

MARCH 2018

THE GENESIS OF THE 'GUPTA CLAUSE' WITHIN THE FINANCIAL REGULATORY FRAMEWORK OF SOUTH AFRICA

**Navigating the digital divide:
Internet access
a human right?**

***Is your firm the type of
entity it purports to be?***

***Do you have a
legal practitioner
personality?***

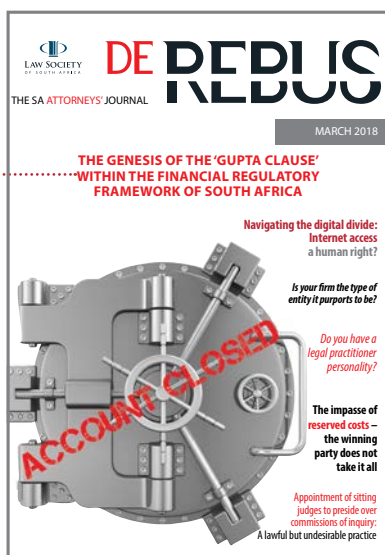
**The impasse of
reserved costs –
the winning
party does not
take it all**

**Appointment of sitting
judges to preside over
commissions of inquiry:
A lawful but undesirable practice**





ENSafrica | Africa's largest law firm



26

THE GENESIS OF THE 'GUPTA CLAUSE'
WITHIN THE FINANCIAL REGULATORY
FRAMEWORK OF SOUTH AFRICA

Navigating the digital divide:
Internet access
a human right?

Is your firm the type of
entity it purports to be?

Do you have a
legal practitioner
personality?

The impasse of
reserved costs –
the winning
party does not
take it all

Appointment of sitting
judges to preside over
commissions of inquiry:
A lawful but undesirable practice

32

20

22

30

47



5



7



11



14



17

Regular columns

Editorial 3

Letters to the editor 4

AGM News

• LSNP AGM: Lawyers should give back to society 5

• ADF will still exist in the new dispensation 7

News

• 2017 prize winners for best articles in *De Rebus* 8

• Progress only achievable through a united profession
discussed at NADEL's National Young Lawyers Summit 9

• Brazil and South Africa to share ideas on improving the
mining sector 13

• Constitutional Court Justice Bess Nkabinde retires 14

People and practices 16

LSSA News

• LSSA discusses way forward after implementation
of LPA 17

• LSSA calls for higher standard of ethics and
accountability for public officials 17

• The Future of Our Profession 18

Books for lawyers 19

Practice management

• Is your firm the type of entity it purports to be? 20

• Do you have a legal practitioner personality? 22

Practice notes

• Trustee duties in relation to member investor choice 24

• Conflicting evidence of handwriting experts 25

The law reports 36

New legislation 41

Employment law update 42

Recent articles and research 44

Opinion

• Appointment of sitting judges to preside over
commissions of inquiry: A lawful but undesirable
practice 47

FEATURES

26 The genesis of the 'Gupta clause' within the financial regulatory framework of South Africa



It is a trite principle of law in South Africa that banks are not legally compelled to give reasons for terminating relationships or closing customers' accounts. This has been long established and settled in, both international and domestic case law. However, as of late there have been various policy developments within SA's financial regulatory framework, which might necessitate a rethink thereof or pose a challenge to this principle. **Nkateko Nkhwashu** briefly looks at some of the key pieces of legislation, which are going to form the basis of the article and how it all fits within the financial regulatory framework.

30 The impasse of reserved costs – the winning party does not take it all



Beverly Shiells writes that there seems to be a misconception among colleagues that the winning party is ultimately entitled to all costs incurred in an action or application and that such costs also include any reserved costs orders made. The Taxing Master has, however, no authority to tax a reserved costs order and any reserved costs order must be unreserved prior to taxation. Failure and/or neglect to address any reserved costs orders prior to the finalisation of a matter can ultimately cost your client a vast amount in legal fees.

32 Navigating the digital divide: Internet access a human right?

The notion that Internet access is a human right that must be guaranteed by government has become an attractive narrative for many commentators. **Martin van Staden** writes that there has been much talk of a 'digital divide', meaning the inequality of access to digital media between wealthier and poorer individuals. #DataMustFall has recently been joined by the official opposition's (the Democratic Alliance's) #Data4All initiative, which is demanding 500MB of free data for the poor, students and jobseekers. Mr van

Staden goes on to say that passion and emotion are crucial ingredients in a democracy, antithetical to the cold application of rules evident in authoritarian dictatorships. However, it remains important to approach ideas like Internet access being a human right with a degree of circumspection, especially if such narrative stands to cost the beleaguered taxpayer more in taxes, and when it appears to be so readily accepted, without question, that it should be a human right.



EDITOR:

Mapula Sedutla
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:

Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:

Kevin O'Reilly
MA (NMMU)

SUB-EDITOR:

Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:

Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

Giusi Harper (Chairperson), Peter Horn, Denise Lenyai,
Mohamed Randerla, Lutendo Sigogo

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park,
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.
Tel (012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

DE REBUS ONLINE: www.derebus.org.za

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

De Rebus editorial staff use online products from:

- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta.** Go to: www.jutalaw.co.za.

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

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

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

Contact: Greg Stewart • Tel (011) 305 7337

Cell: 074 552 0280 • E-mail: GregS@ince.co.za

Classifieds supplement: Contact: Isabel Joubert

Tel (012) 366 8800 • Fax (012) 362 0969

PO Box 36626, Menlo Park 0102 • E-mail: yp@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela

Tel (012) 366 8800 E-mail: david@lssa.org.za

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

ATTORNEYS' MAILING LIST INQUIRIES: Gail Mason

Tel (012) 441 4629 E-mail: gail@lssalead.org.za

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

SUBSCRIPTIONS:

General, and non-practising attorneys: R 1 016 p/a

Retired attorneys and full-time law students: R 780 p/a

Cover price: R 107 each

Subscribers from African Postal Union countries (surface mail):

R 1 615 (VAT excl)

Overseas subscribers (surface mail): R 1 972 (VAT excl)

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

Tel: (012) 366 8800 • E-mail: david@lssa.org.za



LAW SOCIETY

OF SOUTH AFRICA

© Copyright 2018:

Law Society of South Africa 021-21-NPO

Tel: (012) 366 8800



Member of
The Audit Bureau of
Circulations of Southern Africa

A new dawn for South Africa

Since the release of the 'State of Capture' report by former Public Protector Thuli Madonsela in 2015, the country and the legal profession has watched with interest to see if the report would result in any changes in the country. This month's edition of *De Rebus* is a reflection of what has been unfolding in the country over the past few years, which climaxed with the resignation of former President Jacob Zuma on 14 February.

In our letters section, Leslie Kobrin lends his opinion on the Constitutional Court case *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CC) (unreported case no CCT76/17, 29-12-2017). The letter highlights the need for an independent judiciary that is able to discharge its obligation without fear, favour or prejudice. This is important particularly during a time when the Executive is riddled with controversy (see p 4).

In the Law Society of South Africa (LSSA) news section, the LSSA welcomed the decision by the National Executive Committee (NEC) of the African National Congress to recall President Zuma amid all the allegations of corruption related to the imminent reinstatement of the 'spy tapes' criminal charges, and the allegations around complicity in state capture. In addition, LSSA Co-chairpersons Walid Brown and David Bekker have noted that public officials should be prepared to step down and offer to resign at the mere suggestion of impropriety on their parts (see p 17).

Highlighting how corruption impacts on the financial regulatory framework of South Africa (SA), in our cover feature article Nkateko Nkhwashu writes about the genesis of the 'Gupta clause'. The basis of this feature article is two pieces of legislation. The first being the Financial Sector Regulation Act 9 of 2017, which seeks to establish a dual system of financial regulation in SA comprising of the Prudential Authority and the

Financial Sector Conduct Authority. The second being the Financial Intelligence Centre Amendment Act 1 of 2017, which seeks to formally introduce a risk-based approach to customer identification and verification in SA. It is a trite principle of law in SA that banks are not legally compelled to give reasons for terminating relationships or closing customers' accounts. However, due to political dynamics and other policy developments within the financial regulatory framework of SA it seems as though this is about to change (see p 26).

In our law reports section, the Supreme Court of Appeal case of *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA); [2017] 4 SA All SA 726 (SCA), demonstrates that in fact controversy surrounding former President Zuma dates back to 2007 when he was elected president of the African National Congress (see p 37).

In the opinion section, Ndivhuwo Ishmel Moleya's article notes that although lawful, the appointment of sitting judges to preside over commissions of inquiry is an undesirable practice. The opinion article notes that the appointment of Deputy Chief Justice Raymond Zondo to preside over the commission of inquiry stipulated by the State of Capture report, should be welcomed as it will bring integrity into the works of the commission. However, this brings into sharp focus the question of the appropriateness of appointing serving judges to preside over commissions of inquiry (see p 47).

Legal practitioners are reminded, in various articles in our AGM news and news section, that during Apartheid it was lawyers who brought about change and held the state accountable for its wrongdoings. Therefore, practitioners should not be bystanders and watch while the state is overtaken by corruption (see p 5 and 9).



Mapula Sedutla – Editor

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 19 March and 16 April 2018.

Follow us online:



@derebusjournal



De Rebus, The SA Attorneys' Journal

DE REBUS *web*

www.derebus.org.za

LETTERS

TO THE EDITOR

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

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

Value of a minority judgment

On 29 December 2017, judgment was handed down by the Constitutional Court (CC) in the matter of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CC) (unreported case no CCT76/17, 29-12-2017) in which the majority of the court held, *inter alia*, that the National Assembly failed in following its constitutional obligations to hold former President Jacob Zuma to account for having violated his oath of office and to uphold the Constitution following the remedial action recommended by the Public Protector in respect of the upgrades to his Nkandla homestead.

Noteworthy in this matter were two dissenting judgments handed down by Chief Justice Mogoeng Mogoeng and Deputy Chief Justice Raymond Zondo. This very fact resulted in a rather vocal criticism by the political leadership of the Economic Freedom Fighters of the conduct of the Chief Justice for having publicly insisted that his dissenting judgment be read.

I submit that criticism of this is inappropriate and misplaced particularly in the light of the judgment handed down by Judge Johan Froneman who con-

curred with the finding of the majority. It is instructive for me to quote verbatim from this judgment from paras 280 and 281 thereof:

'[280] It is part of constitutional adjudication that, as in this matter, there may be reasonable disagreement among judges as to the proper interpretation and application of the Constitution [this is true of adjudication in other spheres as well. Compare *Phakane v S* (CC) (unreported case no CCT61/16, 5-12-2017) at para 61]. The respective merits of opposing viewpoints should be assessed on the basis of substantive reasons advanced for them. There is nothing wrong in that substantive debate being robust, but to attach a label to the opposing view does nothing to further the debate.

[281] For the reasons lucidly set out in the second judgment [being the majority judgment of Judge Chris Jafta], I do not agree with the reasoning of the Chief Justice and the Deputy Chief Justice in their respective judgments. I do not, however, consider the different outcome that they reach to be the product of anything other than a serious attempt to grapple with the important constitutional issue at hand. The fact that I do not agree with their reasoning or the outcome that they propose does not mean that I consider them to have abdicated

their responsibility to ensure that the National Assembly acts in accordance with the Constitution.'

It would do us well to bear in mind that the hallmark of an independent judiciary discharging their obligation without fear, favour or prejudice is the ability of different agile minds reaching a different conclusion and outcome on being presented with the same facts in the case before them.

Leslie Kobrin, attorney,
Johannesburg

Erratum

The headline in the article by Dr Fareed Moosa 'Remuneration of benefits from a will: Who is a "spouse"' (2018 (Jan/Feb) *DR* 28) was published incorrectly, and should read: 'Renunciation of benefits from a will: Who is a "spouse"'. *De Rebus* would like to apologise for the mistake and for any inconvenience caused in the matter. □

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

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



WHY ARE SOME OF THE LEADING LAW FIRMS SWITCHING TO LEGALSUITE?

LegalSuite is one of the leading suppliers of software to the legal industry in South Africa. We have been developing legal software for over 25 years and currently 8 000 legal practitioners use our program on a daily basis.

If you have never looked at LegalSuite or have never considered it as an alternative to your current software, we would encourage you to invest some time in getting to know the program better because we strongly believe it will not only save you money, but could also provide a far better solution than your existing system.

Some of the leading firms in South Africa are changing over to LegalSuite. If you can afford an hour of your time, we would like to show you why.



“MAKING COMPUTERS WORK FOR YOU”

0861 711150

FOR A FREE DEMONSTRATION,
www.legalsuite.co.za

LSNP AGM: Lawyers should give back to society

The Law Society of the Northern Provinces (LSNP) held its 125th annual general meeting and conference late last year at Sun City. Speakers at the conference included Commander in Chief of the Economic Freedom Fighters, Julius Sello Malema; and Judge President of the Mpumalanga Division of the High Court, Judge Malesela Francis Legodi.

Outgoing President of the LSNP, Luteendo Sigogo, opened the proceedings by saying 2017 marks a monumental year in the legal profession in the country. He added: 'In the Northern provinces, which makes up this law society, it marks the completion of 125 years since the incorporated Law Society of the Transvaal was established in 1892. This is probably the final year in which we will congregate in this form, as in terms of the Legal Practice Amendment Bill 2017 the lifespan of the law society is expected to come to an end by not later than 31 October 2018. The new dispensation under the Legal Practice Council will take effect.'

Reflecting on what the law society in its current form means, Mr Sigogo said: 'As we prepare ourselves to welcome the new era, we must also reflect on what the law society in its current form means to us. It gives us mixed feelings. Some of us see it as a great legacy spreading over a period of more than a century. It has been there since 1892 save for Eastern province closure as a result of the 1899 Anglo-Boer war. During this period it regulated the affairs of the profession, and at the same time protected the interests of the public. On the other hand, it protected and developed the interests of its members, the attorneys. But, to some of us, it is such a monster which terrorised members because of the colour of their skin and gender.'

Mr Sigogo went on further to state: 'It is this law society in 1909, which opposed the admission of Alfred Mangena, the first black, in fact the first African, to be admitted as an attorney, because he was black. It argued that if Mangena was to be admitted as an attorney he will encourage black people to disregard the law and/or to have more legal disputes amongst them. Members are in this regard referred to the reported case, which is *Mangena v Law Society* 1910 TDP 649. ... It was also this law society in 1978, which opposed the admission of Dikgang Moseneke - now recently retired Deputy Chief Justice of the country - as



Commander in Chief of the Economic Freedom Fighters, Julius Sello Malema, addressing attendees at the Law Society of the Northern Provinces AGM held late last year. Mr Malema said the question the legal profession should ask itself is: What value is the profession adding to society?

an attorney on the basis that he was not a South African, because as a result of Bantustans law he happened to fall under the then Republic of Bophuthatswana. We should remind each other that when we close this law society and usher in the Legal Practice Council, we say good-bye to such an ugly side of the history of our society. We open doors to the profession, which must be free of all forms of prejudice which held us back as a nation for many years.'

Lawyers as economic freedom fighters

Addressing delegates at the AGM, Mr Malema began his address by saying: 'I am not sure if you chose the rightful person to come and speak to you, because when you invite us to come and speak to you, you must be prepared to hear things you are not ready to receive, because we tell the truth the way it is.'

Mr Malema went on further to state that the question the legal profession should ask, outside the normal legal practice is, 'What value is the profession adding to society?' He added: 'The question you must ask yourself is whether

you are self-obsessed with legal matters only, and not care that our country, South Africa is on the road of joining many other failed African states. ... Our country, South Africa is in a massive crisis, crisis of economic exclusion of black majority and African sympathique. As we stand here, more than 30 million South Africans live below the poverty line. Almost 10 million South Africans who need jobs are jobless. The rich are getting richer and the poor are getting poorer. The spaces of reserve labourers created by Apartheid, the villages, the townships, the hostels are not improving. They continue to produce poverty and suffering the same way they did under Apartheid. The racial economic inequalities for even children born post 1994 are still defined along the lines of black poverty and white privilege.'

Mr Malema noted that big law firms in the country are white owned. He asked: 'Why are black lawyers not starting big black owned law firms, which will treat candidate attorneys with some degree of respect? The biggest law firms in South Africa should be owned by black people because this is a majority black people's country. The state should use section 9(2) of the Constitution to pass legislation that gives preference to black owned law firms and resolve that all government departments and entities at all levels should brief black law firms.'

Commenting on the Legal Practice Act 28 of 2014 (LPA), Mr Malema said the LPA should be a platform to drive deeper transformation of the legal fraternity, but it does not and will not. He added: 'The transformation of the legal fraternity means that ordinary people should gain access to quality legal representation wherever they are and whichever class position they are in. It looks like majority of legal practitioners are content with the *status quo* of a legal fraternity that only service rich people. How many of you as lawyers offer legal services to poor and helpless widows whose estates are being robbed by criminals? How many of you, as lawyers, commit that at least 10% of your court appearance per year will be *pro bono*?'

Mr Malema stated that lawyers do not need to belong to a political organisation to condemn corruption and theft of public funds. 'You do not need to be a politician to stand against capture of state-owned companies. Do not ever think that court appearances and mak-

ing light heated comments on social media is adequate. Robert Sobukwe, Nelson Mandela, OR Tambo, Duma Nokwe, and many others understood that the battles had to be fought in court, but also on the streets.'

Speaking about land expropriation without compensation, Mr Malema said: 'In the absence of taking [land] ... through legislation and through introduction of progressive laws, nothing has happened. We said, willing buyer, willing seller of the land. There is no money. I said to you black people are becoming poorer and poorer, where will you get the money to buy the land? Okay, let us say you are fortunate ... you have the money to buy the land, there must be a willing seller. There is no longer a willing seller, even if you have the money. And in the absence of the willingness to sell, the land will remain in the hands of the minorities. We must come up with a legislation that says we need this land shared amongst our people. And when we say we are expropriating the land for equal redistribution, they say you want to take land from white people. Listen to me, for equal redistribution, not for black distribution. Both black and white must own the land equally. There is nothing special about whites that they must own more land than black people. We must own this land equally. I do not want to go into the history of how the land was taken from our people, we all know that. We are not calling for vengeance. We are calling for a demographic process to redistribute the land. Let everybody buy in, black and white, because if it is not done in an orderly manner through legislation, through a demographic process, revolution is unavoidable. And you will lose this land through a revolution, and an unled revolution is anarchy. Both me and you will be victims.'

Mr Malema noted that new female entrants into the legal fraternity should be empowered. He cautioned male lawyers by saying 'women are not tools to be used in the bedroom. When you see women, you must see an equal partner, and then you must engage from the same level'.

Speaking about black lawyers, Mr Malema said: 'Black lawyers, many of you disappoint us. When you provide services to your fellow blacks you are not professional. Blacks do not treat each other with respect. ... I use both black and white lawyers, of course preferably black for historical reasons. I empower black people. I have never had a white lawyer saying to me, "oh, Chief, I forgot that letter". Never. But it is always the case with our brothers. ... Empowerment of black people does not mean empowerment of laziness. Empowerment of black people does not mean empowerment of mediocrity. We need quality from black



Judge President of the Mpumalanga Division of the High Court, Judge Legodi spoke about what it takes to be a great lawyer.

people. Do not take advantage and say no, because it is us [black lawyers] they will empower us. You have to earn it. You must sweat for it, because your failure is a failure of the whole village. ... Please, let us provide proper service. But also we must prove to those who say we are inherently incompetent.'

How to be a great lawyer

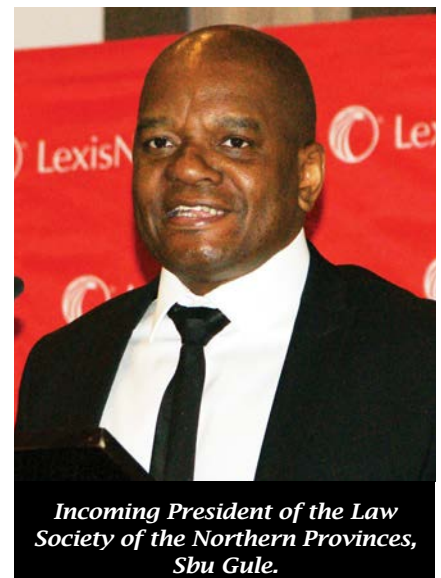
The second speaker at the AGM, Judge President Legodi, began his address by speaking about the division he is deployed to. Judge President Legodi said: 'In terms of subsection 3 of section 6 of the Superior Courts Act [10 of 2013 (the Act)], the Minister must determine the area of jurisdiction of the Mpumalanga division. That has not taken place as yet. As a result, in terms of subsection 2 of section 50 of the Act, the Gauteng division continues to function as the Mpumalanga division until a notice as contemplated in subsection 3 of section 6 is published. Therefore, we are still dependent on the Gauteng division for judges to operate in Mpumalanga division of the High Court. For this we are greatly indebted to Judge President Mlambo for his generosity and guidance.'

Speaking about transformation, Judge President Legodi noted: 'I have made an undertaking that transformation and gender sensitivity in the judiciary will be one of my priorities. Most of the practitioners who are appearing in our division on a daily basis are young, determined ladies. I think they are going very far, despite the tough time which they have in court from the Bench. Not very long, their actions and competency ... will be speaking for them.'

Judge President Legodi asked: 'What does it take to be a great lawyer?' An-

swering that question he said: 'It is said a great lawyer is the one who has analytic skills, the one who is creative, the one who has research skills, inter-personal skills, legal thinking ability, perseverance, public-speaking skills. It is the one who pursues continuous education, the one who has reading comprehensive skills and writing skills. ... Success in a profession as lawyers is ideally measured by your ability to serve not only your clients because they pay you, but also your ability to serve those who cannot pay you anything. You do this by offering yourself to them. A true successful lawyer is the one who is motivated by loving concern rather than a desire for personal glory. In that way you become a true servant of our society. There is a wrong perception that to be a successful lawyer you need to make a lot of money. That is wrong.'

Speaking about the LPA, Judge President Legodi said that the purpose of the LPA, among others, is one, to broaden access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered, that are within the reach of the many people. 'Two, to broaden access to justice by putting in place measures to provide for rendering of community service by candidate attorneys. This is section 3 of the Legal Practice Act. ... The purpose is loud and clear. These candidate attorneys are going to need your guidance and mentorship. They should not be made to feel like they are being made money-making machines, or filling machines. Remember, the experience and knowledge you have acquired in the course of time is meant to be passed over to others for generations to come. Take them to those villages where many of us come from to make them understand what it takes and means to be a true community worker, hoping that



Incoming President of the Law Society of the Northern Provinces, Sbu Gule.

when they complete their period of articles they will find it necessary to return to those villages and serve. There can be no basis not to embrace these noble values underpinned in our Constitution as contemplated in the Legal Practice Act,' Judge President Legodi added.

Other speakers at the AGM included:

- Member of the National Forum on the Legal Profession, Kathleen Matolo-Dlepu, who gave an update on the work done thus far by the National Forum.
- Chairperson of the Attorneys Fidelity

Fund (AFF), Strike Madiba, who gave a report on the AFF.

- Co-chairpersons of the Law Society of South Africa (LSSA), Walid Brown and David Bekker, who gave a report on the LSSA.

- Chairperson of the Attorneys Development Fund (ADF), Nomahlubi Khwinana, who gave a report on the ADF.

See also:

- Separation of powers discussed at KZNLS AGM 2017 (Dec) DR 6.

- Black Lawyers Association's Contribution to the transformation of justice not underestimated 2017 (Dec) DR 10.

- National unified body for the legal profession discussed at FLS AGM 2017 (Dec) DR 13.

- South Africans must defend their independence for the judiciary and value its strength 2018 (Jan/Feb) DR 4.

Mapula Sedutla
mapula@derebus.org.za

ADF will still exist in the new dispensation

The Attorneys Development Fund (ADF), held its annual general meeting (AGM) on 6 February in Johannesburg. Chairperson of the ADF, Nomahlubi Khwinana, said the portfolio and finances of the ADF are in good order. She announced that the ADF will be taking an independent route from the Law Society of South Africa (LSSA). Ms Khwinana added that there are some legal practitioners who have not heard of the ADF. However, she pointed out that the ADF is in collaboration with the Attorneys Insurance Indemnity Fund NPC (AIIF), the LSSA's Legal Education and Development division (LEAD), the KwaZulu-Natal Law Society Library, Lexis-Nexis and the Southern African Legal Information Institute (SAFLII), to get the ADF out there where it can be known.

Chief Executive Officer, Mackenzie Mukansi, in his report, said the ADF has given funding to 15 law firms during the 2016/2017 period, and the statistics of those who were assisted are as follows: 53,33% of beneficiaries were African males, while 13,33% were white males,



The Attorneys Development Fund (ADF) Chairperson, Nomahlubi Khwinana, at the ADF annual general meeting held on 6 February at the Emperors Palace Convention Centre, in Johannesburg.

33,33% beneficiaries are African females. Mr Mukansi added of the 2016 assisted beneficiaries, 75% of the firms assisted were partnership consisting of African females and 25% African males. He noted that 64% of the assisted sole practitioners were African males, with 18% being African females and white males.

Mr Mukansi pointed out that 66, 67% of the beneficiaries assisted in 2016 were from Gauteng, followed by KwaZulu-Natal at 26, 67% and the Eastern Cape at 6,67%. He said the ADF hoped that some of the beneficiaries they have assisted would pay back their loans to the ADF, so that the organisation can assist other applicants who need assistance.

A question from an attendee was posed from the floor. The attendee wanted to know if beneficiaries were recorded as debtors, until such time they have paid back their loans and also who the beneficiaries were. Mr Mukansi said the ADF was shying away from naming beneficiaries, due to the nature the ADF's statutory requirements, not much

details are given about the amount relating to each beneficiary or their names because of the privacy laws involved. He added that they do not record beneficiaries as debtors. It was suggested from the floor to the ADF board that beneficiaries should be recorded as debtors, so that they would be encouraged to pay back the loans to the ADF.

Co-Chairperson of the LSSA, Walid Brown posed a question to the board members of the ADF about their business strategy and plans going forward in the new dispensation when the Legal Practice Act 28 of 2014 (LPA) is fully operational.

Mr Mukansi said the business strategy document was drafted and completed in October 2017. He added that the document states that an informed decision was taken to have the ADF as a financially running operation independent from the LSSA. He noted that the business strategy document has not formally been reviewed by the ADF board members as the document was sent to the board members in late 2017. However, he said the document will be reviewed at a workshop in 2019. 'By 2023 it needs to be something that is a living document that the ADF abides by, aligned with our memorandum of cooperation, aligned with the new dispensation being the LPA,' Mr Mukansi said.

'You will see some of our documentation already starts talking to our new name. We will indulge you on that in the November AGM, for you to ratify us to move from being the ADF to being the Legal Practitioners Development Fund,' Mr Mukansi added. He noted that the ADF focuses on development and advancement of legal practitioners. The next ADF AGM will be held in November.



The Attorneys Development Fund CEO, Mackenzie Mukansi, spoke at the ADF AGM.

Kgomotso Ramotsho,
Kgomotso@derebus.org.za



2017 prize winners for best articles in *De Rebus*

Johannesburg attorney, Emile Myburgh, has won the 2017 LexisNexis Prize for the best article contributed to *De Rebus* by a practising attorney. Mr Myburgh won best prize for his article titled 'Holding delinquent directors personally liable' published in 2017 (July) *DR* 29. The article discussed how a creditor can hold a director personally liable for unpaid debts owed to them by a company in light of the small but growing body of jurisprudence dealing with directors' liability under the new Companies Act 71 of 2008.



Johannesburg attorney, Emile Myburgh, has won the 2017 LexisNexis Prize for the best article contributed by a practising attorney. The article was published in *De Rebus* in July 2017.

Mr Myburgh said the importance of his research in regards to his article, is that creditors need not first liquidate a company before going after rogue directors. Mr Myburgh has won a Lenovo Tablet, as well as one year's free access to one practice area of Practical Guidance. Mr Myburgh said he was stunned and very happy for being chosen a winner on his first ever article submitted to *De Rebus*.

Johannesburg candidate attorney, Alecia Pienaar, won the 2017 Juta Law Prize for best candidate attorney article for her article titled 'Overview of air quality regulatory developments' published in 2017 (Dec) *DR* 38. Her article discussed how climate change has been on the agenda since 1993 when South Africa (SA) first became a signatory to the United Nations Framework. She said the ratifications of the Paris Agreement in November 2016 has introduced a spur of developments to the air quality regulatory regime. She added that the movement interlinks with the mitigation component of SA's Intended Nationally Determined Contribution, which commits to a peak, plateau and decline of greenhouse gas emissions trajectory range.

Ms Pienaar came to the conclusion that it is clear that there is a commitment to move towards a formally regulated climate change framework. Although progressive, the environmental law regime, and in particular the quality sector, is already defined by continuous proliferation of legislation. She said this will likely



Johannesburg candidate attorney, Alecia Pienaar, won the 2017 Juta Law Prize for best candidate attorney article for her article published in *De Rebus* in December 2017.

create numerous lacunas and ambiguities that industries will have to navigate across as they seek to bring their operations into compliance. Ms Pienaar added that she is elated and inspired as this serves as a reminder of the relevance of her chosen field of law and that there is value in consistently reading up and writing on legal development. Ms Pienaar won a tablet device and one year's subscription to Juta's online Essential Legal Practitioner Bundle worth R 25 000.

Kgomotso Ramotsho,
kgomotso@derebus.org.za

Need to advertise a vacancy immediately?

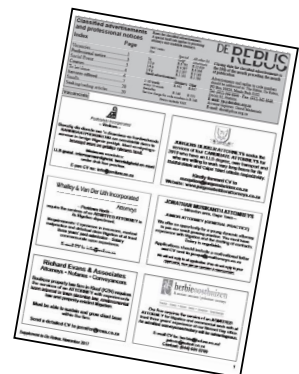
Not able to wait?

***De Rebus Classifieds* has the solution.**

Immediate advertising will be available for the vacancies only on the *De Rebus* website.

2018 rate cards, booking forms and terms and conditions are available at www.derebus.org.za/rate-card

For more information contact Isabel at (012) 366 8800 or e-mail: yp@derebus.org.za



Progress only achievable through a united profession discussed at NADEL's National Young Lawyers Summit

The National Association of Democratic Lawyers (NADEL) held its National Young Lawyers Summit from 26 to 27 January. The purpose of the summit was to engage with young people in the profession regarding to the anticipated changes in the Legal Practice Act 28 of 2014 (LPA).

NADEL President, Mvuzo Notyesi, welcomed delegates to the summit and said this was an opportunity to engage in dialogue of the future of the legal profession. He said the legal profession needs to be looked at from different perspectives, one being the kind of legal education that must be provided.

Mr Notyesi said legal practitioners have a prominent role to play in democracy. 'The role of lawyers is to ensure the promises made in the Constitution are realised and recognised. It is only when we are a united, organised profession that we will achieve that,' he said.

Mr Notyesi noted a number of important issues surrounding the profession. He said there were serious discussions on what must happen to the Law Society of South Africa (LSSA). He also commented on the LLB accreditation and highlighted the discussion on uniformed training for advocates and attorneys, noting that the LPA refers to 'legal practitioners'. The 'intensity' of the respective training has cause serious debate, he added.

Mr Notyesi commented on the difficulty in joining the profession today, adding that if an LLB student is unable to secure articles they might have to give up on their aspiration of joining the legal profession.

In concluding, Mr Notyesi announced the launch of NADEL's constitutional training programme. He said NADEL would like to see students and young lawyers being of assistance at advisory centers, where people may go to receive advice on Constitutional issues.

Unfair discrimination must be stopped

Member of Parliament and General Secretary of the South African Communist Party, Blade Nzimande, gave a message of support and congratulated NADEL on its youth initiative.

'Under the colonial Apartheid regime, black women suffered triple oppression in the form of class exploitation, na-



National Association of Democratic Lawyers (NADEL) President, Mvuzo Notyesi, welcomed delegates to the NADEL National Young Lawyers Summit and said this was an opportunity to engage in dialogue of the future of the legal profession.

tional oppression and gender discrimination. These realities defined the law and the composition of both the judiciary and various legal bodies such as law societies. South Africa is yet to achieve full transformation of the legal practice landscape. Many old order practices, including discrimination, overt or covert, along the lines of race and gender, remain,' Mr Nzimande said.

Mr Nzimande noted the Legal Practice Amendment Act 16 of 2017 was gazetted on 18 January. It contains steps that will help enable the transformation of the legal profession. 'In this regard, the role of young lawyers is to ensure that old order practices associated with the landscape of old order law societies, are not carried forward to the new Legal Practice Council (LPC), both at national and provincial levels. In particular, all forms of racial and gender discrimination, mistreatment and victimisation, or any unfair discrimination, must be stopped and prevented from occurring again,' he said.

Mr Nzimande said the 'energy' of young legal practitioners was needed at the forefront to bring about this change.

Mr Nzimande noted a worrying practice that still continues to this day is the discrimination of black legal practitioners. Most law societies still remain white and predominately male and this creates

a negative impact on new entrants to the profession and requires urgent attention and correction, he said.

'What we need is an enabling environment for the admission and registration of new legal practice entrants, of whom the majority are young lawyers. This must be guided by the principles of non-racialism and non-sexism, and correct the historic imbalances,' he said.

Mr Nzimande then turned to the role of legal practitioners in defending South Africa's democracy, fighting poverty and inequality in society. 'In this regard young lawyers have their cue to take from lawyers such as Joe Slovo, Oliver Tambo, Nelson Mandela and others who dedicated their lives to selflessly serving the people exceptionally,' he said.

Mr Nzimande noted that in the liberation struggle there was also a struggle for the loyalty of professionals and this was where organisations, such as NADEL, contributed to the defeating of Apartheid by stating that its professionals were not 'neutral', but instead took the side of freedom.

Mr Nzimande cautioned that one of the biggest threats facing young professionals and young legal practitioners today is the emergence of what he called a 'parasitic bourgeoisie', which manifests itself in the form of corruption and state capture. 'Any country that has corrupted its professionals has no future,' he said.

In concluding, he offered young lawyers five points:



Member of Parliament and General Secretary of the South African Communist Party, Blade Nzimande, gave a message of support and congratulated NADEL on its youth initiative.



Constitutional Court Justice, Mbuyiseli Madlanga, spoke on bringing back honour to the legal profession.

- The importance of young lawyers organising themselves such as they have done and are doing under the umbrella of NADEL.
- To support and network among themselves and resist the temptation of easy money that may destroy their career.
- To work towards the development of a progressive jurisprudence that must be underpinned by fighting inequality, unemployment, poverty, and to advance the interest of the most marginalised in society.
- That the transformation of the legal profession cannot be separated from the overall transformation of South Africa, such that black legal practitioners have access to legal opportunities in the entire legal profession.
- For young legal professionals, to join the struggle against corporate capture of state and to fight against abuse of state organs, intelligence services and prosecutorial authority.

Bring back honour to the profession

Constitutional Court Justice, Mbuyiseli Madlanga, said legal practitioners need to bring back honour to the profession. He said legal practitioners must never be party to cheating and never be tainted by dishonourable conduct. Justice Madlanga said legal practitioners can only properly play their role in the advancement of the rule of law if they conduct themselves honourably with strict adherence to their rules of ethics. 'It is only then that they can be said to be true to the rule of law,' he said.

Justice Madlanga urged attorneys to have more than a superficial understanding of the Constitution and added that for far too long legal practitioners have compartmentalised themselves into fields of speciality, such as: Corpo-

rate/commercial lawyers, family lawyers, personal injury lawyers, etcetera. 'They say this as if these practices are distinct from and totally unrelated to Constitutional law and practice. Well that is a fallacy,' he said.

Justice Madlanga said it is time all legal practitioners took to heart the words of Judge Chaskalson in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), which held: 'There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

Justice Madlanga pointed out that the Constitution permeates all areas of the legal landscape.

Noting the importance of the Constitution in legal education, Justice Madlanga quoted Justice Pius Langa who said: 'We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of the authority. No longer can we responsibly turn out law graduates who are unable to critically engage with the values of the Constitution and who are unwilling to implement those values in all corners of their practices. A truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education.'

In conclusion, Justice Madlanga said any legal practitioner who practices and does not place the Constitution at the forefront of their practice is failing in the mandate of a legal practitioner.

Transformation in the profession

Deputy Minister of Justice and Constitutional Development, John Jeffery, in a keynote address, spoke on the LPA and said the LPC will transform and improve access to the profession.

Deputy Minister Jeffery said if one looks at the profession from a race and gender perspective one realises much still needs to be done in terms of transformation. 'I think overall with the profession the higher up you go the less transformed it becomes as far as race and gender,' he said.

Deputy Minister Jeffery pointed out that more needs to be done to build black law firms and firms headed predominantly by women. 'As young people ... you have more space to think freely and come up with innovative ideas,' he said.

A panel discussion on the LPA, the regulatory aspects of the LPA and the LPC consisted of NADEL National Executive Committee (NEC) member and member of the National Forum on the

Legal Profession (NF), Krish Govender, Deputy President of the Black Lawyers Association (BLA) and member of the NF, Mashudu Kutama, and Co-chairperson of the LSSA Walid Brown.

Mr Govender, spoke on some of the issues that the NF had to grapple with and said that the issue of practical vocational training remains unresolved.

Mr Kutama, spoke on the future of the profession and said moving forward it cannot be business as usual. If the legal profession is to continue in the same way, the people in the old structures will be the same people in the new structure.

Mr Brown, said the coming into effect of the LPA and the LPC is only going to be 'positive news', particularly for young black attorneys. 'This is going to be the dawn of a new age for attorneys in the country. For one thing it guarantees that the balance of power in the profession is going to shift forever,' he said.



Co-chairperson of the Law Society of South Africa, Walid Brown, said the coming into effect of the Legal Practice Act and the Legal Practice Council is going to be positive for young Black attorneys.

Mr Brown said the LPA guarantees that the demographics of the LPC is going to reflect the demographics of the country in terms of both race and gender. 'This is going to be the era in which the majority of South Africans reclaim the legal profession,' he said. 'Do we still need an attorneys association that speaks on behalf of [and] represents attorneys?' he asked. Noting that both NADEL and the BLA would continue after the LPC comes into operation, and added 'we still need a body that is going to speak on behalf of everyone with one voice'. He added that there are going to be issues that attorneys will need to be able to speak as one voice whether it be with government, the LPC or the international community.

Mr Brown also spoke on practical le-

gal training and said no agreement was reached on this issue. He said there was a fundamental difference of opinion between attorneys and advocates on this issue so it has been put forward to the minister. Lastly, Mr Brown pointed out that technology will have a huge impact on the way attorneys practice going forward.

Legal practitioner values

Chairperson of the LSSA's Standing Committee on Legal Education, Raj Badal, quoted Supreme Court of Appeal Judge Ronnie Bosielo, who gave the keynote address at the LLB Summit in 2013, saying: 'Under South Africa's constitutional dispensation lawyers are constitutionally mandated to overcome the dark history of Apartheid and its deep rooted legacy and to persist in transforming the country into a constitutional democracy'.

Mr Badal reiterated values raised by Judge Bosielo on playing a meaningful role as members of society, training students to act ethically, instilling an understanding of the Constitution, inculcating a spirit of *ubuntu* and social consciousness with reference to the poor, marginalised and vulnerable members of society. He said all of these values are part and parcel of what NADEL stands for. Mr Badal asked about the values instilled in



Chairperson of the Attorneys Fidelity Fund (AFF), Strike Madiba, spoke on the future of the AFF and Attorneys Insurance Indemnity Fund (NPC) at the NADEL National Youth Summit.

legal practitioners today. He added ethics was of great importance.

Mr Badal said ethics should be instilled in every course taught at university. 'Ethics infuses our very profession. It talks to where we want to be as lawyers,' he said. He said what is needed is both a humanitarian legal practitioner and a competent legal practitioner. A

legal practitioner that is able to achieve justice for their client and also have the skills to run their practice.

LLB degree

Deputy Vice-Chancellor of the University of the Western Cape, Professor Vivienne Lawack, spoke on the topic of the LLB degree. Some areas that have had an impact on the context of the degree was the dispensation of a transformative Constitution, evolving IT and globalisation.

Professor Lawack also said the purpose of the degree has changed. The first purpose being entry into the profession. The second purpose to prepare students for post-graduate studies. Lastly, the LLB should not only be for traditional careers. 'It should prepare a student to be able to go into a career where law or legal education would be a requirement,' she said.

Professor Lawack pointed out that an LLB is only one 'cog in the wheel' of legal education. She said there is a collective responsibility to ensure there is quality education for those in the legal profession. 'If we are going to be delivering the greatest lawyers in South Africa we also need to embrace the concept of lifelong learning,' she said.

Director of the University of Fort Hare Legal Clinic, Nasholan Chetty, said the

SOUTH AFRICAN BOARD FOR SHERIFFS HAS OPENED LINES OF COMMUNICATION FOR YOU TO REPORT FRAUD WITHIN THE ORGANISATION.

0800 000 628

The hotline can be used to report unethical behaviour, theft, fraud and other related activities of staff and boards members of the South African Board for Sheriffs by simply dialling this toll free number 0800 000 628 from a Telkom line.

The Board has established a fraud hotline to help maintain the culture of ethical behaviour. The hotline is aimed at enhancing an honest work ethic. We therefore want to provide internal and external stakeholders with a mechanism to bring any unethical business practices to the attention of management.



This is a safe and result guaranteed method of blowing the whistle on unethical behaviour in the organisation for the following reasons:

- All calls are recorded
- The caller may remain anonymous
- Confidentiality is guaranteed
- The caller's details will not be revealed to anyone
- A reference number is provided for the complaint
- All matters are handed over to SABFS senior management for investigation
- Feedback is provided to the complainant on request

The SABFS is appealing to you to make use of the hotline. Do not be a silent observer of practices that erode the values we wish to uphold.

If you have any queries, complaints or compliments please contact us.

SOUTH AFRICAN BOARD FOR SHERIFFS- 88 LOOP STREET, CAPE TOWN 8000

T: 021-426 0577, F: 021-426 2598, SABFS Fraud Hotline: 0800 000 628

E: contact @sheriffs.org.za, W: www.sheriffs.org.za



Director of the Women's Legal Centre, Seehaam Samaai, spoke on the advancement of the rights of women and the development of black feminist legal practitioners.

university introduced compulsory clinic work for all its final year LLB students and this has seen students improve significantly. Mr Chetty noted students often complain of only learning theory and not having anything concrete to work on. However, through the legal clinic work, 'you are adding a real life person to the mix,' he said.

The future of the AFF and AIIF

Chairperson of the Attorneys Fidelity Fund (AFF), Strike Madiba, said in terms of the LPA the AFF will be called the Legal Practitioners Fidelity Fund. The board will consist of five legal practitioners, made up of four attorneys and one advocate. The advocate on the board will have to have a Fidelity Fund Certificate. The Minister of Justice and Constitutional Development and the LPC will each designate two persons to the new board.

The AFF will continue to provide funding for educational needs of the profession, said Mr Madiba.

Mr Madiba said in previous years practicing attorneys received free indemnity insurance from the Attorneys Insurance Indemnity Fund NPC (AIIF). This, however, might not be the case in the future. This might make it very expensive to practice in the future and this may have an impact on those wanting to enter into the profession, he added.

Mr Madiba said the AFF and the AIIF were engaging with members of the profession and other stakeholders on this matter adding this needs to be done to avoid the risk of high cost of practicing acting as gatekeeping to the profession.

Young women in the profession

Director of the Women's Legal Centre,

Seehaam Samaai, spoke on the combatting of normalisation of sexual harassment in the legal profession and the reclaiming of time, space and agency.

Ms Samaai said 'we all know that law is a profession, which can contribute positively towards society. It has the ability to transform the lives of the most vulnerable and marginalised in the most significant way, but it also has the ability to profoundly impact the lives of people, particularly women, if it fails to take into account issues of intersectionality and how issues of race, gender and class impact on the lived realities of women. This means that the law cannot be neutral when we deal with issues affecting women'.

Ms Samaai stated that the centre's purpose is to advance the rights of women through strategic litigation, with a commitment to developing black feminist legal practitioners, putting forth feminist jurisprudence and representing women. Sexual violence disproportionately impacts women and sexual violence and harassment are common and major barriers in the work place. The legal profession is not immune to these practices, she said.

Ms Samaai warned that the power dynamics and skewed power structures in the legal profession can be damaging to women. 'The current legal process lends itself to indirect forms of discrimination and secondary forms of victimisation, which perpetuates and creates systemic discriminatory practices if not addressed in a proper manner by this legal profession,' she said.

Ms Samaai noted it is mostly young women entering the profession who are subjected to sexual harassment. She called on all men in the profession to support their female co-workers, students and young women. 'You must and need to be disrespectful and disloyal to all agents of patriarchy, as well as the rules of patriarchy. We cannot remain complicit in the violence perpetrated against women's bodies and cannot normalise violence within our structures,' she said.

Co-founder of Indiba-Africa Group, advocate Michelle Odayan, said the legal profession is 'not kind to young women,' particularly, young women candidate legal practitioners. Ms Odayan said young women entering the profession become quickly disillusioned when they come up against a hierarchical structure entrenched in patriarchy and old traditional ways. This is not an encouraging environment for smart ambitions young women when they are faced with 'yes-teryear mentalities' and cultural norms that do not suit their needs in reality, she said.

Younger women entering the profession also need safety and security, she said. 'The moment young women try to

articulate their needs, a part from being labelled problematic, the narrative is one of "you should just be lucky you have space to do articles,"' she said. Ms Odayan asked what law practices are doing to make their environment safe and ready made for a new generation of young people to be inspired, thrive and achieve their ambitions?

Recommendations

At the plenary session, LSSA Council Member, Management Committee member and BLA NEC member, Francois Mvundlela; Mr Notyesi; and Deputy Chairperson of the NF, Max Boqwana were presented with the following recommendations:

The LPA

It is resolved that:

- Section 8 of the LPA be amended to include a youth representative.
- Amend s 25(3) on the right of appearance of lawyers and advocates to be the same.
- Section 30 should not be an impediment to access to the profession.
- A minimum remuneration amount for candidate legal practitioners to be stipulated.

It is recommended that:

- When disciplinary action is taken against young legal practitioners, rehabilitative remedial methods should first be considered.
- In terms of r 35 it be noted that quotation on legal fees is not always possible.
- The number of years for a legal practitioner to take on candidate legal practitioner to be reconsidered.

The AFF and AIIF

It is resolved that:

- An AFF bursary be granted for the entire duration of the student's LLB degree.
- Further training be offered without a fee payable to prevent mismanagement of trust accounts and dishonesty.
- If the matter of professional indemnity insurance is not resolved, all possible alternatives be investigated. A summit/meeting to be held with a report on professional indemnity insurance to furnish greater transparency.

Non-regulatory matters (creating a professional interest organisation)

- Young legal practitioners affirm the need for a professional interest organisation.
- It is resolved that this organisation must be charged with protecting the independent voice of the profession, have the authority to have a union function, and address -
 - transformation in the legal profession;
 - bias briefing patterns; and

- the training of candidate legal practitioners.

LLB and professional vocational training

It is resolved that:

- The professional interest organisation must always consult law students at tertiary level regarding the LLB degree curriculum.
- Professional vocational training (PVT) must be one training programme for all candidate legal practitioners regardless if they choose to become attorneys or advocates. PVT should also include business and financial skills for the management of firms.

It is recommended that:

- PVT must include course material from a practice management training course and that this not be a separate course

that is done when one enters into practice only.

- The material for admission examination to include all material without the need to refer to external sources.

Challenges face by young people/women/candidate legal practitioners

- It is affirmed that women be given equal representation in all structures in the professional interest organisation.
- A committee within this organisation be created to deal with abuse of candidate legal practitioners. This committee should formulate rules and standards for the treatment of candidate legal practitioners and disciplinary rules for principals found guilty of ill-treatment and abuse.
- The committee have a telephone line

that candidate legal practitioners can phone in anonymously, to report abuse by their principals. The line operator should be a qualified counsellor/psychologist who will be able to support and assist the candidate legal practitioner.

- Young legal practitioners endorse the NADEL training programme for candidate legal practitioners.

It is recommended that:

- The programme be pilot tested. Once approved, it must be rolled out nationally. It should be mandatory and should be adopted by the LPC as a standard for training candidate legal practitioners.
- For the full recommendations see www.derebus.org.za

Kevin O'Reilly,
kevin@derebus.org.za

Brazil and South Africa to share ideas on improving the mining sector

The Embassy of Brazil in South Africa hosted a seminar on the legal framework of mining in Brazil and South Africa on 7 December 2017 in Johannesburg. Department of Mineral Resources Deputy Minister, Godfrey Oliphant, was the guest speaker. In his speech, Mr Oliphant said he welcomed the invitation to the seminar as South Africa (SA) continually seeks to clarify, promote and advance the country's national interest, most notably through perusing SA's economic priorities, namely, combating inequality, high poverty and unemployment.

Mr Oliphant added that it is in this regard SA works hard to pursue, greater trading and investment relations with other countries such as Brazil, as Brazil is a significant trading partner for SA. 'We have noted with interest the decision by Brazil to abolish a vast national reserve to open the area for commercial exploration that will stimulate and grow the contribution of mining to the Brazilian economy,' Mr Oliphant said. He noted that it will enable Brazilians to participate in the development and growth of the economy. 'We in SA also strive to ensure that the full participation of our citizens in the economy is realised,' he added.

Mr Oliphant said the South African government has taken the decision to radically transform the economy of the country so that black people, who are the majority, can meaningfully participate in the economy of the country. He pointed out that such issues of transformation will enable SA to achieve the goal it has set in the National Development Plan for 2030. He added that one of the goals the



South Africa's Deputy Minister of Mineral Resources, Godfrey Oliphant, spoke at the Legal Framework of the Mining Sector in Brazil and in South Africa seminar.

government wants to realise is to make the South African economy more inclusive, more dynamic and that the fruits of growth of the economy are shared.

Mr Oliphant pointed out that by 2030, the economy should be close to full employment, equipped with skilled people, ensure that ownership of production is more diverse and lastly to provide the resources to pay for investments. He said that the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), is the principle legislation governing the mining sector and that there has been an amendment Bill that was brought before parliament, which will be ready in 2018. He noted that there have been some challenges along the way because of the lack of consultation and some issues of a substantive nature. However, Mr Oliphant said the radical

transformation remains at the centre of SA governments' policy.

Mr Oliphant added that the economic transformation that is spoken about, is the change of the economy whereby SA cannot only rely on a system where one moves from point-to-point every time, but not creating any values in minerals. 'We need to start creating jobs, increase and improve our skills base, but also adding value to our minerals,' Mr Oliphant said. He added that through SA's government's policy the MPRDA aims to ensure the meaningful participation of black people in the mining sector. He pointed out that the policy also intends to reverse the unjust exclusion of black people from the mining sector.

Brazilian Ambassador, Nedilson Jorge, said the Brazilian Congress approved the creation of the National Mining Agency, which will have the responsibility to regulate the mining sector, supervise mining activities and observe market competition. He pointed out that the mining sector has played a major role in history for both Brazil and SA. He added that it is natural and appropriate that Brazil and SA come together to discuss and exchange ideas on the improvement of mining. He said that the government of Brazil is committed to continuing to propose and encourage the growth of the mining industry and also intend to improve technical co-operation with other countries such as SA. He added that there is a lot of room for the private sectors to jointly make efforts and partnership to bilateral investments.

Kgomotso Ramotsho,
Kgomotso@derebus.org.za

Constitutional Court Justice Bess Nkabinde retires

Justice Bess Nkabinde has retired from the Bench of the Constitutional Court after serving for 12 years. A special ceremonial session was held on 7 December 2017 at the Constitutional Court where Justice Nkabinde delivered her final judgment on a labour related matter, *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu* (CC) (unreported case no CCT6/17, CCT/14/17, 7-12-2017). Among the people who attended her final sitting were her family members and former Justices of the Constitutional Court, including former Justice Richard Goldstone, former Justice Albie Sachs and former Justice Yvonne Mokgoro.

Justice Nkabinde's life in law

According to a profile on the Constitutional Court website, Justice Nkabinde was born in Silwerkrans/Tlokwen, North West Province, in 1959. She matriculated from Mariasdal High School, in Tweespruit in the Free State in 1979 and obtained a BProc degree at the University of Zululand in 1983. In 1986, Justice Nkabinde obtained an LLB from North West University. She was awarded a Diploma in Industrial Relations with distinction in 1987 from Damelin. In 1984 to 1988 she worked as a State Law Adviser – Legislative Drafting in Bophuthatshwana. She was admitted as an advocate in 1988 in Bophuthatshwana and commenced her pupillage in 1989 at the Johannesburg Bar.

From 1990 to 1999 Justice Nkabinde worked as an advocate at the North West Bar, in civil, commercial, matrimonial, as well as criminal law matters. From February to October 1999, Justice Nkabinde was appointed as acting Judge of the Bophuthatshwana Provincial Division. In November 1999, she received a permanent placement as judge of the High Court and also was an acting Judge of the Labour Court for one term in Johannesburg in 2000 and 2003.

In 2003 she was appointed to serve on the Special Tribunal on civil matters likely to emanate from investigations by the Special Investigative Units established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996. From October 2004 to May 2005, she was acting Judge of the Labour Appeal Court. Justice Nkabinde was also a member of the Sub-committee of the Coordinating Committee of the Justice System: On Racism and Sexism within the Judiciary Member in



Retired Constitutional Court Justice, Bess Nkabinde, at a special ceremonial sitting at the Constitutional Court in December. Justice Nkabinde has served as a Justice at the Constitutional Court for 12 years.

2004. From 2004 to 2013, she was the Chairperson of the Rules Board for Courts of Law. From June to November 2005, she was the acting Judge of the Supreme Court of Appeal and was appointed as the Justice of the Constitutional Court in January 2006, while serving at the Constitutional Court, she was appointed Acting Deputy Chief Justice from May 2016 to June 2017 and Acting Chief Justice in November 2016.

Tributes for Justice Nkabinde

In his tribute to Justice Nkabinde, Deputy Chief Justice Raymond Zondo said Justice Nkabinde had a long journey as far as her career in law was concerned. He said during her judicial career, Justice Nkabinde made a significant contribution and handed down judgments that provided benefits to a large section of society in different branches of law.

Deputy Justice Zondo added that the judgment, Justice Nkabinde handed in her final sitting in the *Ubogu* case will not only help one person in that particular case, but will help many public service workers who have been suffering under the provisions of s 38(2)(b)(i) of the Public Service Act 103 of 1994. He said Justice Nkabinde would always enquire about her colleagues and ask about their families. 'She is a wonderful woman' Deputy Chief Justice Zondo added.

'I take this opportunity on behalf of my colleagues and behalf of the entire judiciary of South Africa (SA), to say to Justice Nkabinde thank you very much,' Deputy Chief Justice Zondo said. He added that Justice Nkabinde has served the country well and wished her everything of the best and pointed out that he had no doubt that Justice Nkabinde will continue in different ways to contribute to society.

Message from Advocates for Transformation

Advocates for Transformation's, Anthea Platt SC said she had the pleasure of working with Justice Nkabinde when she was the chairperson of the Rules Board. She pointed out that Justice Nkabinde, in her leadership as chairperson of the Rules Board, placed those she was working with in a position to interrogate many rules that have far reaching consequences to



Black Lawyers Association's President, Lutendo Sigogo, sharing a joyous moment with retired Justice Nkabinde and the Law Society of South Africa's representative, Attorney Mabaeng Denise Lenyai, after Justice Nkabinde's retirement at the Constitutional Court.

the citizens of SA. She added that Justice Nkabinde remains a beacon of hope and an inspiration to all women lawyers.

'You, Justice Nkabinde, and other women justices have carved the path that shines a way for all women, especially women of colour that it is indeed possible to thrive and make a mark in the profession, which is in need of diversity and transformation' Ms Platt SC said. She added that Justice Nkabinde's success is one of the many reasons Advocate for Transformation will remain committed to cause in achieving transformation in the legal field and access to justice.

Message from NADEL

National Association of Democratic Lawyers (NADEL) member of the National Executive Committee, Mfana Gwala, said the appointment of Justice Nkabinde was an example of how gender advancement can be achieved. He said Justice Nkabinde's retirement comes at a very young age and he believes that she will continue to be of service to the country.

Message from BLA

Black Lawyers Association (BLA) President, Lutendo Sigogo, said Justice Nkabinde is living proof that dedication to the cause of justice, is what distinguishes great personalities from the rest. 'Through her life we learned that success is not determined by gender or race' Mr Sigogo added. He pointed out that people succeed because they are given opportunities and do their best to fulfil those opportunities. Mr Sigogo said Justice Nkabinde transmitted beyond her race and gender and in her there is a true meaning of what the word woman means.

Message from the GCB

Representing the General Council of the Bar (GCB), advocate Craig Watt-Pringle SC, said he had gathered information from clerks of court who had previously worked with Justice Nkabinde. He said they had described Justice Nkabinde as a caring, warm and approachable person who took interest in others. He added that she was also generous about sharing her experience as a woman in the legal profession, particularly about the challenges women face.

Message from the NPA

National Prosecuting Authority's (NPA's) Director of Public Prosecution in South Gauteng, Andrew Chauke, said the NPA was fortunate and humbled to have been associated with Justice Nkabinde. He added that the NPA was indebted to Justice Nkabinde for her counsel and guidance. 'We will remember her for the many cases she has presided over,' Mr Chauke said.

Message from the LSSA

Law Society of South Africa (LSSA) representative, Mabaeng Denise Lenyai, said Justice Nkabinde has been true to her vision as a humble servant of the people, as a role model and as a jurist who has moulded SA's jurisprudence and society with great respect throughout her career. She pointed out that in an interview for the Constitutional Court oral history project, Justice Nkabinde noted that the court is imbued with the wisdom of having diverse voices.

'There is a need to have such voices, societal voices, so that you can have a rich jurisprudence at the end of the day. Justice Nkabinde's voice has been such a voice. On behalf of the attorneys' profession, we acknowledge and thank you for your contribution to the law, to the Constitutional Court, to the legal profession and to the citizens of our rich and diverse country,' Ms Lenyai said.

Message from the Johannesburg Society of Advocates

The Johannesburg Society of Advocates, Vice Chairperson, advocate Leah Gcabashe SC, said Justice Nkabinde was one of the most distinguished jurists. 'We as the Johannesburg Society of

Advocates proudly claim you as one of our own,' Ms Gcabashe SC said. The Johannesburg Bar said with conviction that as a representative of your generation, Justice Nkabinde, you not only discovered your mission as a jurist, but with determination and drive you made all effort to fulfil it. You have indeed made us proud and thank you for that,' Ms Gcabashe said.

Ms Gcabashe noted that in Justice Nkabinde's judgments, there is a clear record of sensitivity to issues of racism, equality, tradition and culture, physical security and integrity, homelessness, fertility and surrogacy, religion, constitutional obligation and many other issues.

Message from Parliament's National Council of Provinces

National Council of Provinces' Chairperson Thandi Modise, said Justice Nkabinde, in many of her judgments, has brought a lot of light into the lives of many people. She noted that she had seen the calm and patient manner in which Justice Nkabinde delivered herself when presiding at court and praised Justice Nkabinde on her judgments surrounding the issues of polygamy. 'We admire you ma'am because many instances you have actually come out to say, "I am principled and live by the principles I believe in." In many instances, we do not do that. We sacrifice ourselves, sacrifice what we believe in, because we occupy certain positions,' Ms Modise added.

Word by Justice Nkabinde

Justice Nkabinde said that the occasion was a moving moment for her, having been a Justice at the Constitutional Court for 12 years. She thanked her family, colleagues, clerks of the court and the communities of Madikwe and Mahikeng for the sup-



Association of Arbitrators (Southern Africa) NPC

The leading Alternative Dispute Resolution organisation in Southern Africa.

The benefits of being a Member of the Association are:

- Education and training – which enables members to elevate their status from that of Associate to Fellow;
- Once Fellowship status has been acquired – upon successful completion of the two-year Fellowship Admission Course – Members are eligible for admission to the panel of arbitrators from which appointments are made.

The following courses are now open for registration in 2018:

- Accelerated Course for Advocates and Attorneys;
 - Certificate in Arbitration;
 - Fellowship Admission Course;
 - Specialisation in Construction Law.

Registration Closing Date
28 February 2018

To enroll, kindly send an email to Mandisa:
coursecoordinator@arbitrators.co.za

Visit our website: www.arbitrators.co.za/education/

Courses are open to members or those wishing to register as members of the Association of Arbitrators (Southern Africa) NPC

port they have showed her through her journey. She particularly thanked her husband and children for putting up with her imperfections, and absenteeism at home and keeping up with her abnormal hours while she was serving the nation.

Justice Nkabinde added that December 2017 marked 12 years for her as a Justice at the Constitutional Court, but also marked 18 years for her as a Judge of the High Court, Labour Court, Labour Appeal Court, Supreme Court of Appeal and the Constitutional Court. She reflected also on the opportunity that she had to act as a Deputy Chief Justice for 11 months, as well as an acting Chief Justice for one month. 'The opportunities to serve our people in different capacities have undeniably been a privilege in my life,' Justice Nkabinde said. She pointed out that all this was through God's grace and blessing and the support and encouragement from her family, friend's colleagues and communities.

Justice Nkabinde pointed out that it was a single reason that triggered her into practising law. She said she resigned from the public service in the former Bophuthatshwana, for a simple reason of inequality. She added that together with her other colleagues they were treated differently from others and that she took offense to that and objected to the injustice, particularly because no reason whatsoever or any justification was given for the unfair discriminatory. 'When I was threatened with all sorts of things I resigned and believed I could be a voice for those who cannot defend themselves,' Justice Nkabinde said.

Justice Nkabinde spoke about the relationship of the three arms of government, namely, the legislature, the executive and the judiciary in terms of what they share and what separates

them. She said the separation is only in a service of common principles and that the powers are all in the rule of law to realise the principles that are constitutional and fundamental. 'I am saying this with the greatest respect, by the failure to comprehend the equal obligations of all three arms of government, to promote constitutional values, my observation over the 12 years of my service in this court particularly suggest that if the other arms of the government were to embark on legislative and executive process, characterised by the applicable constitutional values, the judiciary will play a far significantly less central role than it is present required to do,' she said.

Justice Nkabinde pointed out that the policies and implications are approved with no or less regard to the constitutional values and for that the courts are and will always be in a far busier time and will constantly be perceived as overreaching when they are exercising their constitutional responsibility.

As she concluded, Justice Nkabinde said one of her wishes was to have more women appointed in the judiciary, particularly in the Constitutional Court Bench. She noted that it was long overdue and it had to happen for obvious reason, not because it is a question of numbers. 'We must find women with potential, we with my sisters and brothers who are committed to a transformative agenda must assist in training to make this ideal,' Justice Nkabinde said.

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



PEOPLE & PRACTICES

People and practices

Compiled by Shireen Mahomed

John Roderick Graeme Polson and Jean Polson have formed a partnership and are practicing as **Polson Attorneys** in Johannesburg. Jeanette Bodemer has been appointed as an associate conveyancer.

From left: Jean Polson, Jeanette Bodemer and John Roderick Graeme Polson.



Abrahams & Gross in Cape Town has two new appointments.



Amber Lotz has been appointed as an associate in the conveyancing and property law department.



Nicole Gerber has been appointed as an associate in the family law, divorce and litigation department.

Hogan Lovells in Johannesburg has two new appointments.



Christine Rodrigues has been appointed as a partner in the finance department.



Mzamo Nkosi has been appointed as an associate in the employment department.



Clyde & Co in Cape Town has promoted Kate MacKay as an associate. She specialises in insurance and litigation.



Compiled by Nomfundo Manyathi-Jele, Communication Officer, Law Society of South Africa
e-mail: nomfundom@lssa.org.za

LSSA discusses way forward after implementation of LPA

The Co-chairpersons of the Law Society of South Africa (LSSA), Walid Brown and David Bekker, are currently hosting information sessions on the way forward after the implementation of the Legal Practice Act 28 of 2014 (LPA).

The sessions are being held around the country and are in the form of informal discussions on the year ahead and what attorneys can expect once the LPA comes into operation fully. At the sessions the LSSA shares its thoughts and hears the views of attorneys on:

- Changes to be brought about by the LPA and how these will impact attorneys.
- What attorneys concerns are and what they expect.
- What the LSSA currently does for attorneys.
- What will be available to attorneys as practitioners once the provincial law societies fall away.
- The way forward.

At the time of writing this report, the LSSA had held three information sessions, namely in Pretoria, Port Elizabeth and Kempton Park where the Co-chairpersons explained the background to the roadshows, the establishment of the LSSA Transitional Committee, as well



LSSA Co-chairpersons, David Bekker and Walid Brown at the Kempton Park information session on the way forward after the implementation of the Legal Practice Act. The session was held at Emperors Palace on 15 February.

the negotiation process between the National Forum on the Legal Profession and the four provincial law societies, which had resulted in the retention of R 50 million to be transferred to the professional body.

It was also highlighted that no firm decisions had been made and that the views of practitioners were being canvassed on whether setting up a profes-

sional association is necessary, whether it is possible and how it will work.

Keep an eye on your e-mails to learn about information sessions taking place in your area or e-mail LSSA@LSSA.org.za for more information.

- See also the guest editorial 'A united profession is stronger than the sum of its separate groupings' written by the Co-chairpersons in 2017 (Dec) DR 3.

LSSA calls for higher standard of ethics and accountability for public officials

On the eve of the resignation of former President Jacob Zuma on 14 February, the Law Society of South Africa (LSSA) welcomed the decision by the National Executive Committee (NEC) of the African National Congress to recall President Zuma amid all the allegations of corruption related to the imminent reinstatement of the 'spy tapes' criminal charges, and the allegations around complicity in state capture.

In a press statement, LSSA Co-chairpersons Walid Brown and David Bekker said: 'As the legal professionals of this country we believe that the time has come for public officials to hold themselves to a higher standard of ethics and accountability. For far too long our public officials have hidden behind the statements of "innocent until proven guilty" and "I have not been found guilty of anything".'

'This should not be our standard of accountability. Instead our officials should be prepared to step down and offer to

resign at the mere suggestion of impropriety on their parts, in an effort at clearing their names without tainting the department or capacity in which they are employed.'

They added: 'It is only by raising these ethical standards that we will be successful at rooting out the corruption that has taken root within our state entities. Failing which, all we will be doing is changing the names of officials and elected leaders.'

The Future of Our Profession

A professional association for attorneys, young lawyers and practical challenges in the Legal Practice Act

LSSA Annual Conference: 23 and 24 March 2018
Century City Convention Centre, Cape Town

The conference will debate and make recommendations for a new association for practitioners, its membership, core functions, support and other services to be rendered to members and its sustainability.

There will be an information session on s 35 of the Legal Practice Act 28 of 2014 (LPA), which sets out the manner for charging fees for legal services under the LPA dispensation, including the fact that non-compliance with s 35 will constitute unprofessional conduct. The session will go on to deal with the changes in the disciplinary processes under the LPA, which make these more client-centric, including

lay representation, open hearings, Fidelity Fund inspections and the role of the new Legal Services Ombud.

Another session aimed at young lawyers will focus on 'the Millennial legal practitioner' as digital natives, their work-life balance and the social consciousness challenges facing young lawyers.

Full information is available on the LSSA website at www.LSSA.org.za under the tag 'News Media and Events' then 'Latest events'.

This conference will also be presented in Gauteng later this year.



2018 Juta Law Prize for the best Candidate Attorney article

win a tablet device & Jutastat
online *Essential Legal
Practitioner Bundle* worth R25 000

Juta Law, in conjunction with *De Rebus* are offering a prize for the best published article submitted by a candidate attorney during 2018. Valued at R25 000, the prize consists of a 32GB tablet with wi-fi & 3G PLUS a one-year single-user online subscription to *Juta's Essential Legal Practitioner Bundle*.

Submission conditions:

- The article should not exceed 2000 words in length and should comply with the general *De Rebus* publication guidelines.
- The article must be published between January and December 2018.
- The *De Rebus* Editorial Committee will consider all qualifying contributions and their decision will be final.

Queries and correspondence must be addressed to: The Editor, *De Rebus*, PO Box 36626, Menlo Park 0102
Tel: (012) 366 8800, Fax (012) 362 0969 • Email: derebus@derebus.org.za

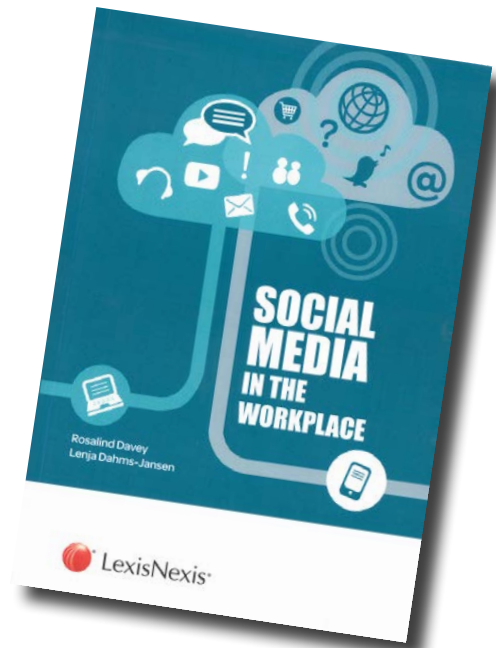


www.jutalaw.co.za



Social Media in the Workplace

By Rosalind Davey and Lenja Dahms-Jansen
 Durban: LexisNexis
 (2017) 1st edition
 Price R 399 (incl VAT)
 342 pages (soft cover)



LexisNexis has recently published *Social Media in the Workplace*. This was a book that I was particularly excited to review as it is highly relevant in our current age of technology where employees are frequently posting information on social media platforms that relates to or has an impact on their employers. This book did not disappoint and is a lot more comprehensive than I initially anticipated.

The first part of the book deals with the balancing of the rights to dignity, equality, privacy and freedom of expression. It goes into detail in relation to each of these rights and explains how these rights have been interpreted through South African cases, as well as cases in other jurisdictions. What is clear is that social media increases the risk of the rights to dignity and privacy being infringed and this book outlines the remedies for such infringements. It also deals with the interplay of social media with legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Employment Equity Act 55 of 1998, the Protection from Harassment Act 17 of 2011, the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, the Protection of Personal Information Act 4 of 2013 (POPI Act) and the Electronic Communications and Transactions Act 25 of 2002.

For me personally, I particularly en-

joyed the case studies on the right to freedom of expression in other jurisdictions, such as Australia, Canada, New Zealand, the United Kingdom and the United States. One section of the book that I thought could have been expanded on was the section on the POPI Act. I would have liked the book to go into a little more detail on the circumstances under which uploading photographs and special personal information onto social media platforms would be permissible under this legislation, once in effect.

Part B of the book focuses on considerations for businesses and particularly explores the law of defamation and its interplay with freedom of expression. Again, the book engages with how this has played out in other jurisdictions. What is very relevant for employers is the section on vicarious liability, which sets out the circumstances under which an employer may be liable for content posted by its employees. It also looks at the duties of directors and employees when using social media, which duties should be clearly communicated to employees.

The section on off-duty misconduct is particularly relevant as employees frequently upload information onto social media platforms in their personal capacity. The book sets out the factors to be considered when determining whether an employee should be disciplined for misconduct on social media, such as the employee's position and whether the employee identified their employer, the

effect on the good name and reputation of the employer, the extent to which the conduct is incompatible with the corporate culture of the employer and the effect on the efficiency, profitability or continuity of the employer.

Finally, the book provides some practical advice on what employers can do to protect the workplace from social media fallout, such as –

- having a social media policy;
- providing training to employees;
- having a social media strategy and crisis management plan;
- communicating to employees the parameters around business use and personal use of social media;
- implementing an escalation procedure; and
- taking steps to manage enforcement of the social media policy.

Monique Jefferson is an attorney at Bowmans in Johannesburg. □

For further enquiries regarding the book review on this page, please contact the publisher of the book.

By
Thomas
Harban

Is your firm the type of entity it purports to be?

One of the decisions a legal practitioner will make – after deciding to open a practice – is what form the practice will take. They may decide to practice as a sole practitioner, in a partnership or as part of an incorporated practice. The decision may be driven by commercial and/or other considerations and they may change from one type of entity to another in the life cycle of the practice. The considerations may even arise when joining a firm.

The applicable legal principles and considerations for various types of entities may, on the surface, appear trite to many legal practitioners but an examination of some of the underlying circumstances in professional indemnity (PI) claims notified to the Attorneys Insurance Indemnity Fund NPC (the AIIF) show that this may not necessarily be the case across the profession. A simple examination of the letterheads of some firms show that the entities may not properly be describing themselves as required by law. There are some firms that use the suffix 'Inc' in their names when, in fact, they are not a practising juristic entity. In other instances there have been practitioners who conduct their practices through both a juristic entity and a partnership from the same premises. In such cases, for purposes of the AIIF policy, this will be regarded as a single entity entitled to one annual limit of indemnity (annual amount of cover) rather than two entities. An important question to consider is if a client, walking into such a firm, is asked whether they would like to instruct the incorporated entity or the partnership, what the response would be. The client's response would most probably be that their intention was to instruct a legal practitioner or specialist in a particular field of law and that no consideration was given to which hat (namely, incorporated practice or partnership) the legal practitioner was wearing.

Two recent matters referred to the AIIF indicate some of the complexities, which can arise when legal practitioners conduct their practices through vehicles other than those normally used and recognised.

Case study one

Recently, an application for indemnity was notified to the AIIF by an entity purporting to be a partnership made up of limited liability companies of which the respective directors were legal practitioners. The AIIF refused to indemnify the entity, *inter alia*, on the grounds that it did not fall within the definition of a legal practice in terms of the Master Policy (clause 5) as it was neither:

- 'a) a sole **Practitioner**;
- b) a partnership of **Practitioners**;
- c) an incorporated **Legal Practice**.'

The AIIF Master Policy defines a 'legal practice' as 'the person or entity listed in clause 5', that practices as any one of the three forms listed above. A 'practitioner' is defined as 'any attorney, notary or conveyancer as defined in the [Attorneys] Act'. In the matter referred to in case study one, the entity thus did not fall within any of the categories of practices referred to in clause 5 of the Master Policy. The matter was referred to a senior legal practitioner for determination (in terms of clause 40 of the Master Policy) and the AIIF's position was upheld. The result is that the legal practitioners in case study one do not enjoy cover under the AIIF policy for any claims that may arise during the period that their practice(s) were conducted through the unrecognised and uninsured entity and are thus exposed to potential personal liability in the event that they do not have other appropriate insurance cover in place.

Case study two

In another matter, an application for indemnity was received from a legal practitioner who, simultaneously, utilised a number of different variations of names for his practice and made reference to several entities (including a proprietary limited company) in the letterheads and other documents used in his practice. This application for indemnity was rejected on a number of grounds including that it did not fall within the definition of an insured in terms of the policy, as a proprietary limited company does not fall within the definition of an insured in the Master Policy. The legal practitioner

concerned brought an application to join the AIIF as a third party to the claim against him. The AIIF opposed the application on various grounds, including the fact that the entity did not fall within the definition of an insured. The High Court dismissed the application brought by the legal practitioner. That legal practitioner will now have to be personally liable for the claims brought against him.

The various scenarios highlighted above bring us to two considerations that the AIIF wishes to address, being –

- whether or not the form of practice elected is a recognised form of practice; and
- the status of the persons in the practice – are those held out as partners/directors in fact holding such office?

These considerations have important implications for the legal practitioners concerned. It is important that some of the relevant statutory provisions are highlighted.

Section 23 of the Attorneys Act 53 of 1979 prescribes the circumstances under which a juristic person may conduct a practice. Rules 2.20 to 2.23 of the Rules for the Attorneys' Profession set out the provisions applying to practices conducted as professional companies. Section 34 of the Legal Practice Act 28 of 2014 (the LPA) deals with the forms of legal practice in future and the relevant provisions read as follows:

'(5) Attorneys may only practise –

- (a) for their own account;
- (b) as part of a commercial juristic entity referred to in subsection (7) and as such, may only make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance, or otherwise with an attorney;
- (c) as part of a law clinic established in terms of subsection (8);
- (d) as part of Legal Aid South Africa; or
- (e) as an attorney in the full-time employment of the State as a state attorney or the South African Human Rights Commission.'

Section 34(7) of the LPA reads as follows:

'(7) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents –

(a) its shareholding, partnership or membership as the case may be, is comprised exclusively of attorneys;

(b) provision is made for legal services to be rendered only by or under the supervision of admitted and enrolled attorneys; and

(c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for –
(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
(ii) in respect of any theft committed during their period of office.'

Practitioners must thus ensure that they conduct their practices through one of the recognised forms.

Section 8(1) of the Companies Act 71 of 2008 (the Companies Act) prescribes that there are two types of companies that may be formed and incorporated under the Companies Act, namely profit and non-profit companies. For present purposes the most important provisions are set out in s 8(2)(c) of the Companies Act to the effect that a company is a:

'(c) a personal liability company if –
(i) it meets the criteria for a private company; and
(ii) its Memorandum of Incorporation states that it is a personal liability company.'

The second aspect of this article concerns the delineation/titles of persons in firms. The AIIF Master Policy defines a 'principal' as a 'sole practitioner, partner or director of a legal practice or any person who is publicly held out to be a partner or director of a legal practice' (clause XXIII). The limit of indemnity and deductible of the practice are determined by the number of partners/directors in the firm. Holding out to the public that the firm has higher number of partners/directors than it in fact has, will lead to a higher deductible being applied in respect of claims notified by the firm. In case study two referred to above, the plaintiff's attorney was listed as a director on the defendant firm's letterhead. This is another reason that the AIIF did not indemnify the claim. A partner/director of a firm is obliged to apply for a Fidelity Fund Certificate.

In some cases, there appears to be a misunderstanding of the concept of 'director' as commonly used in practice as against that used in the Companies Act. As a director of a personal liability company, regard must be had to the provisions of the Companies Act. Section 1 of the Companies Act defines a 'director' as a 'member of the board of a company, contemplated in s 66, or an alternative director of a company and includes any person occupying the position of a

director or alternate director, by whatever name designated'. It must also be remembered that s 77 of the Companies Act prescribes liability for directors and prescribed officers in certain circumstances – this must be read against the provisions of s 34(7)(c) of the LPA when that piece of legislation comes into effect. In the event that a practice has directors' and officers' liability insurance cover in place, inaccurate information in respect of the directors and officers of the entity may jeopardise the cover under that policy.

Practitioners must thus pay special attention to the risks associated with the manner in which they describe the entity in which they practice and also of the titles by which they hold themselves and other person in the firm out to the public.

• To view a copy of the AIIF Master Policy visit www.aiif.co.za.

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

STEP SOUTH AFRICA CONFERENCE 2018

23-24 April 2018
Sandton Convention Centre,
Johannesburg

PROTECTING CLIENT ASSETS IN A
VOLATILE AND UNCERTAIN WORLD

Sponsors include

Social



Exhibitors



Collateral



The topical agenda includes:

- Taxpayer's rights and the constitution
 - The Chief Master's new directive of 2017
 - A round up of recent trust cases on divorce
 - 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
- And much more...

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?

Tony Leon

Resolve Communications (Pty) Ltd.

Local delegate rates available!

Find out more and register at www.step.org/SA-event18

STEP
ADVISING FAMILIES ACROSS GENERATIONS

By
Emmie
de Kock

Do you have a legal practitioner personality?

Have you heard the joke of the legal practitioner who visits his cardiologist for his annual checkup? Waiting anxiously for his results, the cardiologist chuckles and says 'I cannot find your heart, as you are an attorney.' Or the one, when a legal practitioner's wife said 'I love you', and he cross-examined her?

Legal practitioners - of course - have a very good sense of humour, but there may be a point where some may feel that legal practitioner jokes go too far in stereotyping the profession. Every legal practitioner is unique and different, however, if so many jokes about legal practitioners exist, do legal practitioners share similar traits? Is there in fact something like a 'legal practitioner personality'?

Legal practitioners are not the only professionals who are stereotyped, the list also includes, accountants, engineers and 'techies'.

When one then considers how legal practitioners are sometimes negatively stereotyped, the following traits often come up: Greed, dishonesty, confrontational or workaholics. Sometimes there may even be the incorrect perception that some of these traits are required to succeed in the legal profession.

Considering the nature of the job, the competitiveness, and often the seriousness of matters that legal practitioners have to deal with, legal practitioners generally do not like showing any vulnerability. It is likely that legal practitioners behave this way, because they are appointed and trained to represent clients fearlessly and to intimidate their opposition. To some extent, it could therefore, be considered part of a competent legal practitioner's job to act a certain way, by always keeping it together, being in control and believing they are right. Listing these traits, one can think of, for instance, Harvey Specter, the main character of the popular television series *Suits*.

However, no person's behaviour, thinking or belief system is solely dependent on their personality type. Other factors that play a role, may include cultural and religious upbringing, cognitive intelligence, emotional intelligence and personal values. It should further be

borne in mind that a person's personality refers to their preference. A personality type is not an ability, nor is it an excuse for certain behaviour.

According to various sources, there are numerous personality theories and over hundreds of recognised personality types. One of the most popular personality assessment tools used is the Myers-Briggs Type Indicator (MBTI). The MBTI was created by a mother and daughter, Katharine Cook Briggs and Isabel Briggs Myers, who based it on the personality studies of Carl Gustav Jung, who was a famous Swiss psychiatrist and psychoanalyst in the early 1900s.

The MBTI provides for 16 types of personality types based on eight concepts, measured on scales, expressed in percentages, contrasting each other. These eight concepts are each represented by a specific letter as briefly referred to below.

Extrovert (E)/Introvert (I)

There can easily be a misperception that an extrovert is always someone outgoing, charismatic and charming. While the true indicator to determine extroversion or introversion is actually whether a person acquires energy from being with other people, or not. This is not to say that extroverts do not also need time on their own. This also does not mean that introverts do not enjoy spending time with other people. It is just what you lean towards the most as preference.

Sensing (S)/Intuitive (N)

Very simply put, these concepts refer to the workstyle in which a person deals with information. A person who leans more towards 'sensing' usually likes a lot of facts and details and clear instructions. A person who leans more towards 'intuitive' usually likes to focus on the 'bigger picture' or 'bottom line'. This is just an indication of most preferred workstyles of a person, and it is not to say that the 'intuitive' person cannot deal with details, or the 'sensing' person cannot see the big picture, as personality has nothing to do with ability.

Feeling (F)/Thinking (T)

Legal practitioners have to make decisions all day. Whether you are a 'think-

ing' person or a 'feeling' person, may influence how you make decisions. For instance, in the event that a candidate legal practitioner is accused of making unauthorised use of the firm's vehicle, a strong 'thinking' person may regard it as grounds for dismissal, while a strong 'feeling' person may regard harsh disciplinary steps as too severe and will rather try assess why the candidate legal practitioner did it. Considering this extreme example, one can imagine why conflict can arise between legal practitioner partners having to make decisions together.

Perceiving (P)/Judging (J)

Persons with a preference for 'judging' usually likes structure, organising and preparing for deadlines in advance. Persons with a preference for 'perceiving', generally do not prefer to work very systematic, operate well in organised chaos (with messy tables), and like rushing to make deadlines at the last minute.

What is your MBTI type?

Take the test

Following the above, a person's MBTI type is identified by a combination of four letters representing the most applicable contrasting concepts above. For instance, ENFJ or INTP.

There are many free and helpful online resources available, if you would like to assess your MBTI type. In this regard, you could consider doing the online test at www.my-personality-test.com.

To read more about the 16 different personality types provided for by the MBTI, you could also visit www.16personalities.com or www.myersbriggs.org.

Knowing your MBTI status could give you insights in your personality's strengths and weaknesses and your preferred work styles and environment.

It is further a general view that, unless a person experienced severe psychological or emotional trauma, their personality type will not change and stay the same throughout life. Generally, a person cannot merely decide to change their personality type.

According to Benjamin Snyder ('Here's the best job for you based on your per-

sonality type' (www.cnn.com, accessed 5-2-2018)) the best careers for, for instance, an ESTJ type is a chef, for ISTJ is a system administrator, for ENTJ is a physician, and for ISFJ is a kindergarten teacher.

According to an online article by Jennifer Alvey 'The Lawyer Personality' (https://leavinglaw.wordpress.com, accessed 5-2-2018), most lawyers' MBTI type is ISTJ. In the article 'More on the Lawyer Personality' (https://leavinglaw.wordpress.com, accessed 5-2-2018), Alvey refers to a study by Dr Larry Richard who lists the following as the top six MBTI types tested for legal practitioners, namely:

- ISTJ (17,8%);
- ESTJ (10,3%);
- INTJ (13,1%);
- ENTP (9,7%);
- INTP (9,4%); and
- ENTJ (9,0%).

Please note that this article is not meant as professional career advice and it is best to consult with a qualified industrial psychologist or certified MBTI professional for professional advice on the full interpretation and application of

the MBTI tool. The MBTI further is a test, in which the test taker must validate results.

What if you do not have a 'legal practitioner personality'?

Remember that no personality type is inherently better than another personality type, but that the MBTI may assist explaining why certain careers, jobs or positions may be more suitable, or a better natural fit, for some personality types, than for others. The MBTI may also be a helpful tool to help explain conflict between contrasting personalities in the workplace. Similarly, personalities with some contrasting traits, may also assist each other and work very well together to achieve more.

As your personality type is not a reflection of your skills or abilities, and merely an indication of your preferences, any person can gain experience, learn a new skill or behaviour to cope and excel in any situation.

Legal practitioner coaching is something which could assist legal practition-

ers who feel stuck or pressured in their careers. The purpose of legal practitioner coaching is to assist legal practitioners in improving their competence and maximising their natural personal and professional potential.


Conclusion

Have you ever, being a shoe size seven, try to fit in a shoe sized six? You may eventually succeed in getting your feet into the shoes, but it may take some stress, pain and effort. However, it is not the most comfortable experience.

Are you experiencing unnecessary strain in your career as a legal practitioner? Are you a happy legal practitioner? Are you in the best career or position for your personality type?

Consider doing a free MBTI online test and learn more about yourself and perhaps also acquire a better understanding for some of your colleagues.

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



There's no place like home.

We have our place. They have theirs. Visit nspca.co.za for more about the hazards of capturing and breeding exotic animals.

By
Muhammed
Ahmed
Mayat

Trustee duties in relation to member investor choice

This article aims to address the issue of trustee duties in the case of member investor choice. Focus is placed on the direct impact of member investor choice on trustee duties alone – all other general fiduciary duties remain relevant and applicable. A seminal question in this regard, is whether or not trustees may relinquish their duties of management, and if so, to what extent (see R Hunter 'Duties of trustees in regard to member investment choice' (1999) September *Pensions World*).

Basic overview member investor choice

Investor choice finds the *locus* of its genesis in the desire of many pension fund members to exercise some degree of autonomy or choice in the investment process. The traditional investor-trustee paradigm places complete investment discretion with the trustee. This approach, while seemingly sound, proves restrictive in that it cannot adequately accommodate the diverse needs of its different members (individuals of diverse age, risk profiles, etcetera). Member investment choice arrangements attempt to remedy this inflexibility – to an extent – by offering members a spread of portfolio options in which funds can be invested. Individual members may opt to allocate a portion of their contributions toward investing in these portfolios (see C Robinson, 'Implementation of individual investment choice in a public service defined contribution pension fund' (unpublished thesis, University of the Witwatersrand, 2001) at 40-45).

Trustee duties

Trustee duties, in respect of investment choice, have not been clearly elucidated by statute or a court of law (at this point) and, as such, inference is necessary to arrive at a speculative construction of what precisely they may entail. Prior to delving into a more abstract discussion, it must be noted that individual applicable regulatory provisions (such as the Pension Funds Act 24 of 1956 (the Act) reg 28's applicability to funds, which incorporate member investor choice) stand independently and are not impacted by the nature of the 'member-trustee' relationship.

The nature of the 'member-trustee' relationship in the member investment choice paradigm is of fundamental im-

portance in determining trustee duties. Two arguments may be advanced on whether or not the member exercising the choice exercises primary or subordinate power by means of delegation. The former argument would potentially divest the trustees of much responsibility but appears excessively liberal and inconsistent with the purports of much of pension fund regulation. The more prudent argument – and the desired approach where uncertainty exists – finds for the latter delegated authority. To appreciate the ramifications of this we must elaborate further on these two constructions.

Investor as an exerciser of primary power

Proponents of such argument may point to the Act's lack of express preclusion in this regard. They reason that the absence of provision permits the conference of power under a member investment choice arrangement to be reasonably construed as primary power. This in turn should allow for increased autonomy and a significant reduction in the stringency of applicable trustee duties. Given the restrictive ambit of operation – individual's exercising control over what is effectively their own assets – such construction could reasonably remain unencumbered by counterarguments of trustee abdication. Regardless, such arguments place significant reliance on distant abstraction and at times appear laboured and artificial.

As noted above, this view appears excessively liberal and at conflict with the basic purpose of trusteeship and the onerous nature of trustee duties. It appears unlikely that this construction is desired and prudence dictates that trustees would do well to avoid placing reliance on it.

The investor as an exerciser of subordinate power

Section 7C of the Act provides:

'The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.'

Proponents of this view argue that – given the board of trustees' primary duty is to direct, control and oversee investments – all other exercises of control amount effectively to delegation, namely, in this scenario, the trustees delegate investment power to the indi-

vidual member. Delegation is an established principle and one that the courts have dealt with on numerous occasions in the past.

The adjudicator in *Twerefoo v Liberty Life Association of SA Ltd and Others* [2000] 12 BPLR 1437 (PFA) at para 53 discussed trustee duties where delegated:

'[Trustees] retain the residual duties as regards the investment of the fund's monies as one of the key operations of a fund, which the trustees must direct, control and oversee. Part of their duty of diligence, care and good faith involves a *consideration of whether the person to whom the power of investment is delegated is a suitable person. Furthermore it must involve the duty to monitor the performance of the delegee*' (my italics).

Two duties become immediately apparent from the above extract: A duty to ascertain the suitability of the delegee prior to delegation and a duty to monitor performance.

Although it is unclear as to what monitoring entails in the context of member investment choice, this duty to monitor performance should, in practice, not prove as onerous as it seems. It may prove prudent for trustees to limit the available investment choices to a reasonable amount, to allow for the frequent vetting of fund performances. It appears logical to infer that initial and periodic assessments of the offered fund choices must be undertaken by the trustees – as they would, were they in control of the investment – and that such precaution should reasonably satisfy this monitoring duty.

Further, it is evident that only selected 'suitable' members may exercise an elective choice, although the evaluation criteria may be less onerous than normal given the circumstance, wherein a controlled investment environment exists with limited investment options available to the delegee. In this regard, trustees must assess a member by a uniform reasonable criteria prior to delegating the power of election. Failure to do so may render a trustee as having fallen short of the requisite standard of care.

It must also be noted that the duty to ensure 'that adequate and appropriate information is communicated to the members and beneficiaries of the fund informing them of their rights, benefits and duties' is retained (as provided in s 7D of the Act). Louw advances the argument that trustees are responsible for ensuring that the individual investors ex-

exercising investment choice are properly trained (see J Louw 'Member investment choice not to be taken lightly' (2006) December *Pensions World*). It is unclear as to what standard such envisaged training must meet or whether this potential requirement may be precluded by a reasonable member criteria applied before allowing the member to exercise investment choice.

Although incapable of precise articulation, it appears as if the duties that trustees must fulfil are homogenous to those

required under ordinary delegation. Only members who fit a specific criteria may exercise delegated power – although the delegate qualification criteria may be slightly less onerous given the controlled choice of investment products – the trustees must exercise a degree of oversight over the investment choices available and individual investors must be reasonably informed.

This approach seems consistent with a number of proposals aimed at regulating aspects of member investor choice, as

well as a foreign approaches to the question. Where trustees are uncertain in the exercise of their duties, given the lack of prescribed clarity, it would be most wise to err on the side of caution rather than to be bold and risk liability.

Muhammed Ahmed Mayat LLB (Wits) LLM (UJ) is a legal adviser in Johannesburg. □

By
Jannie
Bester

Conflicting evidence of handwriting experts

Experts or so-called experts come in many guises, from handwriting analysts, signature analysts, document analysts, handwriting and signature experts, document experts, graphologists, grapho-analysts, etcetera.

When starting the search for an expert, the choice is in the correct title of the person who needs to be consulted, namely a forensic document examiner.

Forensic document examiners are appropriately trained persons most suitable to assist in disputed document matters. Their skill-set comprises of many disciplines within the forensic document examination field, which includes –

- scientific examinations;
- comparison and analyses of documents in order to establish authenticity or non-authenticity;
- examination of alterations, additions, deletions;
- individualisation of signatures and handwriting;
- identifying or eliminating of sources, such as, typewriting, printed matter, stamped impressions, marks, restoration of obscured evidence or relevant document evidence of any kind;
- writing of reports;
- professional conduct;
- the presentation of expert testimony during judicial process; and
- consultation to aid the users of the examiner's services in understanding the examiner's findings.

Forensic document examiners should have a thorough understanding of the concept of bias and how to minimise bias during the term of consultation. Maintaining independence and objectivity are two critical personal traits of a forensic document examiner.

A forensic document examiner should also have a thorough understanding of the concepts of identification and individualisation, which are two very diverse concepts in the understanding and application process during the forensic examination of written and printed sources.

It is common cause that a forensic document examiner operates in two paradigms, namely objective interpretation and subjective interpretation of technical evidence. When dealing with scientific matters, such as ink spectral analysis, restoration of obscured writing, printed matter identification, paper analysis, alterations and additions, the interpretation of the technical evidence is glaringly objective and the results are clear to the reasonable man. However, when dealing with the individualisation of signatures and handwriting, the interpretation of the technical evidence, at best, is subjective in nature and is based on appropriate training, specialised knowledge, experience, continuous mentorship and own ongoing research augmented by membership of recognised professional bodies and discussion forums. A forensic document examiner would most probably have completed approximately 900 hours of training on the aspects of handwriting and signature individualisation alone.

A forensic document examiner is also guided by best practice examination standards in the form of published international accepted best practice standards.

It is within the signature and handwriting examination results, where the majority of the conflicts appear and this is where the choice of forensic document examiner as consultant is critical to the matter of the client, not discounting any

other disputed or questioned document issues.

When looking for a consultant forensic document examiner, an attorney should not just rely on an advertisement in printed media or electronic media. The choice of a forensic document examiner should be a well-informed and researched decision. Proper due diligence should be done before the services of a forensic document examiner is employed. The due diligence should include –

- confirmation of proper training in the field of forensic document examination;
- personal interviews with previous clients who made use of the particular forensic document examiner;
- reading of law reports and judgments;
- checking of membership of recognised professional organisations;
- a Professional Code of Conduct; and
- a proven track record in the field of forensic document examination.

A forensic document examiner, and their specialised skill-set is an extension of the professionalism of the attorney and an invaluable source during preparation for judicial process and proceedings.

For previous articles see:

- C Greenfield 'Conflicting evidence of handwriting experts' 2005 (June) *DR* 28.
- Letters 'Conflicting evidence of handwriting experts' 2010 (Sept) *DR* 5.

Jannie Bester MCSFS (UK) is a forensic document examiner in Pretoria. □

The genesis of the 'Gupta clause' within the financial regulatory framework of South Africa



Picture source: Gallo Images/Getty

By
Nkateko
Nkhwashu

It is a trite principle of law in South Africa (SA) that banks are not legally compelled to give reasons for terminating relationships or closing customers' accounts. This has been long established and settled in, both international and domestic case law. However, as of late there have been various policy developments within SA's financial regulatory framework, which might necessitate a rethink thereof or pose a challenge to this principle.

Before we 'go drilling for the meaning of words' and start 'connecting the dots', it is imperative to briefly look at some of the key pieces of legislation, which are going to form the basis of the discussion. First is the Financial Sector Regulation

Act 9 of 2017 (FSR Act), which seeks to establish a dual system of financial regulation in SA comprising of the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). Subsequent to the FSR Act and in order to give effect to the mandate of the latter, the central principle of which is the treating customers fairly initiative, a draft Conduct of Financial Institutions Bill (CoFI Bill) is currently before parliament and has not yet been finalised.

Secondly, the Financial Intelligence Centre Amendment Act 1 of 2017 (FIC Amendment Act) seeks to formally introduce a risk-based approach to customer identification and verification in SA. It further introduces certain concepts, which have been subject of rigorous debates during parliamentary processes leading up to its promulgation. One such concept is that of Prominent Influential Persons (PIPs), which is SA's extended version of the international Politically Exposed Persons (PEP) concept. Both concepts include 'family members' and 'close associates' (which include business partners).

Thirdly is the Code of Banking Practice (the Code), which is a voluntary code that 'sets out the minimum standards for service and conduct you can expect from your bank with regard to the services and products it offers, and how [the bank] would like to relate to you'. It also provides for a customer's entitlement and responsibility, as well as issues around 'closing an account', namely, not to close a customer's account without a reasonable prior notice to the customer. It further provides for exceptional circumstances under which banks may close a customer's account without prior notice. Thus -

- if compelled to do so by law (or international best practice);
- the account is not used for a significant period of time; or
- if there is a reason to believe that an account is being used for illegal purposes.

Mostly, the provisions of the Code resemble the 'contractual' obligations of both the bank and its customer, which emanates from the traditional bank/customer relationship. The relationship is a contract between the two parties and is only governed by the agreed terms (and conditions) *inter partes*. Thus, interference from outside third parties (including, eg, the executive branch of government) on this relationship is very restricted. This is one of the key reasons why I submit that the 'inter-ministerial committee', established in 2016 to look at issues of account closures (of a certain family) was ill-advised. This 'inter-ministerial committee' was established at the direction of the Office of the Presidency and ironically chaired by a minister, who had nothing to do with issues of finance or banks.

So begins the journey to the 'Gupta clause'

Traditionally, and owing to the bank/customer relationship and the attendant contractual obligations between the parties thereto, banks are not obliged to give reasons for closing a customer's account, even the motives thereof are irrelevant (*Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA)). A bank only has to give reasonable notice to the customer as per the agreed terms and then terminate the relationship. This is a settled principle in law and aligned with international best practice.

In 2016, however, this principle was challenged from various fronts, including by those in the political sphere. This followed the release of the then Public Protector's report titled the 'State of Capture'. This report implicated the Gupta family in various corrupt dealings together with President Jacob Zuma's family. This led to the four big banks in SA communicating their intention to terminate relationships with the Gupta family and their affiliated companies.

The Gupta family sought reasons from the banks and assistance from the Minister of Finance. For some reason, they never sought redress from the Office of the Ombudsman for Banking Services (see *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* [2017] 4 All SA 150 (GP)). Some banks did provide reasons to the Gupta family, ranging from potential reputational damage to the need to ensure compliance with SA's anti-corruption and anti-money laundering legislation, namely, Prevention of Organised Crime Act 121 of 1998, the Financial Intelligence Centre Act 38 of 2001 (FICA) and Prevention and Combating of Corrupt Activities Act 12 of 2004.

Owing to these developments, the Gupta family intensified their engagements with the then Minister of Finance, Pravin Gordhan, so that he could intervene and assist in resolving this situation. Commendably so, Mr Gordhan refused. He also refused to form part of the established 'inter-ministerial committee'. The Gupta family persisted in pursuing the minister to intervene. This situation led to the minister approaching the court for a declaratory order to the effect that he had no legal obligation to interfere in the relationship between a bank and its customer (the *Minister of Finance v Oakbay Investments* case).

Was a compromise made, if so, what are the implications?

While the above developments were unfolding there were two important Bills before Parliament, which needed urgent promulgation. These were the Financial Sector Regulation Bill (FSR Bill) and Financial Intelligence Centre Amendment Bill (FICA Bill). The FSR Bill had been before Parliament for some time, while the FICA Bill had to be urgently promulgated in order to ensure that SA fulfills its international obligations and thus complies with international standards set by, *inter alia*, the Financial Action Task Force (FATF). SA had been under a targeted follow-up process by the FATF ever since deficiencies within its financial regulatory framework were noted during the 2009 mutual evaluation exercise. SA was under pressure to show some progress to the FATF.

To bring matters into context, when some of the banks were closing the Gupta family's accounts, they raised the fact that due to the adverse media received by the Gupta family after the allegations of corruption in the State of Capture report, the family was now deemed to be high risk and put in the category of PEPs (and close associates). By then the PEP/PIP concept was not provided for in FICA itself. It was, however, provided for in some of the FICA's Guidance Notes. Some banks went as far as to raise the fact that it was included in the FICA Bill, which was then about to come into effect. This is how the whole PEP/PIP concept and the FICA Bill itself became politicised and eventually, was the center of attention in various committee deliberations. I submit that many parliamentarians even lost sight of how the whole (South African PIP) concept came about in the first place.

Due to all the politicking around the closure of the Gupta family's accounts and the attention now given to the PEP/PIP concept of the FICA Bill, the Bill's process was stalled in Parliament. Other role players emerged from nowhere and criticised the Bill. The banking industry was against the PEP/PIP concept, as well, and argued that it went further than international standards as it also covered those in the private sector. For these and other reasons, the FICA Bill, when deliberated on in Parliament, was always tied to the issue of account closures. Due to the number of times this issue was raised at the Standing Committee on Finance deliberations, its chairperson dubbed it the 'Gupta clause'. This further led to some parliamentarians and policy makers suggesting that perhaps there should be a provision in law, either in the FSR Bill, FICA Bill or CoFI Bill, compelling banks - when deciding to open or close accounts - to provide reasons for such decisions.

Needless to say, all these developments put pressure on National Treasury as the policy maker in charge of both Bills. National Treasury then embarked on a campaign to educate various stake-

holders on the intentions of the FICA Bill. This was largely aimed at ensuring that there was a common understanding on the intentions of the Bill and that it urgently be signed into law. SA had to report to the FATF on the next plenary meeting, which was scheduled for February 2017. The fact that SA was given a grace period in 2016 after FATF had resolved to send a high-level delegation to SA made matters worse. To add salt to an already open wound, the president, in November 2016, decided to refer the FICA Bill back to Parliament citing certain potential unconstitutional grounds. The genuineness of this was doubted. This was a huge learning curve for policy makers as it showed the influence politics had on policy development and implementation.

Allegedly, National Treasury started writing to the president trying to clarify what National Treasury perceived to be sensitive and contentious clauses, which led to the FICA Bill being referred back to Parliament. Strategically, National Treasury singled out the PEP/PIP provisions of the Bill, *inter alia*, and tried to explain and plead with the president concerning the actual intentions of these. Furthermore, and taking into account the prevailing politically sensitive Gupta-charged environment of that time, National Treasury undertook to explore (other) regulatory measures under the Twin Peaks regulatory regime to ensure that financial institutions always treated existing and potential clients fairly when making decisions to open or close accounts, and should consider providing reasons for such decisions.

Apparently, National Treasury used the above undertaking as part motivation to have the FICA Bill signed into law urgently. Such motivation also took issues of financial exclusion as a result of account closures into account. The con-

cept of 'treating customers fairly', which is central to the entire Market Conduct Policy Framework was also considered. The understanding within Standing Committee on Finance was that if such a clause was to ever materialise it had to be included within the CoFI Bill, as it involved conduct by financial institutions as against customers. This has, however, changed as seemingly the clause on account closures and the need to provide reasons have been included in the FSR Act. Furthermore, other factors came into play, which eventually forced the president into signing the FICA Bill into law.

Seemingly the clause is now captured under s 106 of the FSR Act, which requires the FSCA to make conduct standards for financial institutions, among others to:

- '(3)(c) ...
- (iv) the disclosure of information to financial customers; and
- (v) principles, guiding processes and procedures for the refusal, withdrawal or closure of a financial product of a financial service by a financial institution in respect of one or more financial customers, taking into consideration relevant international standards and practices, and subject to the requirements of any other financial sector law or Financial Intelligence Centre Act, including –
- (aa) disclosures to be made to the financial customers; and
- (bb) reporting of any refusal, withdrawal or closure to a financial sector regulator.'

A proper interpretation of s 106 implies that banks can now legally be compelled to provide customers with reasons for withdrawal of services or accounts closures. Furthermore, the Code, as well as other literature on the very same subject needs to be revisited and revised. This also has huge implications

on the wealth of case law already established and settled on the same issue. Finally, should this provision be brought before court it is going to be interesting to see how it will be interpreted and pronounced on.

Conclusion

In short, banks are never legally obliged to provide reasons for terminating business relationships. However, due to political dynamics and other policy developments within the financial regulatory framework of SA it seems as though this is about to change. I submit that it is doubtful whether the implications of s 106 have been really considered and thought through prior to including this clause within the FSR Act. On the other hand, one might argue that given mass closure of low risk accounts and the need to foster government's objective of financial inclusion this is a welcomed development. Others, however, may argue that these challenges will be addressed under the new risk based framework of the FIC Amendment Act. Regardless of which argument carries the light of day, it is reiterated that the implications of this are huge.

Nkateko Nkhwashu LLB (University of Venda) LLM (UJ) Cert in Legislative Drafting (UP) Cert in Compliance Management (UJ) Cert in Money Laundering Controls (UJ) Cert in Policy Development (Pro Active College) is an advocate at Empowerment Dynamics Consulting in Centurion.

Mr Nkhwashu writes in his personal capacity.



Together, we can fight leukaemia and other life-threatening blood disorders

Be somebody's hope for life and...

SHARE. GIVE. REGISTER

#IamHope



Call us toll-free on **0800 12 10 82**
For more info visit www.sunflowerfund.org.za



The Sunflower Fund
Hope begins with you



WE SEE IT!

"Optimism is true moral courage"
Sir Ernest Shackleton

*As a market leader in product innovation
we are now proud to offer you...*

Impersonation Fraud Cover

Conveyancing fraud is now believed to be the most common type of cybercrime in the legal sector, and can result in unwary homebuyers losing hundreds of thousands of rands. Don't let your firm be caught!

As the market leader in Professional Indemnity cover for Attorneys, we are now able to offer our clients Impersonation Fraud Cover, which protects your firm against the loss of money in your care, custody and control resulting directly from an insured Employee having, in good faith transferred money from the firm's business account and/or trust fund account(s) or amended the banking details of a client, supplier, or service provider in the firm's EFT payment systems as a result of a fraudulent instruction from a person purporting to be someone from your firm or from a client, supplier, service provider or the like.

Terms and conditions apply.

With Shackleton Risk Management you will...

- be assured of competitive rates, backed by International Re-insurers
- receive unparalleled levels of service through our nationwide representation

THE RISK SPECIALISTS

A niche market insurance broker
for Liquidators, Business Rescue Practitioners,
Attorneys, Executors, Curators, Tutors
and Trustees

At Shackleton Risk we specialise in...

- Security Bonds for Deceased and Curator Estates
- Security Bonds for Liquidators
- Professional Indemnity Insurance
- Business Rescue Professional Indemnity Insurance

If you would like more information on any of our products
please contact YOUR BROKER or email info@srisk.co.za



FSB Number 33621

The impasse of reserved costs – *the winning party does not take it all*

By
Beverly
Shiells

Picture source: Gallo Images/Getty



There seems to be a misconception among colleagues that the winning party is ultimately entitled to all costs incurred in an action or application and that such costs also include any reserved costs orders made. The Taxing Master has, however, no authority to tax a reserved costs order and any reserved costs order must be unreserved prior to taxation. Failure and/or neglect to address any reserved costs orders prior to the finalisation of a matter can ultimately cost your client a vast amount in legal fees. The client will be burdened with reserved costs, which despite the costly financial implication also results in a diluted victory and an unsatisfied client. Similarly an agreement by the opponent to pay the costs of the action also does not automatically include reserved costs unless expressly stated.

Reserved costs explained

The position in both the High Court and

magistrate's court is that if you bring an interlocutory application or if a matter is postponed and costs are awarded as costs in the cause, the costs will follow the result of the action namely, the winning party takes it all. If, however, the court reserves the issue of costs to be argued and adjudicated on at a later stage, it cannot be taxed until the court has made a ruling on who is ultimately liable for the reserved costs. The costs can also be unreserved if there is an agreement between the parties that spe-

cifically addresses the liability for the reserved costs. Reserved costs, as such, do not follow the result and the winner of the action and/or application is not automatically entitled to the reserved costs without either an order or agreement to that effect. Reserved costs is a specific costs order that delays the adjudication of the liability of costs to a later stage.

The issue of reserved costs was addressed in the matter of *Commissioner for Inland Revenue v Niemand* 1965 (4) SA 780 (C) where Watermeyer J held that the order as to costs was not a final order and not appealable. Judge Albert Kruger and Wilma Mostert in *Taxation of Costs in the Higher and Lower Courts: A Practical guide* (Durban: LexisNexis 2010) at 10 states that:

'It is therefore the duty of the attorney or counsel to bring the reserved costs under the court's attention to make a final decision either on trial or settlement of the matter. If the attorney or advocate neglects to ask the court for an

order or to obtain an agreement on the reserved costs, those costs cannot be recovered from the other party on taxation and their own client would be legally responsible to settle reserved costs in respect whereof no further costs order was made.'

Wunsh J in *Martin NO v Road Accident Fund* 2000 (2) SA 1023 (W) referred to the matter of *How v Earl Winterton* (No 4) (1904) 91 LT 763 where it was held that a Taxing Master has no authority to deal with reserved costs and that the issue of reserved costs must be referred back to court to determine the liability of same. Only once the court has dealt with the reserved costs will the Taxing Master have the necessary authority to tax same in accordance with the costs order. At 765 Kekewich J held that:

'I think that when costs are reserved it is necessarily implied, and the practice of the court sanctions the implication, that there is reserved the question of the incidence of those costs, quite apart from the question whether they are to be paid by the plaintiff or the defendant. It may turn out that they are to be paid by neither, and that the costs of both ought to come out of the estate, or be paid by a third party. In the meantime the court has pronounced no opinion whatsoever, not only on the question whether the plaintiff should pay the defendant or the defendant should pay the plaintiff but as to how the costs should be borne at all. It might in the end say that neither party should have any costs, or it might deal with them in one of the other ways I have suggested; but it is quite impossible, I think, for the Taxing Master, dealing with the costs of a defendant to an action, to look at costs which have been reserved.'

Wunsh J held in *Martin* that:

'Costs are usually reserved if there is a real possibility that information may be put before the Court which eventually disposes of the action or the application which may be relevant to the exercise of a discretion in regard to them (cf *Hillkloof Builders (Pty) Ltd v Jacomelli* 1972 (4) SA 228 (D) at 233H), although, where the issues affecting interlocutory costs are clear, the Court then dealing with the matter should not choose an easy way out to shift the task to another Court (*Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd* 1960 (3) SA 401 (D) at 404H-405B; *Trust Bank of Africa Ltd v Muller NO and Another* 1979 (2) SA 368 (D) at 318C-D). Costs are reserved because there is no ready view about the liability for them and they will not necessarily follow the result of the case. They are separate from the costs of the action or application.'

In *AA Mutual Insurance Association Ltd v Gcanga* 1980 (1) (SA) 858 (A) it was held that a reserved costs order does not

become attached to the main judgment and that it 'remained separate from and independent of that judgment and did not necessarily follow the result of the action between the parties.'

Practical illustration and application for variation of order in terms of r 42(1)(b)

The claimant's matter is postponed *sine die* and the wasted costs (which would include a portion of both the attorney and counsel's preparation, costs of witnesses for attending court, reservation and preparation fees for experts and counsel's day fee) are reserved to be argued at the next round. Both counsel and the attorney neglect to raise the issue of reserved costs and the action is ultimately finalised with a costs order in the claimant's favour. The costs of the postponement can easily be in the region of R 100 000 depending on the seniority of the counsel and number of experts involved. The reserved costs will now have to be paid by the client, despite their victory in the matter. The attorney can approach their opponent to agree to pay the reserved costs, which they will unlikely agree to after the fact. Alternatively, one can bring an application to court to address the issue of reserved costs. There are, however, inherent risks associated with bringing an application. In the unreported judgment of *Cipla Medpro (Pty) Ltd v H Lundbeck A/S and Another In re: H Lundbeck A/S and Another v Cipla Medpro (Pty) Ltd* (CCP) (unreported case no 89/4476, 24-5-2010) (Southwood J) in the Court for the Commissioner of Patents the applicant brought two applications in terms of r 42(1)(b) of the Uniform Rules of Court in which it sought to vary the court orders in two urgent applications dismissing the applications with costs, including the costs consequent on the employment of two counsel. In each application the applicant sought an order that the costs order, include the qualifying fees of the expert witness. It is trite law that an order for costs must include the costs for your experts' qualifying fees to be able to recover same on taxation. Rule 42(1)(b) provides that the court may, on the application of any party affected vary an order or judgment in which there is a patent error or omission. Southwood J held that:

'In the present case the parties argued the question of costs and the courts made costs orders. There is no suggestion that these costs orders did not correctly express the intention of the court or that the court did not consider what was argued or omitted to order what was requested. It is clear from the facts that the court did not consider the qualifying fees of expert witnesses because it was

not requested to include such fees in the order. As far as Rule 42(1)(b) is concerned the applicant has not established a patent error or omission attributable to the court. ... The application must therefore be refused on these grounds alone.'

In *Goldsworthy (born Marshall) v Goldsworthy* [2009] JOL 23468 (ECG) the divorce decree did not include the reserved costs of a previous postponement. The applicant brought an application wherein she sought an order that costs be determined in her favour. The respondent opposed same on the basis that there was no patent error or omission attributable to the court and the court is *functus officio*. It was held that:

'[I]t was common cause that the aspect of reserved costs constituted a *bona fide* omission on the part of all concerned. The reserved costs were overlooked by the legal representatives of the parties, and consequently were not brought to the attention of the trial judge.

Rule 42 (1)(b) of the Uniform Rules of Court provides that a court may *mero motu* or upon the application of any party affected, rescind or vary any order or judgment in which there is ambiguity, error or omission. The present court therefore had the power to deal with the reserved costs and to make a determination in respect thereof. That would not constitute altering the original order.'

Conclusion

The course of action to be followed when faced with a situation where reserved costs were not addressed is the following:

- Negotiate an agreement with your opponent, which expressly states that they will be liable for the reserved costs.
- Redirect the matter to court by bringing an application in terms of r 42(1)(b) of the Uniform Rules.

It is as such imperative that reserved costs are dealt with promptly and prior to the finalisation of the matter to avoid unnecessary delays in recovering client's costs or ending up with a situation where the client is ultimately responsible to settle the reserved costs. The client is furthermore saddled with the unnecessary costs of bringing an application in terms of r 42(1)(b) and the legal practitioner is left embarrassed by their failure and/or neglect to address the reserved costs at the appropriate forum.

Beverly Shiells LLB (*cum laude*) (UP) is an attorney at Tiaan Smuts Attorneys in Pretoria.



By
Martin
van
Staden

Navigating the digital divide: Internet access a human right?

Since the inception of the '#DataMustFall' movement in 2016, the notion that Internet access is a human right that must be guaranteed by government has become an attractive narrative for many commentators.

Indeed, there has been much talk of a 'digital divide', meaning the inequality of access to digital media between wealthier and poorer individuals. #DataMustFall has recently been joined by the official opposition's (the Democratic Alliance's) #Data4All initiative, which is demand-

ing 500MB of free data for the poor, students and jobseekers.

Passion and emotion are crucial ingredients in a democracy, antithetical to the cold application of rules evident in authoritarian dictatorships. However, it remains important to approach ideas like Internet access being a human right with a degree of circumspection, especially if such narrative stands to cost the beleaguered taxpayer more in taxes, and when it appears to be so readily accepted, without question, that it should be a human right.

A liberty right versus an entitlement right

Insofar as the liberty of the individual relates, Internet access is certainly a human right.

During the Arab Spring of 2010 to 2012, the Egyptian government cut Internet access to the people to protect itself from being ousted. Turkey's government has taken similar measures to silence the opposition and the press. In September 2017, Togo also cut Internet access to anti-government dissidents.

In South Africa (SA), s 16(1)(a) of the Constitution provides that everyone has freedom of expression, including freedom of the press and other media, and s 16(1)(b) provides that everyone has the right to receive and impart information or ideas. This, read with s 25(1), which provides that everyone has the right to own private property and not to be arbitrarily deprived of it, certainly means that every South African may have an Internet connection without fear of government interference.

This, however, is not what most advocates of Internet access as a human right mean. To them, it is an entitlement right, meaning that Internet access must be provided (at taxpayers' expense), not merely allowed.

The Constitution

The pertinent question is whether the Constitution provides for an entitlement right to Internet access in the same way it does a liberty right.

At the outset, it is important to bear in mind the constitutional principle enunciated by Sir Kentridge AJ in *S v Zuma and Others* 1995 (2) SA 642 (CC) 'that the Constitution does not mean whatever we might wish it to mean'. Referring to the late Privy Council Judge Lord Wilberforce's 'reminder that even a constitution is a legal instrument, the language of which must be respected'. Kentridge continues and states that the language used by the constitutional drafters must not be 'ignored in favour of a general resort to "values"', as then 'the result is not interpretation but divination'.

Section 7 of the Constitution provides that government must 'respect, protect, promote and fulfil the rights in the Bill of Rights'. The wording used here is particularly important. Government must give effect to and promote only those rights that are in the Bill of Rights – no more, and no less. Government cannot create new fundamental (human, constitutional) rights from scratch without amending the Constitution, whereas it may create statutory rights, such as our right to possess firearms under the Firearms Control Act 60 of 2000.

There is no explicit right to Internet access in the Constitution. Section 32's right to access to information does not equate to a right to Internet access as it is explicit about its limitation. Everyone has the right to have access to information held by the state and access to information held by any other person if it is required to enforce one's rights. This relates clearly to specific information and cannot be read to mean that the data held by data service providers is neces-

sary for people to exercise their right to dignity or freedom of expression.

International treaty law, which has become more prolific over the past two decades on this very topic, could tell a different story.

Section 39(1)(b) of the Constitution obliges South African courts to consider international law in their interpretation of the Bill of Rights, meaning that international treaty law might compel SA to give effect to a human right to Internet access. This does not mean that the Bill of Rights itself may be substituted for what an international treaty provides. Instead, if there is doubt or uncertainty as to what a particular section in the Bill of Rights means, or how it should be applied to a particular situation, the courts must venture an interpretation that accords with existing international law.

Section 231(4) of the Constitution provides that international law becomes a part of South African law if Parliament enacts it into our law as legislation. That rule of international law must, however, be consistent with the Constitution and existing statutory law, otherwise Parliament cannot enact it as legislation. This is evident from ss 1(c) and 2 of the Constitution, which provides for the supremacy of the Constitution and the rule of law.

This principle is contentious considering the principle that domestic law cannot overrule international law. In practice, the courts and government will rarely, if ever, find South African constitutional principles to be inapplicable due to some conflicting international rule. It must be assumed that the Constitution will reign supreme in every instance when considering international law.

Section 232 of the Constitution, further, provides that customary international law is automatically part of South African law unless it is inconsistent with the Constitution or statutory law. Customary international law consists of principles generally accepted by the international community as law, but which are not necessarily found in treaties. There is, however, no discernible human right to Internet access to be found in customary international law.

Section 233 provides that courts 'must prefer any reasonable interpretation' of South African legislation, which is consistent with international law, over an interpretation that is inconsistent with international law.

International law

The #Data4All initiative claims that the United Nations (UN) considers Internet access a human right. This refers to a non-binding resolution adopted on 27 June 2016 by the UN Human Rights Council (UNHRC) that, *inter alia*, affirms that the rights, which people have

offline, must also be protected online, especially freedom of expression, and calls on governments to bridge digital divides (UNHRC 'The promotion, protection and enjoyment of human rights on the Internet' A/HRC/32/L.20 (27 June 2016) (www.article19.org, accessed 14-2-2018)).

A Declaration of Principles was also adopted by the World Summit on the Information Society in 2003 in consultation with the UN, national governments and other stakeholders in the information and communication technology (ICT) industry. It contains various principles relevant to the question of Internet access as a human right.

Principle 4 provides that communication is 'a basic human need' and 'central to the Information Society'. Everyone should have the opportunity to participate in the Information Society. This principle accords perfectly with the Constitution and the notion that the right to Internet access means that people should not be hindered from accessing the Internet, rather than a right to have the Internet provided to them.

Principle 23 provides that certain policies should be developed, which 'enables universal service obligations' to 'areas where traditional market conditions fail'. It goes on to name examples of government providing access points in post offices, schools and libraries.

This principle, like the UNHRC's call for governments to bridge digital divides, does not find expression in the Constitution. Indeed, s 9(2) of the Constitution, which provides for substantive and not merely formal equality of persons, echoes s 7 in that it provides that equality 'includes the full and equal enjoyment of all rights and freedoms'. It must be assumed that these 'rights and freedoms' are those already found in the Bill of Rights. Thus, for example, whereas government has a constitutional obligation to ensure the educational divide between rich and poor is bridged, the same cannot be said for the digital divide.

Principle 39 of the Declaration provides that the rule of law, 'accompanied by a supportive, transparent, pro-competitive, technologically neutral and predictable policy and regulatory framework reflecting national realities, is essential for building a people-centred Information Society'. This principle endorses a sound notion of the rule of law, that is, policy must be predictable, transparent, and pro-competition. Government intervention to provide Internet access must thus be supported by these characteristics.

The Department of Telecommunications and Postal Services' ICT policy, however, is not so supported. It is, firstly, assuredly anti-competitive by venturing to establish a new telecommu-

nications monopoly. Secondly, it seeks to hog radio frequency spectrum desperately needed by data providers. And, thirdly, the process of its adoption was anything but transparent, with bad faith public participation in the formulation of the White Paper and a socio-economic impact assessment released hopelessly late, after the minister had already declared the policy as 'final'.

The true nature of human rights

It is prudent to ask whether, despite any domestic or international law providing that Internet access is a human right, it is truly in the nature of human rights to be capable of 'creation'? Put differently, do human rights pre-exist law and accrue to all human beings by virtue of our humanity, or do popular assemblies and governments 'make' human rights? This is yet another incarnation of the age-old debate between natural law and positivism.

For a human right to be of a 'human' nature, it must satisfy the requirement of universality. Indeed, a human right means that something belongs to all humans regardless of who, where or even when they are. Being human is not temporally limited, meaning that these types of rights have existed for as long as human beings have existed, regardless of

the fact that we only recently developed a conception of human rights.

By this logic, I submit that Internet access cannot be a human right.

The Internet is a relatively recent invention, which the humans of ancient Rome or Great Zimbabwe could not have enjoyed a right to, despite the fact that they were humans. The notion that things can 'become' human rights is problematic in that it violates the very essence of the concept of fundamental rights, namely, inalienability and universality. If something can 'become' a right, it can naturally stop being a right, which is a can of worms that only dictators and tyrants would wish to open.

Conclusion

Vint Cerf, considered to be one of the pioneers of the Internet, said that 'technology is an enabler of rights, not a right itself' (www.nytimes.com, accessed 29-1-2018). When we wish to exercise our right to freedom of expression, we do not think that government must – at taxpayers' expense – provide us with a podium and an audience. When we think about our right to privacy, we do not think government must provide us with tinted windows or locks for our gates. Instead, we have the right to these things but exercising those rights remains our own, personal responsibility.

To conceive of all 'good' or 'important' things as human rights, as Dr Nigel Ashford astutely writes, 'reduces the moral force of the claim' (N Ashford 'Human Rights: What they are and what they are not' *Political Notes No. 100* (London: Libertarian Alliance 1995) (www.libertarian.co.uk, accessed 29-1-2018)). When we speak of human rights, we must be referring to a set of rights, which human beings are entitled to only by virtue of our existence as human beings. Internet access is assuredly thus not a human right. It can, however, be made into a constitutional or statutory right, of which it is currently neither.

Making a statutory right of Internet access should only be pursued after an extensive good faith public participation process and an independently conducted socio-economic impact assessment to ask the most important question of all: Can the cash-strapped South African taxpayer afford to pay for everyone's Internet access? Unless serious economic growth and employment sets in soon, the answer must be an unequivocal 'no'.

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



A conference presented by the Corporate and M&A Law Committee, supported by the IBA African Regional Forum

Africa: Opportunities and Challenges in Mergers and Acquisitions Transactions

19–20 April 2018, Radisson Blu Hotel Waterfront, Cape Town, South Africa

Exploring current trends and latest developments in the African M&A market as well as providing unparalleled opportunities to network with international peers, this event is a must attend for all legal professionals doing business in and with the African market.

This year's topics will include:

- Common trends driven by country and sector specific opportunities
- Shift from energy and mining M&A towards TMT, myth or reality?
- Impact of cultural differences on negotiation and deal structuring
- Practical tools for risk mitigation – Case studies
- How to exit a deal
- The opportunities and limits of alternate dispute resolution in Africa



the global voice of
the legal profession



Follow us
@IBAEvents
#IBAMA18

FOR MORE INFORMATION AND TO REGISTER YOUR INTEREST VISIT WWW.IBANET.ORG/CONFERENCES/CONF851.ASPX



Juta ONLINE LEGAL SOLUTIONS

Essential works for
legal practitioners



ONLINE TRIAL AVAILABLE



Online



Price – Current annual single-user sub: R15,120 (R1,260 per month)

The Essential Legal Practitioner Bundle Online

Save time and money with up-to-date access to over 33,000 cases, annotated legislation and Juta iconic commentary works in this integrated online platform, and quickly and intuitively find the information you need. Incorporates the *South African Law Reports*, *Statutes and Regulations*, *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa*, *Juta's Unreported Judgments* and *Erasmus: Superior Court Practice*. This must-have resource is available at a fraction of the cost of the annual subscription prices to these essential publications.



Online



Price – Current annual single-user sub: R11,606

The South African Law Reports (1947 to date) Online

Juta Law Reports Editors

The *South African Law Reports* is the primary source of legal precedent in South Africa. Published since 1947, the series incorporates decisions of the Constitutional Court, Supreme Court of Appeal, and all divisions of the High Court – carefully selected and expertly cross-referenced and annotated by Juta's editorial team.



Online



Price – Current annual single-user sub: R3,524

Juta's Unreported Judgments Online

Juta Law Reports Editors

This unrivalled online database of over 30,000 judgments will substantially enhance the depth of your research, add weight to your heads of argument, and give you the tactical advantage in litigation. The collection is updated daily with South African and Namibian judgments, each expertly summarised according to law topics that narrow to specific and cogent areas of law, for easy location of the judgments you need.



Online



Price – Current annual single-user sub: R10,378

Juta's Statutes and Regulations of South Africa (1910 to date) Online

Juta's Statutes Editors

Updated daily, this online resource provides access to statutes from 1910 to date, regulations for Acts from 1990 to date and selected regulations made in terms of important Acts prior to 1994 in a consolidated and annotated form. *Juta's Weekly Statutes Bulletin* email newsletter is included with your subscription.



Online



Price – Current annual single-user sub: R1,616

Erasmus Superior Court Practice 2e Online

DE van Loggerenberg; Constitutional Court parts revised by E Bertelsmann

The 2nd edition of this authoritative work comprises unrivalled clause-by-clause commentary on the Acts and Rules, and interprets provisions with reference to judgments in which they have been considered. It also features extensive discussions of important related subjects. Subscribers can register for electronic email updates notifications of material changes that impact the work as they arise, keeping you up-to-date.



Online



Price – Current annual single-user sub: R2,020

Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa (Volumes I & II) Online

DE van Loggerenberg

Jones & Buckle, the definitive work on civil practice in the lower courts in South Africa, includes a section-by-section analysis of the Magistrates' Courts Act 32 of 1944 (as amended), Rules of Court made in terms of this Act, and commentary, which includes references to decided cases. The continually updated online version includes additional access to referred Acts, legislation judicially considered, the full text of Cases referred to in the commentary and a Table of Cases (both alphabetical and by Court).

Single-user online subscription prices include 14% VAT and are valid until 30 June 2018.
Multiple user license pricing on request.

For further details visit our website.

Juta Customer Services • Email orders@juta.co.za • Fax 021 659 2360 • Tel. 021 659 2300.

4606/02/2018



www.jutalaw.co.za





Heinrich Schulze *BLC LLB (UP) LLD (Unisa)* is a professor of law at Unisa.

THE LAW REPORTS

January 2018 (1) South African Law Reports (pp 1 – 330);
[2017] 4 All South African Law Reports December (pp 605 – 927);
[2018] 1 All South African Law Reports February (pp 321 – 619);
2017 (12) Butterworths Constitutional Law Reports (pp 1497 – 1605)

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
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Administrative action in contractual context also reviewable: In *Parkscape v MTO Forestry (Pty) Ltd and Another* 2018 (1) SA 263 (WCC) the first respondent (MTO) concluded a lease with the second respondent, South African National Parks (SANParks). SANParks was appointed by government to manage South Africa's national parks. The lease allowed MTO to clear invasive plantations on the Table Mountain National Park (the park).

The applicant, Parkscape, was a non-profit organisation dedicated to the preservation of Cape Town's urban forests.

In managing the felling of the trees, SANParks was acting in terms of a Cabinet policy decision that all plantations on Table Mountain would, over time, be felled. The lease contained a felling schedule that could be accelerated – subject to approval by SANParks – if plantations were destroyed or partially destroyed by fire. In July 2016 SANParks approved a request by MTO for the accelerated felling of trees damaged by the mountain fires of March that year.

Shortly after MTO initiated

the programme, Parkscape obtained an order interdicting the felling of the so-called Dennendal compartment of trees (near the suburb of Tokai), and a *rule nisi* calling on MTO and SANParks to show cause why its consent to accelerated felling should not be set aside. Parkscape was particularly concerned about the resultant loss of shade in the Tokai area of the Park. Parkscape argued that the Park was a public amenity managed by SANParks under statutory authority; that the consent to accelerate felling constituted the exercise of a public power; and that public consultation was, therefore, needed before the accelerated felling could take place.

SANParks, in turn, argued that its agreement with MTO was based on contract, and consequently, concerned matters of private law. It further argued that its agreement with MTO did not involve any public power considerations.

Gamble J held that SANParks had indeed exercised a public power when it agreed to the expedited felling. The decision was governmental in nature, regulated by legislation, had immediate and direct legal consequences for both MTO and Parkscape's members, and the balance of power was in SANParks' favour. The decision thus constituted reviewable administrative action.

SANParks had failed to discharge its responsibilities to the public and had unlawfully breached Parkscape's right to be informed of the true state of affairs and to be heard in

relation thereto. The decision fell far short of procedural fairness.

SANParks' decision to accelerate the felling of trees was set aside and MTO was interdicted from felling any trees in the Dennendal compartment until lawful decisions to that effect were taken.

The application was thus allowed with costs.

Contract – demand guarantee

What constitutes substantial compliance: In *Lombard Insurance Co Ltd v Schoeman and Others* 2018 (1) SA 240 (GJ); [2018] 1 All SA 554 (GJ) Golden Sun purchased fuel on credit from Sasol. Golden Sun requested the applicant, Lombard, to issue a demand guarantee in favour of Sasol. In exchange, Golden Sun executed a counterindemnity in favour of Lombard, for which the respondents (the sureties) stood surety. The guarantee provided that Lombard had to pay the guarantee on the receipt by it (as guarantor), at Sasol's own address, of Sasol's (as beneficiary) written demand, which demand would state that an amount of up to R 60,5 million was then due and payable by Golden Sun (as client) to the beneficiary. Golden Sun was placed under liquidation.

Two demands for payment were made by Sasol with which Lombard duly complied.

Lombard launched the present application against the

sureties for payment under the counterindemnity after unsuccessfully demanding payment from Golden Sun. The sureties opposed the claim. They argued that Sasol's demands did not comply with the terms of the guarantee in that they did not take place at Sasol's address; but at that of Lombard. As a result, so they argued, Lombard was under no obligation to pay Sasol under the guarantee, and therefore neither Golden Sun nor the sureties were liable to indemnify Lombard in respect of its payment.

The core issue was the degree of compliance required in the case of demand guarantees, that is, whether strict compliance was called for, or whether substantial compliance was sufficient.

Maier-Frawley AJ pointed out that the issue at stake was a question of some debate in both English and South African law.

The core issue to be determined was simply whether there was compliance with the terms of the guarantee under consideration. That involved determining what the relevant terms actually required, being a matter of interpretation, on the basis and in the manner laid down, *inter alia*, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). More particularly, it was necessary to interpret the terms of the guarantee in their contractual context, regard being had to the commercial purpose of the particular provisions and the provisions of the guarantee as a whole, while bearing

in mind the inherent features of a demand guarantee.

The essential requirement giving rise to liability under a demand guarantee was the receipt by the guarantor of a demand containing a statement confirming that a debt was due and payable by the client. That occurred in this case, notwithstanding the demand not having been made at Sasol's address. As such, there was sufficient compliance with the terms of the Sasol guarantee, and the applicant was entitled to claim against the sureties based on the counter-indemnity.

The sureties were thus ordered to pay Lombard an amount of R 54,8 million, plus interest and costs.

Criminal law – prosecution

Decision to discontinue prosecution: The facts in *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA); [2017] 4 SA All SA 726 (SCA) date back to 2007. Shortly after the applicant, who subsequently became the President of South Africa, Jacob Zuma, was elected president of the African National Congress (the ANC), Zuma was indicted on criminal charges including racketeering, corruption, money-laundering and fraud. The prosecuting team wanted the indictment served as soon as possible, without regard to political considerations, but the Acting National Director of Public Prosecutions at the time (the ANDPP), Mokotedi Mpshe, (on his version of events) was persuaded by Leonard McCarthy, at the time the Director of Special Operations (the DSO), to hold service over until after the ANC's elective conference.

Suffice it to mention that the National Prosecuting Authority (NPA) later decided to discontinue the prosecution. In 2016 the High Court, on review, set aside the NPA's decision following a rationality challenge by the first respondent, the Democratic Alliance (the DA).

In Zuma and the NPA's consolidated applications for leave to appeal against the High Court's decision, both the applicants conceded, shortly

after the hearing commenced, that the NPA's decision to discontinue the prosecution was flawed, in particular that it was irrational. They further conceded that Mpshe had incorrectly invoked s 179(5)(d) of the Constitution and s 22(9) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) in reviewing his own decision to prosecute, when that section only authorised him to review decisions to prosecute of other directors of public prosecution.

The crisp issues before the SCA were to assess whether these concessions by the two applicants, were correctly made and whether there were additional reasons to set aside the decision to discontinue the prosecution.

Navsa ADP held that the recordings on which Mpshe relied in justifying the decision to discontinue the prosecution, even if taken at face value, did not encroach on the propriety of the investigation of the case against Zuma or the merits of the prosecution itself. Collectively, the conversations neither showed a grand political design, nor was there any indication of clarity of thought on the part of the relevant NPA officials about how either former President Mbeki or Zuma would be decisively advantaged or disadvantaged by the service of the indictment on either side of the ANC elective conference time line.

The manner in which the affidavits were drawn and the case conducted on behalf of the NPA was inexcusable. The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appeared to have been deliberate, and was in itself irrational.

In reviewing his own decision to institute criminal proceedings against Zuma, and ultimately making the decision to terminate the prosecution, Mpshe wrongly invoked and relied on s 179(5)(d) of the Constitution and s 22(2)(c) of the NPA Act. These provisions deal with the review by an NDPP of a decision of a DPP and were inapplicable. Thus, the concessions on behalf of Zuma and

the NPA that, on that basis, the decision to terminate the prosecution was liable to be set aside, was correctly made.

The application for leave to appeal was granted, but both appeals were dismissed with costs.

• See law reports 'administrative law' 2016 (Oct) DR 36 for the GP judgment.

Delict

Element of unlawfulness: In *Pro Tempo Akademie CC v Van der Merwe* 2018 (1) SA 181 (SCA) the appellant (the defendant) was the owner of a school. It planted saplings in the school's playground. Alongside the saplings, as supports, the defendant erected steel posts, which protruded 60 cm out of the ground. The respondent's (the plaintiff) son, 13, during a cricket game, leaned or sat on one of these, and was impaled, injuring his rectum and bladder.

The plaintiff successfully sued for her son's damages. The defendant appealed to the SCA. The issue was whether the defendant's action in erecting the steel posts was wrongful.

Navsa ADP held that it was indeed wrongful. In this regard it pointed out that the action was positive, and resulted in physical injury. The defendant created the danger.

In *Transvaal Provincial Administration v Coley* 1925 AD 24 the Appellate Division had

recognised a duty to prevent danger on similar facts. In the *Coley* case the defendant erected wooden stakes to protect trees in an area where children usually played. A girl fell on one of the sticks which resulted in her eye having to be removed. The court in that case held that 'a prudent and careful man, who gave his mind to the matter as such a person would naturally do, should have foreseen that the sticks with such sharp projections in [an area] where children would naturally play, were a source of danger to very young children and sooner or later might result in injury.' The court had regard to the notorious fact that children, by nature, are impulsive.

In the *Pro Tempo* case the court further held that teachers were under a duty to prevent harm to children in their care and children had a constitutional right to appropriate care when removed from their families.

It concluded that the defendant, which was a school for children with learning disabilities, knew of the plaintiff's son's hyperactivity. It failed to take steps to prevent foreseeable harm to children using the playground.

The appeal was thus dismissed with costs.

Liability for omission: In *Van Vuuren v Ethekwini Municipality* 2018 (1) SA 189 (SCA) the appellant's (the plaintiff)

Cyril Muller Attorneys

incorporating

**Willie Wandrag
Costs Consultants**

Economic reality dictates that few, if any, are in a position to disregard the expense of litigation and attempts to maximise costs recovery on behalf of successful litigants or to limit the exposure of the less successful have served to highlight the degree of speciality required in this field. To assist attorneys in this regard, Cyril Muller Attorneys offer professional and efficient solutions to these aspects of litigation.

Should you require assistance with any of the following, be it between parties to litigation or as between the attorney and his client, we would be pleased to oblige:

- the drawing, taxing, opposing of bills of costs;
- the fixing of security for costs; or
- any advice regarding aspects of costs and charges.



Contact: Cyril or Willie

Tel: (011) 326 4722 - Fax: (011) 781 8338

info@cmattorneys.com

eight year old son, John, used a water slide in one of the respondent municipality's (the defendant in the court *a quo*) pools at the beachfront in Durban. While John was sliding, he was pushed or bumped by a child sliding behind him, causing him to lose his balance at the slide's exit. As a result, John bumped his face on the bottom of the pool. His alleged injuries included a fracture of his jaw and loss of teeth that required surgical intervention.

At the time, there was no municipal official controlling access to the slide or supervising its use. The slide itself was restricted for the use of under-12s, with a municipal bylaw making it an offence for anyone above that age to enter or use it.

The plaintiff sued the defendant for her and John's damages, but her action was dismissed by the High Court. On appeal to the SCA, the crisp issues were whether the defendant's failure to control access to and to supervise the slide was wrongful.

Navsa ADP pointed out that the defendant created the risk of harm by providing the pool and slide. It was common cause that any potential users of the slide would be immature and undisciplined. Public policy required the prevention of chaotic use of the slide, such as pushing, sliding in groups or intentionally colliding with other users.

In considering the defendant's potential liability, the court considered the constitutional norm of the best interests of children.

The court reasoned that the imposition of a duty of care would not result in 'an abdication of parental control' or 'an intolerable financial burden'. It would further also not extend to all facilities controlled by the defendant.

The court concluded that the defendant's omission was negligent and it was, therefore, held liable for any damage the plaintiff could prove were owed to her or John.

The appeal was upheld with costs.

No delictual remedy for procedurally unfair debarment under PAJA: In *Odinfin (Pty) Ltd v Reynecke* 2018 (1) SA

153 (SCA) the appellant (the defendant in the court *a quo*) Odinfin, was an authorised financial services provider (FSP) in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act).

While the respondent (the plaintiff in the court *a quo*) Reynecke, was still employed by Odinfin, he attended an induction programme with Nedbank with whom he was seeking employment. Reynecke failed to disclose this to Odinfin. When the true facts came to Odinfin's knowledge, it initiated disciplinary proceedings against Reynecke. The alleged misconduct by Reynecke was dishonesty and/or competing with employer and/or conflict of interest.

Reynecke gave written notice of termination of his employment and did not attend the disciplinary hearing. He was found guilty of misconduct and, without notice, he was debarred by Odinfin in terms of s 14(1) of the FAIS Act.

This caused Reynecke's then employer, Nedbank, to dismiss him. Reynecke later obtained the review and setting-aside of the debarment, an administrative action, on the ground that Odinfin had failed to give him notice and a hearing before doing so.

Reynecke then instituted a delictual action for damages, alleging Odinfin was obliged to give him notice and a hearing, before disbarring him. The High Court upheld his claim. On appeal to the SCA, the issue was whether non-compliance with s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was delictually wrongful.

On appeal, Tsoka AJA held that the answer to the present dispute turns not on the provisions of the FAIS Act, but on the provisions of PAJA itself. There is nothing in PAJA to suggest that the Legislature intended there to be a delictual remedy for non-compliance with its provisions in general or its provisions relating to procedural fairness in particular.

On the contrary, PAJA deals with at some length with the rights of an aggrieved person affected by unfair administra-

tive action, namely judicial review in terms of s 6 and the remedies provided for in s 8. Here Reynecke exercised his right of judicial review and obtained an order setting aside Odinfin's procedurally unfair action.

The fact that PAJA does not afford a delictual remedy for damages does not necessarily mean that unjust administrative action will not be delictually wrongful if there was a breach of the statute pursuant to which the administrative action was taken and if such statute on a proper interpretation confers a delictually remedy.

Reynecke did not allege that there was a breach of the FAIS Act. And even if there had been a breach of s 14 of the FAIS Act, it (the FAIS Act) does not envisage a delictual claim for damages. The primary aim of s 14 is not to protect the interests of employed representatives such as Reynecke, but to advance the public good.

The imposition of liability for damages would have a 'chilling effect' on the performance by FSP's of their statutory duty imposed by s 14 and on the administration of the FAIS Act.

Where the decision-maker (here: Odinfin) has acted dishonestly or corruptly, the court will impose liability. However, courts are slow to find that statutes accord delictual remedies for mere negligence in performing an administrative duty.

The appeal was thus upheld with costs.

- See case note Daryl Marc de Bruyn 'Employer liable for damages caused to employee due to non-compliance with debarment process' 2015 (Sept) *DR* 42 for the GP judgment.

Financial services

Effect of disbarment of a financial advisor by the employer FSB: In *Financial Services Board v Barthram and Another* 2018 (1) SA 139 (SCA) the respondent, Barthram, was employed by Discovery. After Barthram purported to terminate his employment with Discovery and joined the employ of Old Mutual,

Discovery found evidence, which prompted it to notify the Financial Services Board (the FSB) that Barthram 'did not comply with the requirements of the FAIS [Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act)] for continued appointment as a representative of [Discovery]'. In its notice to the FSB, Discovery marked with an 'X' the block labelled 'honesty and integrity' as the reason for the withdrawal of Barthram's authority to act.

Barthram successfully lodged an urgent application for an interim order to have his debarment lifted. In subsequent review proceedings the court *a quo* dismissed Barthram's application. It further held that a distinction should be drawn between what is contained in s 14(1) and 14A of the FAIS Act. The court *a quo* held that the effect of s 14(1) is that the debarred representative 'can no longer represent that particular financial services provider'. The effect of a debarment in terms of s 14A, in turn, precludes the debarred representative from rendering financial services on behalf of any FSP.

On appeal to the SCA the Registrar for Financial Service Providers (the Registrar), contended that the High Court erred in its finding that the effect of a debarment of Barthram by Discovery in terms of s 14(1) was that he was only precluded from rendering financial services to the public on behalf of the latter. Barthram, in turn, appealed against the dismissal of his application to have his debarment lifted.

Ponnan JA held that the FAIS Act requires an authorised FSP such as Discovery not just to be authorised and licensed by the Registrar, but also to exercise oversight in respect of the initial and continuing fitness of its chosen representatives.

The FSP, having gone through a vetting process at the hand of the Registrar, is eminently suited to subject its representatives to a similar initial vetting and thereafter to exercise oversight of them. A debarment of a representative in terms of s 14(1) is complete when the FSP has withdrawn the representa-

tive's authority to act on its behalf and has removed such person's name from its own register in terms of s 13(3).

The court held that the court *a quo* has misinterpreted the legal effect of a debarment in terms of s 14(1) in holding that it precludes the representative only in respect of the debarring FSP. A representative that no longer has the fitness and propriety or competency requirements poses a risk to the investing public generally. A representative who is debarred in terms of s 14(1) is thus debarred on an industry-wide basis from rendering financial services to the investing public.

However, so the SCA reasoned, Discovery failed to follow the principles of procedural fairness required in reaching its decision to debar Barthram. Discovery had failed to honour the *audi alteram partem* rule during a meeting between Barthram and two Discovery employees. Barthram was not afforded the opportunity to represent himself or to present his case.

Barthram's debarment was therefore invalid and the appeal was dismissed with costs.

Implied/express duty on service provider to exercise reasonable skill and care:

The facts in *Oosthuizen v Castro (Centriq Insurance Co Ltd as Third Party)* [2017] 4 All SA 876 (FB) were as follows: Castro (the defendant) was a financial services provider (FSP). Oosthuizen's (the plaintiff) husband passed away and she inherited an amount of money. She decided to invest an amount of R 2 million of the money, and requested the defendant to advise her in that regard. The defendant advised her to invest the money in the Sharemax investment scheme. It is trite that she lost the capital amount of her investment.

The plaintiff sued the defendant for damages. She alleged that the defendant had failed to act honestly and fairly in her interests in recommending the Sharemax investment scheme. She alleged further that the defendant had failed to exercise the

degree of skill, care and diligence to be expected of an authorised financial services adviser furnishing investment advice.

The defendant, in turn, claimed indemnity from the third party insurer (the insurer). The insurer, however, denied its liability under the policy, because, so it argued, the defendant's behaviour fell into the insurance policy's exclusion clause.

The exclusion clause provided that the insurer 'shall not indemnify [the defendant in respect of] any loss arising out of any claim made against them ... arising from or contributed by depreciation (or failure to appreciate) in value of any investments ... or as a result of any actual or alleged representation ... provided by the [defendant] as to the performance of ... such investments'.

As a result, the court dealt in detail with the question of what exactly Castro did, and what exactly was excluded from cover in the insurance policy.

Daffue J listed the following aspects which required his consideration: First, the duties of a financial advisor or broker such as the defendant; and, secondly, the rules of construction of contracts in general and insurance contracts in particular.

In dealing with the first aspect, the court referred to extensive authority on the subject of the duties of a FSP. Generally, a provider of financial services will be under an implied if not express contractual duty to exercise reasonable care and skill in carrying out the services required of him. The standard of care and skill will be, at least in most respects, that to be expected of a like provider engaged to provide the relevant services.

The court pointed out that the defendant was aware that the plaintiff was in a vulnerable position and was anxious about not losing any of her investment. There were sufficient red flags around the investment scheme to require that he proceed with caution in advising the plaintiff. His poor advice was indicative of lack of skill, care and dili-

gence and was not commensurate with the exorbitant commission received by the defendant.

With regard to the second aspect, namely that of the third party action against the insurer, the court held that the insurer had placed too much emphasis on the wording of the exclusion clause and in doing so, disregarded the purpose of the insurance contract entered into between defendant and the insurer. The insurer had undertaken to indemnify the defendant against losses arising out of any legal liability arising from claims first made against the defendant and reported during the period of insurance for breach of duty in connection with his business by reason of any negligent act, error, or omission, committed in the conduct of the defendant's business. The exclusion clause had to be interpreted restrictively so that it made business sense in the eyes of both insurer and insured.

The defendant was ordered to pay the plaintiff the capital amount of R 2 million and interest as set out in the court order. The third party was ordered to indemnify the defendant against the defendant's liability to plaintiff, subject to the limitations referred to above.

Nature of proceedings before Enforcement Committee: In *Pather and Another v Financial Services Board and Others* 2018 (1) SA 161 (SCA); [2017] 4 All SA 666 (SCA) the court was asked to consider the nature of proceedings before the Financial Services Board's (FSB) Enforcement Committee (EC). The facts were that the Directorate of Market Abuse (the DMA) conducted an investigation in terms of s 83(1) of the Securities Services Act 36 of 2004 (the Act) into the two appellants. The first appellant, Pather, was the Chief Executive Officer of the second appellant, Ah-Vest Ltd.

The DMA investigation concluded that the two appellants contravened s 76 of the Act. The matter was referred to the EC of the FSB where 'it was established on a balance of probability that Pather authorised the manipulations'

of [the second appellant's] books. The EC imposed various administrative penalties in the amount of R 3 million on the two appellants.

The two appellants lodged a review application with the GP. They argued that the EC had incorrectly applied the civil standard of proof and that the EC should have applied the criminal standard of proof (that is, 'beyond reasonable doubt'). Their application was dismissed.

On appeal to the SCA, Ponnan JA held that the powers of the EC and the Appeal Board are limited to the imposition of a monetary penalty. In proceedings before the EC, neither the police nor the prosecutorial authority is involved. That the facts underpinning the complaint can as well give rise to a criminal offence does not alter the nature of the complaint before the EC.

In proceedings before the EC, there is no formal accusation of a breach of the criminal law. The proceedings are initiated by way of a complaint by the DMA to the EC, not a criminal charge. The proceedings before the EC do not lie within the criminal sphere and cannot be classified as being criminal in nature.

Section 104 of the Act provides that 'if a panel is satisfied that a respondent has contravened or failed to comply with the Act', it must impose an 'administrative penalty'. The civil standard of proof thus applies to proceedings before the EC. However, the civil standard of proof does not necessarily mean a bare balance of probability. The more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence before we should find the allegation proved on the balance of probabilities.

Finally, the court confirmed that the constitutional protection to ensure that administrative decisions may be reviewed in a court on grounds of unlawfulness, procedural unfairness or unreasonableness, is regulated in terms of s 33 of the Promotion of Administrative Justice Act 3

of 2000, and not in terms of s 35(3) of the Constitution.

The appeal was thus dismissed with costs.

Prescription

Date on which debt becomes due: In *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC); 2017 (12) BCLR 1562 (CC) the facts were as follows: On 1 September 2007 the respondent, Grindstone, borrowed an approximate R 3,05 million from the appellant, Trinity. The loan capital was immediately claimable from Grindstone, but it was a term of the agreement that it would only become payable once Grindstone had received the written demand and the notice period has expired.

Clause 2.3 of the agreement provided that: 'The Loan Capital shall be due and payable to the Lender within 30 days from the date of delivery of the Lender's written demand'.

On 19 September 2013 Trinity enquired from Grindstone when the latter would pay the outstanding debt. On 9 December 2013, Trinity, by service of the sheriff, delivered a letter of demand on Grindstone. No payment was forthcoming. Instead, Grindstone denied liability on the basis that the debt had prescribed.

In the WCC, Trinity applied for a provisional order of liquidation of Grindstone. The High Court held that the debt of Grindstone had been extinguished by prescription and, by reason thereof, dismissed Trinity's application.

In a split decision, the SCA confirmed the High Court's decision that the clause in question did not contain a clear indication that prescription would be postponed.

On appeal to the CC the case was decided by majority decision of six to five, mainly on the interpretation of the relevant clause and not the applicable principles. The minority decision relied heavily on the reasoning by the minority in the SCA on the interpretation of clause 2.3 of the agreement.

The majority per Cameron J held that prescription started on the day that the loan was advanced and the

parties' written agreement did not postpone it. The minority judgment placed undue significance on the term 'due' in the clause in deciding whether the parties intended to postpone prescription.

The court referred to a long line of earlier SCA decisions in which the court had interpreted the meaning of 'due' in s 12(1) of the Prescription Act 68 of 1969. On the basis of these decisions the court held that the concept of 'due' means that 'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'. Thus, prescription cannot begin to run against a creditor before his cause of action is fully accrued.

A loan payable on demand is thus due immediately on conclusion of the contract unless there is a clear contrary agreement between the parties that it will become due at a later stage. The fact that payment was due 30 days after demand makes no difference to the fact that the debt is due immediately for purposes of the Prescription Act. The creditor has the exclusive power to demand that performance be made any time after the agreement.

In the present agreement, the word 'due' was used in different contexts and it clearly indicated that the parties had no intention to postpone prescription.

Ultimately, it is a question of fact whether the parties intended demand to be a condition precedent for the debt to be 'due'. Each case has to be decided on its own fact.

The appeal was accordingly dismissed with costs.

Unjust enrichment - payment made in error

Prove of excusability of error not always a requirement: In *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* [2017] 4 All SA 705 (SCA) the respondent, Medshield, was a medical scheme registered in terms

of the Medical Schemes Act 131 of 1998 (the Act). It sued the appellant, Yarona, for payments allegedly made in the *bona fide* and reasonable, but mistaken belief that they were owing. It was averred that Yarona was unjustifiably enriched by the payments and Medshield correspondingly impoverished. Medshield's relied on the *condictio indebiti*.

Rogers AJA held that it is not every mistake which entitles the mistaken party to recover payment. The onus rests on the claimant to prove the excusability of the error. Having regard to each of the payments made to Yarona, the court found that other than for one of the payments, it could not be said that they were excusable.

Faced with that reality, Medshield argued that the requirement of excusability should be relaxed in the case of medical schemes. The court dismissed Medshield's argument. Healthcare is a matter of fundamental importance to everyone. Medical schemes provide a way of ensuring as far as possible that people have access to adequate healthcare. Members of medical schemes are particularly vulnerable to abuse. Many of them earn modestly. If the funds which should be administered for their benefit are abused, they stand not only to lose moneys deducted from their earnings but to have their access to healthcare jeopardised. The persons charged with the administration of the scheme can be viewed as representatives standing in a similar position to executors, trustees and liquidators. In that light, although Medshield had failed, in respect of all but one of the payments, to prove that such payments were made as a result of excusable error, its right to recover them by way of the *condictio indebiti* was not barred.

Yarona, in turn, contended that Medshield was required to prove not only that Yarona was enriched by the amounts claimed but also that such enrichment occurred at Medshield's expense, that is, that Medshield was impoverished by the amounts claimed. Since Yarona received unowed mon-

neys, its enrichment was presumed and it bore the onus to plead and prove loss of enrichment, which it did not do. It argued however, that Medshield failed to prove its impoverishment, as it had benefited from the services rendered by Yarona.

The court rejected Yarona's argument. It held that whenever a mistaken payment was made, Medshield was impoverished by the relevant amount. For Yarona to seek to rely on any enrichment caused by its having rendered services to Medshield, it should have instituted a *condictio* against Medshield by way of a counterclaim.

The appeal was thus 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, civil procedure, company law, contempt of court, criminal law, environment, funding of political parties, immigration, labour law, mineral law, personal injury and privacy and dignity.



Have you read a recent law report that you want to give your opinion on?

Or would you like to write a comprehensive case note on an interesting case?

Then have a look at the *De Rebus* writing guidelines and send your article to:

derebus@derebus.org.za



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

Bills

Public Investment Corporation Amendment Bill B1 of 2018.

Commencement of Acts

Children's Amendment Act 17 of 2016 and the Children's Second Amendment Act 18 of 2016. *Commencement:* 26 January 2018. GN49 GG41399/26-1-2018.

Promulgation of Acts

Legal Practice Amendment Act 16 of 2017. *Commencement:* To be proclaimed (see the amended s 120). GN33 GG41389/18-1-2018 (also available in isiXhosa).

Insurance Act 18 of 2017. *Commencement:* To be proclaimed. GN32 GG41388/18-1-2018 (also available in Afrikaans).

Selected list of delegated legislation

Allied Health Professions Act 63 of 1982

Unprofessional conduct: Prohibition of multilevel marketing, perverse incentives and franchising. BN1 GG41386/19-1-2018.

Civil Aviation Act 13 of 2009

Eighteenth Amendment of the Civil Aviation Regulations, 2017. GN R13 GG41379/12-1-2018.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Amendment of sch 4: Manner of calculating compensation. GN17 GG41382/16-1-2018.

Increase in monthly pensions. GN18 GG41382/16-1-2018.

Increase of the maximum amount of earnings on which the assessment of an employer shall be calculated. GN16 GG41382/16-1-2018.

Convention on the International Recognition of Rights in Aircraft Act 59 of 1993

Third amendment of the Mortgaging

of Aircraft Regulations, 2017. GN R31 GG41387/19-1-2018.

Higher Education Act 101 of 1997

Regulations for the registration of private higher education institutions: Application for amendment form. GN41 GG41399/26-1-2018.

Regulations for the registration of private higher education institutions: A guide for completing the application for registration as a private higher education institute. GN43 GG41399/26-1-2018.

Regulations for the registration of private higher education institutions: Annual reporting form. GN42 GG41399/26-1-2018.

Regulations for the registration of private higher education institutions: A guide for completing an application for amendment. GN44 GG41399/26-1-2018.

Liquor Products Act 60 of 1989

Amendment of the limitation on use of certain particulars in sale of liquor products. GN4 GG41370/5-1-2018 (also available in Afrikaans).

Magistrates' Courts Act 32 of 1944

Appointment of one or more places within each district for the holding of a court for such district (Cape Town). GN61 GG41414/31-1-2018.

Occupational Diseases in Mines and Works Act 78 of 1973

Increase of pension benefits. GN60 GG41410/26-1-2018 (also available in Afrikaans).

Promotion of National Unity and Reconciliation Act 34 of 1995

Increased amounts in terms of reg 8(2)(a) of the regulations relating to assistance to victims in respect of basic education. GN R12 GG41378/12-1-2018 (also available in Afrikaans).

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of traditional leaders, members of provincial houses of traditional leaders and members of national house of traditional leaders for 2017/18. Proc1 GG41372/4-1-2018.

Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support (R 266 200 with effect from 31 January 2018). BN4 GG41399/26-1-2018 (also available in Afrikaans).

Draft Bills

Draft Public Audit Amendment Bill. GenN9 GG41386/19-1-2018.

Draft delegated legislation

Amendment of the policy for quality assurance of private learning centres, private further education and training colleges and accreditation of private assessment bodies in terms of the General and Further Education and Training Quality Assurance Act 58 of 2001 for comment. GN8 GG41370/5-1-2018.

Fee guideline and schedules pursuant to the guideline in terms of reg 19(13) in terms of the National Credit Act 34 of 2005 for comment. GenN8 GG41377/12-1-2018.

Proposed regulations to exclude a waste stream or a portion of a waste stream from definition of waste in terms of the National Environmental Management: Waste Act 59 of 2008. GN14 GG41380/12-1-2018.

Draft owner builder exemption application form in terms of the Housing Consumer Protection Measures Act 98 of 1998. BN2 GG41386/19-1-2018.

Regulations on additional functions assigned to the National Student Financial Aid Scheme (NSFAS) in terms of the National Student Financial Aid Scheme Act 56 of 1999 for comment. GN34 GG41390/19-1-2018.

Draft Asbestos Abatement Regulations in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN R29 GG41387/19-1-2018.

Draft rural education policy in terms of the National Education Policy Act 27 of 1996 for comment. GN36 GG41399/26-1-2018.

Determination of permit fees under s 23(2)(a) of the National Railway Safety Regulator Act 16 of 2002 for comment. BN25 GG41399/26-1-2018.

Lift, escalator and passenger conveyor regulations: Incorporation of the code of practice for inspection and testing of lifts in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN R52 GG41400/26-1-2018.



Employment law update



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

Section 197 transfer

In *Fraser Alexander (Pty) Ltd v Tswelopele Beneficiation Operation (Pty) Ltd and Others* [2017] 12 BLLR 1251 (LC), the applicant had been contracted to perform maintenance and management work on a dam in terms of an agreement which expired. Prior to the expiry of the agreement the respondent put the work out to tender, but did not appoint another contractor. Instead, the respondent performed limited maintenance work itself and then appointed another contractor to perform remedial work, as the applicant's performance under the contract had not been up to standard. The applicant alleged that the remedial work formed part of the general maintenance work and, therefore, fell within the scope of the agreement that it had had with the respondent. Accordingly, the applicant alleged that the agreement between the respondent and the new contractor constituted a transfer of a business as a going concern in terms of s 197 of the Labour Relations Act 66 of 1995.

The respondent's evidence was that the contractor had been appointed for a limited duration to simply perform remedial work and not the normal management and maintenance work, after which another contractor would be appointed.

Whitcher J considered the facts and found that none of the applicant's tools, machinery or assets transferred to the respondent or the new contractor. Furthermore, no employees were transferred to the respondent or the new contractor by the applicant. The new contractor used 25 of its own employees to perform the remedial work whereas the applicant sought to transfer 65 of its employees to perform this work. Furthermore, the work performed by the new contractor was substantially different and was of a short term duration albeit that there

were some similarities. In this regard, while the applicant may have performed some remedial work, this remedial work was incidental to its main business. On the other hand, the essence and totality of the new contractor's business was remedial work. The purpose of the applicant's work was to prevent defects from occurring whereas the purpose of the new contractor's work was to repair defects that had occurred.

Whitcher J commented that there cannot be a transfer of a business as a going concern when a contract is terminated for non-performance like it was in this case as it would not be possible for the service to continue seamlessly. In this case, extensive remedial work had to be done first as the dam had become inoperable. Whitcher J also remarked on the impracticalities of s 197 applying to these set of facts as the employees would have to transfer to the respondent for a week, then to the interim contractor for three months and then to a new service provider, once appointed. The application was dismissed.

Dismissal for operational requirements

In *South African Breweries (Pty) Ltd v Louw* [2018] 1 BLLR 26 (LAC), the applicant restructured its business in the Eastern Cape. The respondent's role of sales manager was proposed to be made redundant and the functions that he performed would be subsumed into a new role of area manager. This new role had greater responsibilities than the sales role as it encompassed management functions and operations, as well as the sales functions. It was also at a higher management level than his current role. The respondent was not successful in applying for the area manager role and was retrenched. The Labour Court (LC) found that the dismissal was unfair and ordered reinstatement. The applicant took the matter on appeal alleging that this decision was based on findings of fact that were not pleaded or recorded in the pre-trial minute and were not supported by the evidence.

The LC found that the dismissal was unfair as the respondent could have

been given an alternative position in another town. Furthermore, the LC found that fair selection criteria had not been applied as performance ratings of the candidates interviewed had been considered when making the appointment for the new area manager role. This was not recorded in the pre-trial minute but the LC found that the alternative position and selection criteria could be read into the pre-trial minute from the pleadings.

This was held by the Labour Appeal Court (LAC) to be incorrect. In this regard, the LAC stated that in order for there to be a fair trial each side needs to know the case that they are required to meet. A court cannot tolerate a party making up the case as they go along as this would result in disorderly litigation. The purpose of a pre-trial minute is to narrow down the issues. Thus, a litigant cannot go back to the broader pleadings unless an amendment to the pre-trial minute is agreed. In practice, a pre-trial minute often contradicts the pleadings as issues are narrowed down. It is thus essential to give careful consideration to what is included in a pre-trial minute as the court cannot undo what the parties have confined themselves to in the pre-trial minute. In this case, the alternative position in another town was not recorded in the pre-trial minute. Furthermore, the applicant never applied for this alternative position despite being invited to do so.

It was held by the LAC that it was appropriate for the applicant to invite the respondent to apply for the new role. Performance was not used as a selection criterion as alleged by the respondent but rather the fact that the role was being made redundant and he was the incumbent of the role was the selection criterion. The respondent's past performance was not the selection criterion but became relevant in determining the employee's suitability for the new role. It was held by the LAC that being required to compete for a new role is not a method of selection for retrenchment but is a legitimate method for seeking to avoid the retrenchment of a displaced employee. The respondent had also not objected to the selection process at the time. The appeal was upheld with costs.



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

Identifying the correct cause of action

Ekurhuleni Metropolitan Municipality v SAMWU and Others (LAC) (unreported case no JA56/2015, 18-2-2017) (Sutherland JA with Musi JA and Coppin JA)

On 11 February 2011 an internal disciplinary hearing was brought to an abrupt end when violence broke out. The chairperson was assaulted, his cellphone thrown against the wall and the recording device damaged.

All the employees who came before the chairperson were dismissed for their actions on 11 February for either participating in, alternatively inciting unruly behaviour. The employees were informed of their dismissals by way of a notice without being subjected to an internal hearing.

The second respondent employee referred a dismissal dispute to the bargaining council. At arbitration the employee denied she took part in or incited the violence on the day in question. The appellant employer led evidence of witnesses who testified that she tried to prevent others entering the room to assist the chairperson and was shouting 'hit him, hit him'.

In accepting the employer's version, the arbitrator found the employee's dismissal substantively fair, but procedurally unfair. Relying solely on the Labour Relations Act 66 of 1995 (LRA), the arbitrator found there was no reason why the employer could not hold an inquiry as envisaged in sch 8 of the Code of Good Conduct annexed to the LRA. However, given the magnitude of the misconduct, the arbitrator declined to award the employee any compensation flowing from her procedurally unfair dismissal.

On review, the first respondent union, on behalf of the employee, raised the following grounds to set aside the award –

- the arbitrator erred in not awarding compensation after having found the employee's dismissal procedurally unfair;
- the arbitrator was wrong to reject the employee's version of events;
- the finding that the employee showed

no remorse could not be sustained in the absence of an internal inquiry; and

- the dismissal was in breach of a collective agreement and the arbitrator's failure to address this point was reason alone to set aside the award.

The Labour Court (LC) focussed largely on the last ground raised. It was common cause that a collective agreement between the union and employer afforded an employee the right to a disciplinary hearing before an employee is met with any sanction. The court found that the arbitrator's failure to address the non-compliance with the collective agreement resulted in him misdirecting himself as to the nature of the inquiry and that he ought to have 'examined and applied the collective agreement'. The court set aside the award and remitted the matter to the bargaining council.

On appeal the employer argued that the court *a quo* misdirected itself by failing to recognise the proper cause of action referred to arbitration – the employee referred an unfair dismissal dispute and not a dispute about the application of a collective agreement.

In addressing this argument, the Labour Appeal Court (LAC) held:

'The submission is sound. Indeed, a claim based on a breach of a collective agreement is one that is regulated by section 24 of the LRA. The dispute referred in this case is about an alleged unfair dismissal and is regulated by section 191 of the LRA. Moreover, the relief sought is that which is regulated by section 193 of the LRA which provides remedies for unfair dismissals, not breaches of a collective agreement.'

In addition, the LAC referred to its own judgment in *Highveld District Council v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 517 (LAC) and quoted the following extract:

'The relevant issue referred to the arbitrator was whether the respondent's dismissal was procedurally fair. Put differently, the respondent sought to vindicate his right in terms of s 185 of the Labour Relations Act 66 of 1995 (the Act) not to be unfairly dismissed. More specifically, the respondent sought to vindicate his right in terms of s 188(1) (b) of the Act to be dismissed only in accordance with a fair procedure. It is a right separate and distinct from the respondent's contractual rights in terms of the collective agreement.

...

It does not follow ... that a contractual procedure does not give rise to contractual rights that a contracting party can enforce in the appropriate forum and in the appropriate manner. In this case, however, we are not called upon to adjudicate a contractual right, but a statutory right to a dismissal that is procedurally fair.'

Following this the LAC held that the court *a quo* incorrectly approached the matter by conflating an unfair dismissal dispute with a dispute concerning the application of a collective agreement.

In assessing the arbitrator's findings against the test set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), the LAC concluded that the remaining attacks raised against the award stood to fail. The LAC did, however, observe, on two separate occasions in its judgment, that in the absence of a cross review against the finding that the employee's dismissal was procedurally unfair, it could not disturb the arbitrator's finding on this specific issue.

The appeal was upheld with costs and the arbitration award confirmed.

Commentary

It is clear that the employee's contractual right to a disciplinary hearing before being dismissed, as found in the collective agreement, was breached. Thus, it was open for her to refer a contractual dispute to the LC and sue the employer for damages. Had she embarked on this cause of action, her dispute would fall squarely within the confines of a contractual dispute where the tenet of lawfulness as opposed to fairness, would be the determining yardstick.

Elaborating on this point, in *Denel (EDMS) Bpk v Voster* 2004 (4) SA 481 (SCA), the employer adopted a two-stage approach in disciplining its employees; an employee would first come before a disciplinary committee, which if finding the employee guilty of the charge, would recommend the sanction to certain identified managers. The policy gave the managers the authority to accept or reject the committee's recommendations. This procedure formed part of the employee's terms and conditions of employment.

The respondent employee was subjected to a hearing before the disciplinary committee and having been found guilty of the charges put to him, the committee took it on itself to dismiss the employee without following the second stage of the disciplinary process. The employee successfully sued the employer in the High Court for breach of contract. On appeal, the Supreme Court of Appeal (SCA) held that the disciplinary policy adopted by the employer was a fair one, but rejected the argument that the alternate process used to dismiss the employee was 'just as good'. When an employer agrees to or compiles with a specific policy, it is not a defence in a contractual dispute to argue that any deviation from the policy is just as fair as the policy itself. The SCA held the employer was obliged to follow and implement its own policy and could not unilaterally depart from same. The appeal was dismissed with costs.



By
Meryl
Federl

Recent articles and research

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

Accessing articles from publishers

- For LexisNexis articles contact: customercare@lexisnexis.co.za for the publication details.
- For individual journal articles pricing and orders from Juta contact Michelle Govender at mgovender@juta.co.za.
- For journal articles not published by LexisNexis or Juta, contact the Kwa-Zulu-Natal Law Society Library through their helpdesk at help@lawlibrary.co.za (their terms and conditions can be viewed at www.lawlibrary.co.za).

| Abbreviation | Title | Publisher | Volume/issue |
|-----------------|---|---------------------------------------|-----------------------------------|
| <i>Advocate</i> | Advocate | Bar Council of South Africa | (2017) December |
| <i>AHRLJ</i> | African Human Rights Law Journal | Pretoria University Law Press (PULP) | (2017) 17.2 |
| <i>IPLJ</i> | South African Intellectual Property Law Journal | Juta | (2017) 5.1 |
| <i>Litnet</i> | LitNet Akademies (Regte) | Trust vir Afrikaans Onderwys | (2017) December |
| <i>PER</i> | Potchefstroom Electronic Law Journal | North West University, Faculty of Law | (2017) December (2018) January |
| <i>SALJ</i> | South African Law Journal | Juta | (2017) 134.4 |
| <i>SAYIL</i> | South African Yearbook of International Law | Juta | (2016) |
| <i>SJ</i> | Speculum Juris | University of Fort Hare | (2016) 30.1 (2016) 30.2 |
| <i>SLJ</i> | Stellenbosch Law Review | Juta | (2017) 28.2 |

Access to information

Salau, AO 'The right of access to information and national security in the African regional human rights system' (2017) 17.2 *AHRLJ* 367.

Administrative law

Van Coller, H 'Geloofsinstellings en die hersieningsbevoegdheid van die howe' (2017) December *LitNet*.

Civil procedure

Broodryk, T 'Strategic considerations in global litigation: Comparing judicial case management approaches in South Africa with the United States' (2017) 28.2 *SLJ* 379.

Company law

Thabane, T and Snyman-van Deventer, E 'Pathological corporate governance deficiencies in South Africa's state-owned companies: A critical reflection' (2018) January *PER*.

Court administration

Rabkin, F 'Court records a new tool for accountability' (2017) December *Advocate* 57.

Constitutional law

Chitimira, H 'Selected challenges and prospects of the Zimbabwe Constitution of 2013 in the protection of human rights and constitutional democracy in Zimbabwe' (2017) 28.2 *SLJ* 354.

Kibet, E and Fombad, C 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17.2 *AHRLJ* 340.

Ntlama, N 'The "Treadmill Approach" in South Africa's constitutional adjudication process' (2016) 30.1 *SJ* 32.

Credit law

Brits, R 'The National Credit Act's remedies for reckless credit in the mortgage context' (2018) January *PER*.

Vessio, M 'Section 127 of the National Credit Act: A form of statutory repudiation – how it modifies the common law' (2016) 30.1 *SJ* 67.

Criminal law

Bellengère, A "'We'll teach you a lesson": The role of the SCA as educator and disciplinarian – a note on *S v Mashinini* 2012 (1) SACR 604 (SCA) and *S v MM* 2012 (2) SACR 18 (SCA) with reference

to *S v Kolea* 2013 (1) SACR 409 (SCA)' (2016) 30.2 *SJ* 1.

Customary international law

Ozubide, A 'How the use of force against non-state actors transformed the law of self-defence after 9/11' (2016) *SAYIL* 1.

Delict

Okpaluba, C 'Does "prosecution" in the law of malicious prosecution extend to malicious civil proceedings? A Commonwealth update (part 1)' (2017) 28.2 *SLJ* 402.

Education law

De Freitas, SA 'The protection of public schools with a religious ethos in South Africa against the background of *Zylberberg v Sudbury Board of Education*' (2017) 28.2 *SLJ* 424.

Environmental rights

Bilchitz, D 'Exploring the relationship between the environmental right in the South African Constitution and protection for the interests of animals' (2017) 134.4 *SALJ* 740.

Family law

Bonthuys, E 'Has the time come to abolish or adapt the husband's common-law right to his wife's domestic services?' (2017) 28.2 *SLJ* 336.

Carnelley, M 'The impact of the abolition of the third party delictual claim for adultery by the Constitutional Court in *De v RH* (CCT 182/14) [2015] ZACC 18' (2016) 30.1 *SJ* 1.

Epstein, CA and Zaal, N 'End of the road for breach of promise claims? *Cloete v Maritz* 2013 (5) SA 448 (WCC) and *Cloete v Maritz* SAFLI [2014] ZAWCHC 10' (2016) 30.1 *SJ* 80.

Housing law

Tshehla, B 'Eviction in the rental housing sector in South Africa' (2016) 30.2 *SJ* 39.

Human rights

Anifalaje, K 'Implementation of the right to social security in Nigeria' (2017) 17.2 *AHRLJ* 413.

Agbor, AA 'Pursuing the right to an effective remedy for human rights violation(s) in Cameroon: The need for legislative reform' (2017) December *PER*.

Botha, J 'Towards a South African free-speech model' (2017) 134.4 *SALJ* 778.

Botha, J and Govindjee, A 'Prohibition through confusion: Section 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2017) 28.2 *SLJ* 245.

De Villiers, I 'Spatial justice, relationality and the right to family life: A discussion of *Hattingh v Juta* 2013 (3) SA 275 (CC)' (2017) 28.2 *SLJ* 487.

Gumboh, E 'Correct but wrong: A critical analysis of recent jurisprudence on the proper test for release pending appeal applications in Malawi' (2017) 17.2 *AHRLJ* 436.

Khalil, AA 'The direct application of the Constitution by ordinary courts and the concept of Shari'a as a source of legislation: A review of the Sudanese Supreme Court's decision in *Sudan Government v ASK*' (2017) 17.2 *AHRLJ* 460.

Rukundo, S 'Criminals or activists? Finding the space for hacktivism in Uganda's legal framework' (2017) 28.2 *SLJ* 508.

Humanitarian law

Fowkes, J 'Armed conflicts and the *Lex Specialis* debate in Africa: Implications of the emerging women's and children's-rights regimes' (2016) *SAYIL* 73.

Insurance law

Stander, AL and Kloppers, HJ 'Verandering en verhoging van die risiko tydens die termyn van die versekeringskontrak' (2017) 28.2 *SLJ* 466.

Intellectual property

Alberts, W 'The promotional use of a trade mark: Its potential to have significance' (2017) 5.1 *IPLJ* 1.

Amechi, EP 'Whose knowledge is it anyway? Traditional healers, benefit-sharing agreements and the communalism of traditional knowledge of the medicinal uses of plants in South Africa' (2017) 134.4 *SALJ* 847.

Du Bois, M 'The appropriate scope of property rights in registered designs' (2017) 5.1 *IPLJ* 34.

Hobololo, V 'A critical analysis on the right of university technology transfer offices to develop intellectual property policies: Reflections on the IPR Act' (2016) 30.2 *SJ* 13.

Job, C 'The value judgment conundrum: A critical review of recent trade mark appeal decisions' (2017) 5.1 *IPLJ* 143.

Mujuzi, JD 'Private prosecution of copyright infringements in Kenya: A comment on *Albert Gacheru Kiarie t/a Wamaitu Productions v James Maina Munene & 7 others* [2016] EKLr 1' (2017) 5.1 *IPLJ* 172.

Mupangavanhu, Y 'The protection of scent, taste and sound marks in South Africa: Threats and possibilities' (2017) 5.1 *IPLJ* 33.

Nzomo, V and Rutenberg, I 'Patenting the un-patentable: Lessons for African patent systems from a review of patent subject matter exclusions in Kenya' (2017) 5.1 *IPLJ* 58.

Okojie, AE and Umore, GL 'Counterfeiting and piracy: Challenges to effective protection of intellectual property rights in Nigeria' (2017) 5.1 *IPLJ* 115.

Olubiyi IA and Adam, KI 'An examination of the adequacy of the regulation of collecting societies in Nigeria' (2017) 5.1 *IPLJ* 89.

Shay, RM '*Moneyweb (Pty) Ltd v Media 24 Ltd & Another* [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ)' (2017) 5.1 *IPLJ* 159.

Wrensch, JJ and Koornhof PGF 'Video game modification in South Africa' (2017) 5.1 *IPLJ* 75.

International criminal law

Barrie, G 'A synopsis of the International Law Commission's final report on the obligation to extradite or prosecute' (2016) *SAYIL* 203.

International law

Lubaale, EC 'The first cultural-property conviction at the ICC: An analysis of the *Al Mahdi* judgment' (2016) *SAYIL* 126.

Lubbe, HJ '*Democratic Alliance v Minister of International Relations and Co-operation* 2017 (3) SA 212 (GP)' (2016) *SAYIL* 242.

Swanepoel, CF 'Is a permanent African Criminal Court likely soon considering the continent's post-colonial response to international criminal justice?' (2016) 30.1 *SJ* 15.

Swart, M and Ramsden, C 'A shrewd awakening: The mobilisation of South African civil society in the *Al Bashir* matter' (2016) *SAYIL* 215.

Tladi, D 'Progressively developing and codifying international law: The work of

the International Law Commission in its 68th session' (2016) *SAYIL* 165.

International trade law

Oluyeju, O and Mafu, M 'The African Growth and Opportunity Act: A poisoned chalice handed to South Africa?' (2016) *SAYIL* 30.

Judicial officers

Diedericks, L 'The employment status of magistrates in South Africa and the concept of judicial independence' (2017) December *PER*.

Labour law

Calitz, K 'The precarious employment position of ministers of religion: Servants of god but not of the church' (2017) 28.2 *SLJ* 287.

Ebrahim, S 'A critical analysis of the new equal pay provisions relating to atypical employees in sections 198A - 198D of the LRA: Important lessons from the United Kingdom' (2017) December *PER*.

Ebrahim, S 'Reviewing the suitability of affirmative action and the inherent requirements of the job as grounds of justification to equal pay claims in terms of the Employment Equity Act 55 of 1998' (2018) January *PER*.

Gounden, S and Iyer, D 'Protecting Employees with HIV/Aids at the Workplace: A vicarious liability approach' (2016) 30.2 *SJ* 57.

Pretorius, JL 'The limitations of definitional reasoning regarding "quotas" and "absolute barriers" in affirmative action jurisprudence as illustrated by *Solidarity v Department of Correctional Services*' (2017) 28.2 *SLJ* 269.

Law of contract

McKerrow, RD 'Agreements to negotiate: A contemporary analysis' (2017) 28.2 *SLJ* 308.

Law of trusts

Wood-Bodley, MC 'Variation of the terms of a testamentary trust: *Hanekom v Voight NO*' (2017) 134. 4 *SALJ* 728.

Legal education

Colgan, D; Domingo, W and Papacostantis, H 'Change to a skills-based LLB Curriculum: A qualitative study of participants in a family law course' (2017) December *PER*.

Duminy SC, W 'Learnings and writing observations on written advocacy. From Aristotle and Horace to Robert Louis Stevenson up to "Quack this way: David Foster Wallace & Bryan A. Garner talk language and writing"' (2017) December *Advocate* 43.

Glasgow QC, E 'South African advocacy training: An example to the rest of the world' (2017) December *Advocate* 34.

Meiring J 'Advocacy training: There's method in the madness' (2017) December *Advocate* 30.

Legal profession

Williams, M 'Lawyers to take up the vanguard against fake news?' (2017) December *Advocate* 52.

Legal research

MacKenzie, P 'If only geese still laid golden eggs (article on Safflii)' (2017) December *Advocate* 53.

MacKenzie, P 'Treasure trove many take for granted Safflii, the friendly local law library has been around for fifteen years' (2017) December *Advocate* 55.

Maritime law

Vrancken, P 'Africa's Integrated Maritime Strategy and the law of the sea' (2016) *SAYIL* 97.

Marriage law

Smith, BS 'Perspectives on the juridical basis for taking (the value of) trust assets of alter-ego trusts into account for the purposes of accrual claims at divorce: *REM v VM*' (2017) 134.4 *SALJ* 715.

Personal injury law

Broodryk, T 'Individual issues and the

class-action mechanism: Determining damages in single-accident mass personal injury class actions' (2017) 134.4 *SALJ* 821.

Matlala, DM 'Problems of Serious Injury Assessment' (2016) 30.1 *SJ* 44.

Prisons law

Peté, SA 'A disgrace to the master race: Colonial discourse surrounding the incarceration of "European" prisoners within the Colony of Natal towards the end of the nineteenth and beginning of the twentieth centuries' (2017) December *PER*.

Property law

Cramer, R 'The abandonment of land-ownership in South African and Swiss law' (2017) 134.4 *SALJ* 870.

Ntsoane, LS 'The registration of special notarial bonds under the Security by Means of Movable Property Act and the publicity principle: Lessons from developments in Belgium' (2018) 21 January *PER*.

Viljoen, SM 'Substantive adjudication of the decision to expropriate property' (2017) 28.2 *SLJ* 444.

Reproductive rights

Savage-Oyekunle, OA and Nienaber, A 'Adolescents' access to emergency contraception in Africa: An empty promise?' (2017) 17.2 *AHRLJ* 475.

Kangaude, GD 'Adolescent sex and "defilement" in Malawi law and society' (2017) 17.2 *AHRLJ* 527.

Ofuani, AI 'Protecting adolescent girls with intellectual disabilities from involuntary sterilisation in Nigeria: Lessons from the Convention on the Rights of Persons with Disabilities' (2017) 17.2 *AHRLJ* 550.

Tax law

Du Plessis, I 'Can a trust be regarded as a person for purposes of a double-taxation agreement to which South Africa is a party?' (2017) 134.4 *SALJ* 907.

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



Lexis® Practical Guidance

YOUR PROFESSIONAL LEGAL HOW-TO GUIDE

WIN a Lenovo Tablet and one year's free access to LexisNexis Practical Guidance

The winner of the 2018 LexisNexis Prize for the best article contributed to *De Rebus* by a practicing attorney will receive a Lenovo Tablet, as well as 12 months free access to one practice area of Practical Guidance.

The first of its kind in South Africa, Lexis® Practical Guidance allows you to navigate the complexities of the legal landscape with easy-to-use practical aids that are conveniently accessible from a single digital platform. It's smart guidance for professionals.

With intuitive search features, regular content updates and quick links to deeper research tools, Lexis® Practical Guidance helps improve efficiency, reduce outsourcing costs and manage legal risk so that you can focus on what you do best.

Curated by top legal experts and designed by practice area, each module provides access to a multitude of guidance notes, commentary, case law, automated forms, precedents, checklists and other resources across all the topics you need.

The following conditions apply to entries: The article should not exceed 2 000 words in length and should also comply with the other guidelines for the publication of articles in *De Rebus*.

- The article must be published between 1 January 2018 and 31 December 2018.
- The Editorial Committee of *De Rebus* will consider contributions for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

Any queries and correspondence should be addressed to:
The Editor, *De Rebus*, PO Box 36626, Manlo Park, 0102.
Tel: 012 366 8800 Fax: 012 362 0969
Email: derebus@derebus.org.za



For more information on LexisNexis Practical Guidance visit our website on www.practicalguidance.lexisnexis.co.za

By
Ndivhuwo
Ishmel
Moleya

Appointment of sitting judges to preside over commissions of inquiry: A lawful but undesirable practice

On 9 January 2018, former President Jacob Zuma announced that he had decided to appoint a commission of inquiry to investigate the allegations of state capture contained in the former Public Protector, Thuli Madonsela's report entitled 'State of Capture'. In that report, the Public Protector proposed a remedial action, which partly required the president to appoint a commission of inquiry (the commission) 'headed by a judge' selected by the Chief Justice. It is now common cause that Chief Justice, Mogoeng Mogoeng, selected Deputy Chief Justice of the Constitutional Court (CC), Raymond Zondo, to preside over the commission. The appointment should be welcomed as it will bring integrity into the works of the commission. However, it brings into sharp focus the question of the appropriateness of appointing serving judges to preside over commissions of inquiry. This article explores this question.

The lawfulness of appointing sitting judges to preside over commissions of inquiry

Our law does not prohibit the appointment of judges, serving or retired, from presiding over commissions of inquiry. Section 84(2)(f) of the Constitution simply confers the president the power to appoint a commission of inquiry. The provision does not specify or prescribe who is eligible for appointment as a member of a commission of inquiry. Similarly, the Commissions Act 8 of 1947 (the Act) does not deal with this aspect. The Act merely empowers the president to make proclamations and/or regulations regarding the appointment of a commission of inquiry. It follows therefore, that the president is at liberty to appoint any competent candidate to serve as a member of a commission of inquiry. It has become a common practice to appoint retired judges, senior counsel or serving judges to preside over commissions of inquiry. The appointment of judges as members of a commission of inquiry was found to be constitutionally permissible in the case of *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC). In the *Heath* case, at para 34, the CC pointed out that '[i]n appropriate circumstances judicial

officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution.' The court, however, was careful to point out that '[i]t is undesirable ... to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office.'

The appointment of serving judges to preside over commissions of inquiry in South Africa (SA) is not unprecedented. In the Commission on the Ellis Park Disaster, the Hefer Commission, the Khampepe Commission and the Seriti Commission, serving judges were appointed. However, the appropriateness of the practice has received minimal attention. The appropriateness of the practice was, however, called into question in the case of *City of Cape Town v Premier, Western Cape, and Others* 2008 (6) SA 345 (C), at para 167, where a serving judge was embroiled in a dispute between political opponents.

Should sitting judges preside over commissions of inquiry?

The fact that it is lawful to appoint serving judges to preside over commissions of inquiry does not necessarily mean the practice is at all appropriate or desirable. This is indeed implied in the CC's observations in the *Heath* case where it pointed out that in 'appropriate circumstances judicial officers can no doubt preside over commissions of inquiry.' The statement implies that there may be certain circumstances where it would be inappropriate to appoint a serving judge to preside over a commission of inquiry. Indeed, commissions of inquiry are sometimes mandated to investigate socially and politically controversial issues of national interest. The public does not always welcome their findings. In some cases, their findings are challenged in the courts. Their findings may also form the basis of a civil or criminal action. The terms of reference of a commission of inquiry may require the commission to investigate broad, complex and politically sensitive issues, which require much time and undivided attention of the commissioners.

There are several reasons that militate against appointing sitting judges to pre-

side over commissions of inquiry. When a sitting judge is appointed to preside over a commission of inquiry, the appointee does not necessarily cease to be a judicial officer. Instead, the appointed judge continues to carry out normal duties as a member of the court unless given special leave. The judge will therefore have to perform both normal duties as a judicial officer and as a member of the commission. It can hardly be gainsaid that such a situation would affect the judge's normal duties as a judicial officer.

In the *Heath* case, at paras 29-30, the CC observed that the fact that the work that a judge is required to perform 'will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions' weighs against appointment to another post. Commissions of inquiry usually take longer to complete their mandate. Therefore, if a judge is granted special leave to serve as a member of a commission, the demands of the judicial office may be neglected.

In *Heath*, at para 45, the CC found that the 'indefinite nature of the appointment ... preclude[d] the head of the unit from performing his judicial functions.' More so, at para 43, it pointed out that '[w]hilst the length of the appointment is not necessarily decisive in the determination of the question whether the functions a judge is expected to perform are incompatible with the judicial office, it is ... a relevant factor.' Participation of a judge in commission of inquiry that is likely to take long may, therefore, 'impair his/her ability to carry out judicial functions' (*City of Cape Town* at para 182).

The observations of the Indian Supreme Court in *T. Fenn Walter & Ors vs Union Of India & Ors Appeal* (civil) 3993 of 2002 are apposite in this regard. In that case, the court stated that the 'appointment of Judges to head or chair a commission of inquiry or to perform other non-judicial work would create [an] unnecessary burden on the Judges and it would affect the administration of justice.' The court further observed that the work of commissions take a considerable amount of time and that if a 'sitting Judge is appointed, considerable time is lost and the Judge would not be in a position to attend to his regular judicial work.' These observations cannot be gainsaid.

The controversy that surrounds the works of commissions of inquiry also militate against appointing sitting judges as commissioners. Most of the investigations involve politically and socially controversial issues. In a compilation dealing with commissions of inquiry in Canada, Roderick Alexander Macdonald pointed out that although judges bring 'knowledge, experience and impartiality to the inquiry process', 'involving a sitting judge in what may turn into a partisan political issue can threaten the independence of the judiciary' and '[t]he reputation of the particular judge.' ('An Analysis of the Forms and Functions of Independent Commissions of Inquiry (Royal Commission) in Canada' at p 13) (www.mcgill.ca, accessed 16-1-2018).

In *Heath*, at paras 29-30, the CC observed that where, among other factors, the non-judicial work that a judge is required to perform 'creates the risk of judicial entanglement in matters of political controversy', the judge should decline appointment. It is so, because such controversies may muddle the integrity of the judge, and ultimately, the independence of the court in which the judge serves. The Goldenberg Commission of Inquiry in Kenya is a classic example of why it is not desirable to appoint serving judges to preside over commissions of inquiry. The report of that commission was a subject of controversy and multifarious litigation. It resulted in an awkward situation where a report compiled by a member of a superior court was impugned in the lower courts. All this led the Commission to recommend that 'no sitting judge should be appointed to head or participate in a public in-

quiry unless the Chief Justice has first satisfied himself that the nature of the intended public inquiry has no political implications.' The recommendations were based on the following reasons:

- Judges who serve in politically motivated inquiries run the risk of being dragged into politics and having their reputation for impartiality ruined.
- The tendency to sue members of commissions for things done as commissioners exposes judges to the risk of being condemned to personally pay costs of the suit.
- The appointment of serving judges keeps them away from their substantive duties for inordinately long periods to the detriment of litigants.
- Any shortcomings in the reports of commissions may follow the judge to the bench since there is no system of appeal through which the judge could be vindicated.

The controversial nature of issues investigated by commissions of inquiry is not always readily discernible. A seemingly non-controversial issue may, on investigation, turn out to be controversial. In the same way, an issue, which is thought to be suitable for a serving judge to investigate, may turn out to be a threat to judicial independence and the reputation of impartiality of that particular judge. This simply underscores the fact that the problems that come with appointing serving judges to preside over commissions of inquiry cannot be resolved by simply 'deciding in any particular case whether it is "appropriate" for a judge to involve him or herself, in the particular commission' (*City of Cape Town* at para 184).

In my view, the proper approach is espoused in the *City of Cape Town* case where the court stated that 'active judges should, as a matter of principle, not chair commissions of inquiry' (para 187). This approach obviates the need to grapple with the question whether it is "appropriate" for a judge to involve him or herself, in the particular commission.'

Conclusion

Although not unlawful, the practice of appointing serving judges to preside over commissions of inquiry should be avoided. If needs be, serving judges should only be appointed where it is crystal clear that the independence of the judiciary and reputation of impartiality of the particular judge will not be threatened, and where there are no other suitable candidates. There are clearly more plausible reasons to disqualify serving judges from presiding over commissions of inquiry than there are for appointing them. It is so that serving judges clothe the works of commissions with integrity, which is necessary to maintain public confidence in the process. More so, that they possess the necessary experience and skills required for conducting a commission of inquiry. However, less cannot be said of retired judges. They too possess these qualities. Moreover, they have more time at their disposal than sitting judges.

Ndivhuwo Ishmel Moleya LLB (Univen) is a candidate attorney at Adams & Adams in Pretoria. □

LOOKING FOR A CANDIDATE ATTORNEY?

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

This free of charge service operates as follows:

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

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

Should you wish to participate in this project, please feel free to contact: Dianne Angelopulo at (012) 441 4622 or e-mail: dianne@LSSALEAD.org.za



Picture source: Gallo Images/iStock



2018 Bound Statutes

Choose current premium content



Reputation is earned, there is no shortcut to success. It takes time to become a trusted name in the legal profession. Since 1934 we have consistently published premium titles that have earned their place in South Africa's most prestigious legal practices.

OUR BOUND STATUTES ARE NO EXCEPTION

The 2018 Bound Statutes offer a comprehensive collection of cross-referenced South African legislation. Updated to 16 March 2018, you can rely on the quality and accuracy of our Statutes to ensure you are on top of changes to the law.



LexisNexis Bound Statutes offer you:

- 8 comprehensive hard cover volumes.
- Acts arranged under 35 subject titles for ease of reference.
- A detailed Gazette Index.

Title: Statutes RSA:
Bound Volumes 1 to 8
ISBN: 180BDSTA18SYS
Price: R6,726.00
(incl VAT, excl delivery)

1+1+1+1+1= One

We've been internationally recognised* as the number 1 Private Bank and Wealth Manager in South Africa. 5 years in a row. For Investec. One Place™ – the seamless service experience that helps our clients create, grow and preserve their wealth, locally and internationally.



* Internationally recognised
by Financial Times of London



Out of the Ordinary®

 **Investec**