have there been any significant changes to the constitution of your firm during the past three years? YES/NO

If yes, please provide details of these changes

2. Principal office details:

- I. Address and postal code
- II. Telephone
- III. Email
- IV. Docex
- V. Website
- VI. Details of any other physical address at which the practice will be carried on and name of practitioner in direct control

3. Contact details of person completing this assessment.

- I. Capacity: Select one of the following: Senior Partner/Risk Manager/Chair of Risk Committee/Compliance Officer:
- II. Telephone
- III. Cell phone
- IV. E-mail address

4. Composition of the practice.

Number of:

- I. Partners/directors
 - II. Associates
 - III. Candidate Attorneys
 - IV. Paralegals
 - V. Other staff including secretaries
 - VI. Total
- VII. DOES YOUR PRACTICE HAVE ANY LEGAL PROCESS OUTSOURCING (LPO) ARRANGEMENTS WITH OFFSHORE COMPANIES OR FIRMS OF ATTORNEYS?**
YES/NO

If yes, please provide details of these arrangements and the

RISK MANAGEMENT RESOURCES continued...

numbers of professional staff and support staff involved

VIII.(For practices with fewer than 10 directors/partners) in the table below, list all partners/directors by name, together with their number of years in practice and their areas of specialisation.

Partner/ director's name	Partner's practice no	Years in practice	Area of specialisation

5. For the past financial year, please provide approximate percentages of total fees earned in the following categories of legal work:

- i. Conveyancing
- ii. Commercial
- iii. Criminal
- iv. Debt collection
- v. Estates – trustees executors administrators
- vi. Insurance
- vii. Investments
- viii. Liquidations
- ix. Marine
- x. Matrimonial
- xi. Patents & Trademarks
- xii. Personal injury MVA
- xiii. Medical malpractice

xiv. General litigation

xv. Legal Process Outsourcing (LPO)

xvi. Other (please specify any type of work that makes up a significant percentage of your fees)

SECTION 2

Risk Management Information

6. Does your practice have a specific individual responsible for risk management and/or quality control within the practice? YES/NO

If this is someone other than you, please give name, position, qualifications and contact details. That person should complete the Risk Management Section below, or assist you in completing it.

7. When engaging new employees, does your practice always require and check references carefully? YES/NO/n/a

7.1 Do you check for unexplained gaps in employment history? YES/NO/n/a

7.2 Do you include criminal checks? YES/NO/n/a

8. Does your practice have in place Minimum Operating Standards (MOS) or a uniform set of standards of best practice for staff? YES/NO

If no, see Risk Management Tips on Website www.aiif.co.za

If yes:

I. are they (choose the correct one) for professional staff only/administrative staff only/both professional and administrative staff?

II. are they reduced to writing and available to staff in either electronic or hard copy? YES/NO

III. do you have a system in place to measure and ensure compliance with your MOS? YES/NO

9. Do you know your clients? Do you have systems and checks in place to ensure that FICA requirements are always followed before any work is done or any deposit is taken from a prospective client or money is paid out to a third party? YES/NO

If no, see The Financial Intelligence Centre Act 38 of 2001/FIC website www.fic.gov.za/LSSA website and Risk Management Tips on AIIF Website www.aiif.co.za

10. Many claims arise out of practices having taken on “problem” clients. Does your practice screen prospective clients before taking on a mandate? YES/NO

If no, see Risk Management Tips on Website www.aiif.co.za

If yes,

I. does your practice have any uniform system in place for this? YES/NO

II. does this include a conflict of interest check? YES/NO

RISK MANAGEMENT RESOURCES continued...

- III. does this include any checks whether other attorneys have previously been instructed on respect of the same matter? YES/NO
- IV. does this include obtaining comprehensive contact details for the client and family or employers? YES/NO (see *Mlenzana v Goodricke & Franklin Inc* 2012 (2) SA 433 FB)
11. Claims sometimes arise out of practitioners' having acted for family/ friends/ acquaintances. Does your practice have any policy that regulates acting for them? YES/NO
12. Does your practice have a policy that formal Letters of Engagement must be signed by clients? YES/NO
- If yes:
- I. Is your policy strictly enforced? YES/NO
 - II. Does the format ensure that, prior to taking on the mandate, client's requirements are clearly identified and can be met by your practice? YES/NO
- III. Does it deal fully with your billing rates and policies? YES/NO
- IV. Does your policy include amending the letter of engagement as circumstances change? YES/NO
- V. Does your policy include the use of letters of non-engagement? (letters sent to prospective clients confirming that you have not accepted the mandate eg. where there is a conflict) YES/NO
- If no, see Risk Management Tips - Letters of Engagement on website www.aiif.co.za
13. Does your practice use Checklists for matters where appropriate? YES/NO
14. Does your practice have a policy that requires staff to draw up a Working Plan (plan on steps to be taken to implement and manage their planned strategy) for their matters? YES/NO
- If yes:
- does the policy stipulate that the Working Plan should be updated as circumstances change? YES/NO
 - does the policy provide that the Working plan should be communicated to client? YES/NO
- If no, see Risk Management Tips on Website www.aiif.co.za
- 15.
- Is all advice confirmed in writing? YES/NO
 - Are all instructions confirmed in writing? YES/NO
- If no, see Risk Management Tips on Website www.aiif.co.za
16. Claims can arise out of matters having been transferred from one attorney to another (either within or from outside the practice.) Does your practice have a policy dealing with this situation? YES/NO
- If yes, briefly describe your system
- If no, see Risk Management Tips on Website www.aiif.co.za
17. Claims against practitioners sometimes arise out of ineffective delegation. Does your practice have policies in place with regard to delegation? YES/NO/n/a
- If yes, describe them
- If no, see Risk Management Tips on Website
18. Many claims against practitioners arise out of a lack of or poor supervision.
- 18.1 Does your practice have policies in place with regard to the supervision of all staff including attorneys, support staff and candidate attorneys? YES/NO/n/a
- If yes, describe them
- If no, see Risk Management Tips on Website
- 18.2 Do you allow candidate attorneys, paralegals or newly-qualified attorneys to handle their own matters without close supervision? YES/NO/n/a

RISK MANAGEMENT RESOURCES continued...

18.3 Do they have authority to “sign-off” advice to client? YES/NO/n/a

If yes, is the advice checked by a partner/director before it is conveyed to client? YES/NO/n/a

18.4 Do you impose fee targets on your candidate attorneys? YES/NO/n/a

If yes, are you satisfied that they are able to deal with the personal pressure of these targets? YES/NO/n/a

18.5 Does your firm have a substantial debt collection practice? YES/NO

If so, is it run by a director/partner/associate with a minimum of 2 years’ experience? YES/NO

If not, is it supervised by a director/partner/associate with a minimum of 2 years’ experience? YES/NO

If yes, specify whether the matters are run by a candidate attorney / paralegal.

19. Does your practice have a policy in place with regard to the drafting of documents? YES/NO

If yes, describe it

If no, see Risk Management Tips on Website

20. Does your practice have a policy in place for training of;

- professional staff? YES/NO

• support staff? YES/NO
If yes, does it include the following?

- Vocational (including legal developments) YES/NO
- Risk management YES/NO
- Ethical YES/NO
- Best business practice YES/NO
- Basic legal procedures YES/NO
- Your firm’s ethos YES/NO
- Quality standards YES/NO
- Client care YES/NO
- Fraud and money laundering YES/NO
- Other (PLEASE SPECIFY)

21. Are partners, directors, professional and support staff trained to be made aware of :

- your risk management structure and procedures, YES/NO/n/a
- the chain of responsibility and authority YES/NO/n/a
- their individual responsibilities to report all issues and concerns to the responsible person? YES/No/n/a

22. 1 Many claims arise out of the failure of or non-existence of a diary system. Does your practice have an effective diary system FOR FILES in place? YES/NO

If yes, does it include;

- the use of a dual system YES/NO

- the use of a centralised system YES/NO
- the use of checks and balances to ensure that diarised matters are attended to YES/NO
- the use of Prescription Alert YES/NO

Briefly describe your system:

22.2 Does your practice have an effective diary system FOR COURT AND IMPORTANT DATES in place? YES/NO

If yes, describe it

23. Does your practice have a system of client file audits and reviews? YES/NO

If yes, do you use it effectively for:

- risk management YES/NO
- performance assessment YES/NO

Describe your system briefly

If no, see Risk Management Tips on Website and a practical guide in Risk Alert Bulletin (May) 2/2015 p 4 or the AIIF website: <http://www.aiif.co.za/file-audits>

24. Does your practice have regular meetings of professional staff to discuss problem matters? YES/NO/n/a

25. Does your practice have effective policies on uniform file order? YES/NO

If yes, describe them

If no, see Risk Management Tips on Website

RISK MANAGEMENT RESOURCES continued...

25.2 Does your practice have policies on file storage and retrieval? (Procedures to ensure that files are not lost or misplaced or overlooked) `

If yes, describe them

26. A director of a large practice in Pretoria rightly believes that practices should promote the important principle that IF IT IS NOT IN WRITING IT IS NOT DONE!

26.1 Many claims cannot be successfully defended because of the absence of relevant file notes. Does your practice have a uniform policy on the making of file notes? YES/NO

If no, see Risk Management Tips on Website

26.2 Does your staff record all telephone discussions in writing? YES/NO/n/a

If no, see Risk Management Tips on Website

27. Does your practice have a system in place for checking all relevant incoming correspondence by a partner/director, principal or departmental head? YES/NO/n/a

If no, see Risk Management Tips on Website

28. Do you have a formal file closing procedure? YES/NO

If yes:

- does it include a formal

policy for closing/ending the mandate? YES/NO

- does it include a termination of mandate letter? YES/NO

If no, see Risk Management Tips on Website

29. Do you have effective and uniform billing policies and procedures in place? YES/NO

30. Are all your policies reduced to writing and available to staff in either electronic or hard copy? YES/NO /n/a

31. Do you have effective checks and balances in place to ensure that your policies and procedures are being complied with? YES/NO/n/a

32. Do you have a client complaints procedure in place? YES/NO

33. Do you have a fraud prevention program and policy in place? YES/NO

34. Do you have a policy that monitors and ensures control over your professionals' workloads? YES/NO/n/a

Have any actions been taken to prevent the recurrence of the claims situations that arose as set out above? YES/NO
If yes, please elaborate

SECTION 4

Insurance Information

1. How did you find out about the AIIF and its functions?

2. Do you believe that the existence of the AIIF and its functions is adequately communicated to the profession? YES/NO

If no, please suggest ways in which these could become better known to the profession.

3. Do you make use of any of the AIIF's risk management interventions? YES/NO

If yes, which ones? Risk Alert Bulletin/Prescription Alert/Website/Other

4. Are there any other interventions that you would find helpful in your practice? YES/NO

If yes, please discuss

NAME :

CAPACITY:

SIGNATURE:

DATE OF COMPLETION:

SECTION 3

Claims Information

Please insert the required claims information into the table below:

Insurance Year	No of claims/circs notified	No of claims settled	No of claims withdrawn	No of claims still not resolved

STEP SOUTH AFRICA CONFERENCE 2018

PROTECTING CLIENT ASSETS IN A VOLATILE AND UNCERTAIN WORLD

VIBRANT SOCIAL PROGRAMME INCLUDED IN THE AGENDA

Programme focus:

- Taxpayer's rights and the constitution
- The Chief Master's new directive of 2017
- A round up of recent trust cases on divorce
- Country updates: The Caribbean, Dubai, Mauritius & Cyprus
- The latest requirements for South Africans obtaining residency/citizenship by investment
- Emigrating from South Africa
- Why do I need a UK/US/European will?
- CRS- work in progress
- Elderly and vulnerable clients
- A round up of international trust cases on divorce and insolvency
- Beneficial ownership registers- pipe dream or reality?
- Life after SVDP- dealing with HNW clients and their post disclosure problems
- ID theft, digital fraud and tracking illicit funds

KEYNOTE SESSIONS

Walking the fine line between taxpayer's rights and efficient revenue collection

Judge Bernard Makgabo Ngoepe
Tax Ombud

South Africa in 2018-will it be better than 2017?

Justice Malala

Political commentator, columnist and author

From Trump to Brexit – what awaits us in 2018?

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STEP SOUTH AFRICA CONFERENCE 2018

The upcoming South Africa Conference will take place in Africa's industrial heartland of Johannesburg. With an agenda focusing on providing advice in a world and age of great uncertainty and instability, this event on 23-24 April 2018 will provide you with two days of topical, in-depth content, including a detailed look at emigration; the state of South Africa in 2018; and the world after Brexit and the election of President Trump.

The conference will also look at protecting taxpayer's rights, as well as trusts being attacked both locally and internationally

by ex-spouses and creditors. In addition to the traditional talks by industry and technical experts, the conference will feature two highly acclaimed political commentators on South African and world affairs in Justice Malala and Tony Leon, as well as a talk by South Africa's tax ombud.

The conference will also feature a vibrant social agenda, enabling you to network with your fellow delegates, as well as the traditional highlight of a uniquely Johannesburg tour the Sunday before it begins!

Conference programme

SUNDAY 22 APRIL 2018

9:00am Optional tour

Heritage tour - Gold Reef City

DAY 1 – 23 APRIL 2018

SANDTON CONVENTION CENTRE

8:15am Registration & refreshments

Exhibits open

8:50am Welcome from STEP Johannesburg

Harry Joffe TEP, Branch Chair

9:00am **Keynote address:** Walking the fine line between taxpayer's rights and efficient revenue collection

Judge Bernard Makgabo Ngoepe, Tax Ombud

10:00am Taxpayer's rights and the constitution

- What rights do taxpayers have in dealing with SARS?
- How successful have they been in enforcing these rights in the constitutional court?

Dr. Beric Croome TEP, ENS Africa

10:30am The Chief Master's new directive of 2017 – a discussion among the Master's office

- What were the reasons for the directive?
- The directive and:
 - New trusts
 - Independent trustees
 - Amendment of trust deeds

Lester Basson, Chief Master at Department of Justice and Constitutional Development and staff from the Master's office

11:10am Networking & refreshments

11:30am A round up of recent trust cases on divorce

- Trusts and divorce – is the law still uncertain?
- Are trusts still being successfully attacked?

Harry Joffe TEP, Discovery Legal Services

12:00pm **Keynote address:** South Africa in 2018 – will it be better than 2017?

Justice Malala, Political commentator, columnist and author

1:00pm Networking lunch

2:00pm Country updates

- The Caribbean
Chris McKenzie TEP, O'Neal Webster (UK) LLP
- Cyprus
Costas Souris, Global Property Wealth
- Dubai
Carlyle K Rogers TEP, Carlyle Rogers Legal Consultants FZE
- Mauritius
Rizwana Ameer Meea TEP, Sphere Management Mauritius Limited

3:00pm The latest requirements for South Africans obtaining residency/citizenship by investment in the following jurisdictions:

- The Caribbean
- Cyprus
- Malta
- Mauritius
- Portugal
Nigel Barnes, Henley & Partners

4:00pm Networking & refreshments

4:20pm Panel Discussion – emigrating from South Africa

*Panel Chair: Rupert Lawrence Worsdale TEP, Maitland Charles R van Staden, Hogan Lovells (South Africa) Inc
Hugo van Zyl TEP, FNB (part of First Rand Group) South Africa*

5:20pm Day one close

6:30pm Networking reception and dinner

*The Butcher House Shop & Grill
Kindly supported by Standard Bank*

Register now at www.step.org/SAevent2018



Speaker biographies can be found at
www.step.org/SAevent2018

DAY 2 - 24 APRIL 2018
SANDTON CONVENTION CENTRE

8:15am	Registration & refreshments	12:00pm	A round up of international trust cases on divorce and insolvency
	<i>Exhibits open</i>		<ul style="list-style-type: none"> Can placing assets in an overseas trust protect them from claims on divorce? Can placing them in such a trust protect them from creditors' claims? A round-up of the cases on these issues and the practical considerations that arise <p><i>Chris McKenzie TEP, O'Neal Webster (UK) LLP</i></p>
8:50am	Welcome from STEP	12:30pm	Beneficial ownership registers – pipe dream or reality?
9:00am	Why do I need a UK/US/European will?		<ul style="list-style-type: none"> The International Interest in Beneficial Ownership History of Beneficial Ownership Regulation The Privacy versus Transparency debate Current Status on Beneficial Ownership across the globe <p><i>Assad Abdullatiff TEP, Axis Fiduciary Ltd</i></p>
	<ul style="list-style-type: none"> How are clients with assets in the US/UK/Europe affected on death? What are the consequences for clients if not properly handled? <p><i>Gordon Stuart TEP, Accuro Trust (Mauritius) Ltd</i></p>	1:00pm	Networking lunch
9:30am	Winding up a digital estate	2:00pm	Life after SVDP – dealing with HNW clients and their post disclosure problems
	<ul style="list-style-type: none"> What are the dangers with digital assets? What must the executor be aware of? What clauses should a will contain? <p><i>Christoff Pienaar, Cliffe Dekker Hofmeyr</i></p>		<ul style="list-style-type: none"> Restructuring opportunities Starting again Closing the loop <p><i>Anthea Stephens TEP, Standard Bank, Wealth and Investment</i></p>
10:00am	Panel Discussion: CRS – work in progress	2:30pm	Panel Discussion: ID theft, digital fraud and tracking illicit funds
	<ul style="list-style-type: none"> How have South Africans been affected? What lessons have been learnt? Is privacy dead? Exchange of information and taxpayers rights? What has the Caribbean experience been? <p><i>Panel Chair: Andrew Knight TEP, M Partners</i> <i>Dr. Beric Croome TEP, ENS Africa</i> <i>Carlyle K Rogers TEP, Carlyle Rogers Legal Consultants FZE</i> <i>Rupert Lawrence Worsdale TEP, Maitland</i></p>		<p><i>Panel Chair: Steven Powell, ENSAfrica FORENSICS (PTY) LTD</i> <i>Rachel Coyle MBE, S-RM</i> <i>Kevin Hogan, Investec Bank</i> <i>Jacques Malan, FACTS Consulting</i></p>
11:00am	Networking & refreshments	3:30pm	Keynote address: From Trump to Brexit – what awaits us in 2018?
11:30am	Elderly and vulnerable clients		<i>Tony Leon, Resolve Communications (Pty) Ltd.</i>
	<ul style="list-style-type: none"> How does one plan for incapacity in an international context? Lasting powers of attorney in the UK? What options are available to South Africans? <p><i>Patricia Wass TEP, Enable Law</i></p>	4:15pm	Conference closing address

Register now at www.step.org/SAevent2018

STEP SOUTH AFRICA CONFERENCE 2018

23-24 APRIL 2018

Social Activities Include:

Optional tour - 22 April 2018

Heritage tour – Gold Reef City

A two-hour interactive tour where you will dig deep into the historical world of Johannesburg's gold rush. Learn how Johannesburg came to be, how gold was discovered on the reef, descend 75 meters underground plus witness the magnificent glow of a live gold pour. The tour also gives you access to the Gold Reef City theme park which has some of South Africa's fastest, biggest, most twisting and turning thrill rides.

Fee: ZAR 600

Networking reception and dinner at The Butcher House Shop & Grill – 23 April 2018

Kindly supported by Standard Bank

Wind down with fellow delegates over drinks and dinner after the opening day of the Conference and enjoy some of the best cuisine the City has to offer at this family business, handed down over three generations from the first female butcher in South Africa.

The Networking Reception and Dinner is included in your delegate rate. You can bring a guest for ZAR 800

Register now at www.step.org/SAevent2018

ABOUT STEP

STEP is the global professional association for practitioners who specialise in family inheritance and succession planning. We work to improve public understanding of the issues families face in this area and promote education and high professional standards among our members. STEP members help families plan for their futures, from drafting a will to advising on issues concerning international families, protection of the vulnerable, family businesses and philanthropic giving. Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

For any queries regarding this event please contact the conference team on +44 (0)20 7340 0500 or email conferences@step.org

Following on from the highly popular **Global Congress** in 2016, the 2018 STEP Global Congress will take place on 13-14 September 2018 in Vancouver, Canada.

Find out more at
www.stepglobalcongress.com

STEP DIPLOMA IN INTERNATIONAL TRUST MANAGEMENT

SOUTH AFRICA

The global benchmark qualification for those working in the international trusts arena which leads to Full STEP Membership. It provides both a practical and academic approach to the issues that arise in the international trust industry.

In South Africa this course is delivered via Distance Learning Plus (DL+) which provides candidates with a fully supported route through their studies.

The Diploma comprises of four Advanced Certificates:

- Trust Creation: Law and Practice
- Company Law and Practice
- Trust Administration and Accounts
- Trustee Investment and Financial Appraisal

The programme will:

- Increase your knowledge of all aspects of the international trust profession
- Provide an overview of the legislation, principles and practice in your local jurisdiction

- Enhance your career with a qualification that is recognised by those working in the trust industry
- Provide a route to STEP membership and TEP status
- Enhance your ability to give holistic advice to clients as a 'trusted advisor'
- Distinguish you and your firm from the competition

www.step.org/DipITM