

A CRITICAL EVALUATION OF THE RABS BILL AND THE COMMON LAW RIGHT TO DELICTUAL CLAIMS

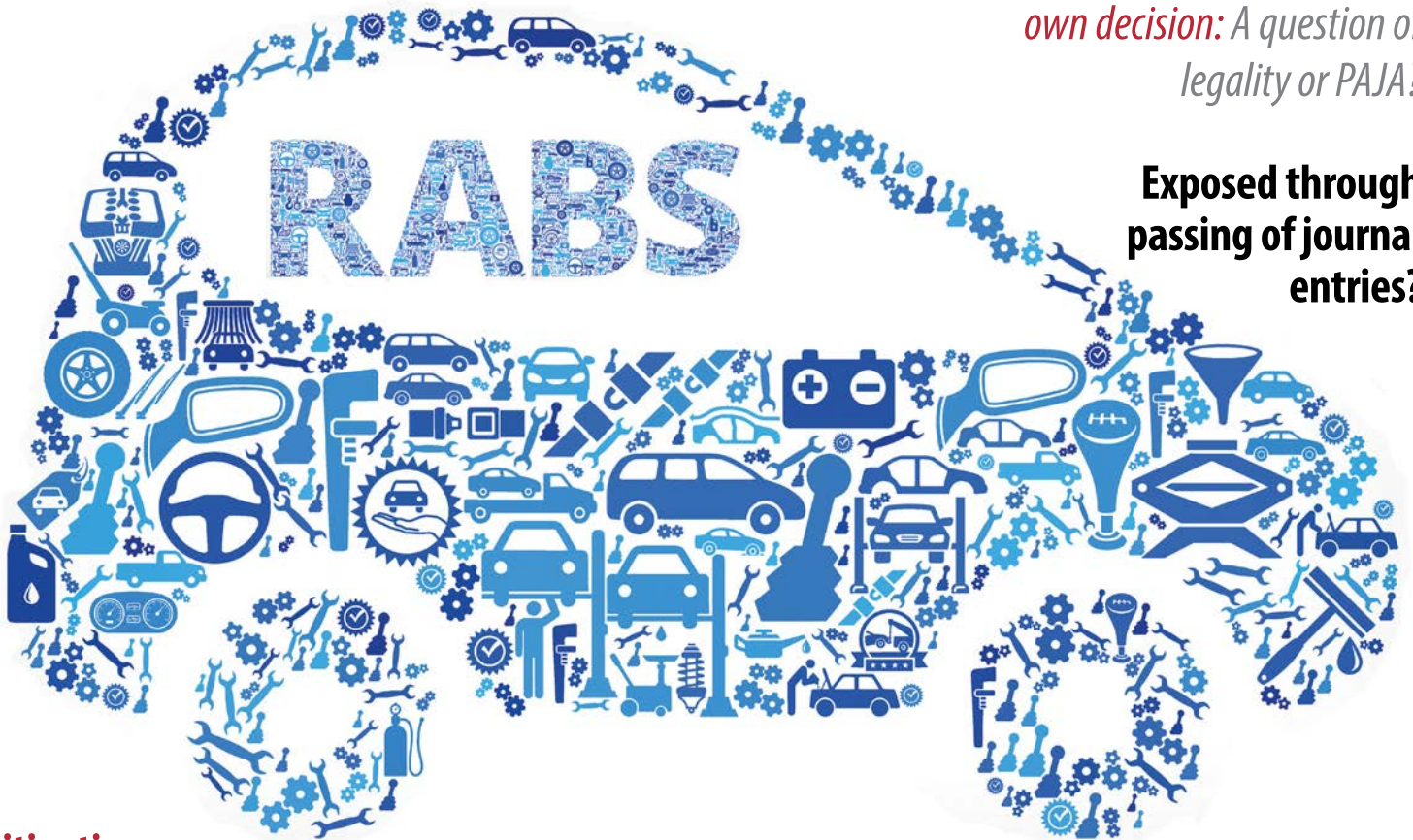
Excessive pricing to the
detriment of consumers

Dispassionate appointment
of the NDPP

Access denied:
Spoliation as remedy to director
denied access to workplace

*Organs of state seeking a review of
own decision: A question of
legality or PAJA?*

**Exposed through
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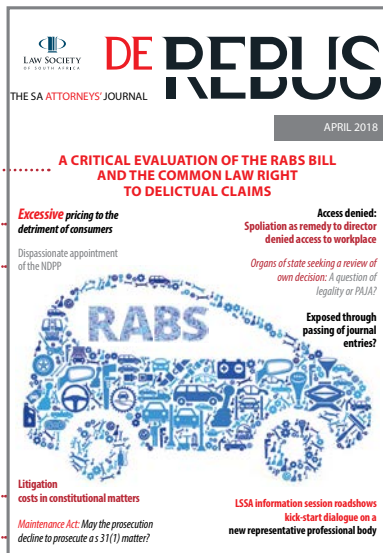
**Litigation
costs in constitutional matters**

*Maintenance Act: May the prosecution
decline to prosecute a s 31(1) matter?*

**LSSA information session roadshows
kick-start dialogue on a
new representative professional body**



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FEATURES

24 A critical evaluation of the RABS Bill and the common law right to delictual claims

In April 2017 the Minister of Transport gave notice in the Government Gazette (GenN 302 GG40788/18-4-2017) of the intention to introduce the Road Accident Benefit Scheme Bill, 2017 (RABS Bill) into Parliament in terms of r 241(1)(b) of the National Assembly. The RABS Bill excludes non-patrimonial benefits. **Prof Hennie Klopper** states that it has been suggested that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 presents a basis for RABS justifying the abolition of non-patrimonial compensation and the common law right to recover statutory regulated insufficient compensation. This point of view calls for critical evaluation.

28 Access denied: Spoliation as remedy to director denied access to workplace

Legal disputes are cropping up everywhere all the time. This is discernible by the many matters on our court rolls. **Nicholas Mgedeza** states that one needs to determine whether in the circumstances where a director is prevented from entering the workplace by the employer, what the expeditious legal remedy is. To be particular, he determines whether *mandament van spolie* (spoliation) is the appropriate remedy under the circumstance.

32 Organs of state seeking a review of own decision: A question of legality or PAJA?

Thenjiwe Vilakazi writes that on 14 November 2017, the Constitutional Court determined for the first time whether the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies when an organ of state seeks to review its own conduct. Ms Vilakazi discusses the matter of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC), where the State Information Technology Agency brought an application for leave to appeal the majority ruling of the Supreme Court of Appeal who had decided that PAJA applies to review applications instituted by organs of state.

36 Excessive pricing to the detriment of consumers

The definition of 'excessive price' in s 1 of the Competition Act 89 of 1998, as amended (the Act), is a price that 'bears no reasonable relation to the economic value of that good or service.' A product does not appear to assist the understanding of what is likely to be regarded as excessive pricing. **Mfundo Ngobese** submits that the adoption of this definition may well have been a deliberate position on the part of the legislature. Due to the openness of this definition it provides a good basis for adapting it to the South African economic context through case law.

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Legal education: Will we ever get it right?

While the profession ponders the effects of state capture, how land expropriation without compensation will be implemented and the future of practice under the Legal Practice Act 28 of 2014 (LPA). There are many other issues that the profession needs to grapple with as the LPA becomes fully operational. One such issue being legal education.

In our news section we cover the recently held Legal Education Conference where issues in and around education were discussed. Issues debated on legal education have been discussed in the past, but now is the opportune time to make the necessary changes as the profession transitions to regulation by the Legal Practice Council. The debates should not only include discourse on the worth of the LLB degree, the debates should also include the importance of practical vocational training (PVT) and how this would

be implemented in the future dispensation. An important part of one becoming a great legal practitioner is influenced by what they learn during their period as a candidate legal practitioner, so this part of legal education should not be left out in the discussions.

One of the contentious issues discussed at the Legal Education Conference is uniformed PVT. The Law Society of South Africa is of the view that PVT should be uniform for candidate attorneys and pupils, while the General Council of the Bar says that it should not be uniform. Another topic discussed at the conference is that the LPA requires that all candidate legal practitioners be paid a stipend. Currently pupils do not get paid, while candidate attorneys are paid, although unacceptably low salaries. Suggestions have been made for the Attorneys Fidelity Fund (AFF) to pay candidate legal practitioners, which might exhaust the capital of the AFF.



Mapula Sedutla - Editor

An important point of consideration that was made at the Legal Education Conference is the fact that the discussions on legal education are predominantly conducted by those who want to include themselves in the future of legal education, which they may not necessarily be part of. Society requires the legal fraternity to meet their demands in terms of service delivery, this means that legal practitioners of the future should be mindful of these demands while they are keeping up to date with the ever changing law.

The road to being a great legal practitioner is paved by the education that the legal practitioner receives, if this is not done adequately the rule of law, transformation of the legal fraternity and access to justice are in jeopardy (see p 6).

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- Please note that the word limit is 2000 words.
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LETTERS

TO THE EDITOR

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

South African lower courts through the eyes of a candidate legal practitioner

Janet Reno once said: 'Being a lawyer is not merely a vocation. It is a public trust, and each of us has an obligation to give back to our communities.' Being a legal practitioner is an amazing opportunity to fight for the rights of those who cannot fight their battles themselves. It is an opportunity to fend for the people of South Africa.

I knew that my two years of articles was not going to be a 'walk in the park'. Everyone warned me. 'Working eight to five is tiring', they said. 'Dealing with all types of different people requires special skills', they said. 'You are going to be one of the lowest people in the food chain', they said. To be quite frank, I really accepted all of the above when I commenced my law studies.

I prepared myself for the worst: An uncomfortable working environment, being faced with a matter, which I do not know anything about, sounding like an inexperienced toddler if I decided to voice my opinion and all other types of different, distasteful scenarios. What I did not prepare myself for, is the manner in which things are done at court.

First of all, the courts are not con-

cerned with time. It does not matter whether you have a taxation scheduled for 10:00 am or a trial that was set down, months ago, for 09:00 am. If you have to go to court you most definitely know that you are going to spend at least half a day there.

Secondly, the court clerks only assist you if they approve of your face. I am not being dramatic, it is really my take on the matter. The worst of all is the fact that they may like your face on Monday but despise it on Wednesday. This leads to documents that cannot be filed, papers that cannot be paginated, summonses and warrants that are not issued and stressed candidate legal practitioners who cannot explain to their principals why their work is not done.

Thirdly, it is an extraordinary day if the court personnel are actually available. In the past few weeks I have been confronted with closed or locked doors on more than one occasion, situations where I walked from floor to floor, and building to building where even the supervisor could not inform me of the whereabouts of her personnel. Then to add insult to injury, some of the personnel only pitched up at the office at 10:55 am and refused to help, because they were now entitled to a tea break.

Fourthly, a handful of court personnel are actually prepared to work. Adam says it's Eve and Eve says it is the snake.

You get referred to so many different people, and each and every one tells you exactly the same thing: 'It is not my job and I am not prepared to assist you with this. You should rather ask person A on the fourth floor'. Once you finally find person A's office, person A informs you that they no longer deal with s 65 Applications and that you should go back to person B on the first floor.

We all have the opportunity to better the life of South Africans. When I say we, I am referring to candidate attorneys, attorneys, advocates, magistrates, judges, clerks and court personnel. We are confronted with desperate and helpless people on a regular basis and delaying the court process only adds to the burdens that so many people have to carry.

Mariëtte Wright, candidate attorney,
Cape Town

Response to appropriate contact and maintenance guidelines for sperm donors

I wish to respond to the article by Anonymous 'Appropriate contact and maintenance guidelines for sperm donors' 2017 (Sept) *DR* 51. The article purports to deal with sperm donation, and calls



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for critical contemplation of how our law deals with the parental rights and responsibilities of sperm donors. The law regarding gamete donation in general is indeed subject to many well-deserved criticisms. However, any such criticism must be based on sound legal analysis. As I will show, this is unfortunately not the case with the article.

I should state upfront that the author contacted me to draw my attention to the article, and that we subsequently corresponded and met in person. This correspondence, which included court papers, did clarify important aspects regarding the litigation to which the author refers in the article. However, at the request of the author, I here limit my response to the content of the article.

Anonymous is a party to a parental rights and responsibilities legal dispute that is the subject of the article. This brings me to the first problem with the article, namely that it fails to cite the judgment of the case that it purports to discuss. No explanation is offered for the absent citation. The absence of a citation of the judgment is problematic for several reasons, most prominently the dearth of facts presented in the article itself, and the inherent danger that the author may not present the facts objectively.

The skimpy facts presented in the article are accompanied by some highly unlikely claims, such as the following: 'A report prepared by the Office of the Family Advocate, recommended a known sperm donor be granted full parental rights

and responsibilities, against the child's mother's wishes.' A possible explanation for this highly unlikely claim may be found in a statement made elsewhere in the article: 'The [Children's] Act is silent on ... whether gamete donors, in instances where intercourse is used, are excluded from the definition [of parent].' This statement is incorrect: Sections 1(1) and 26(2)(b) of the Children's Act 38 of 2005 both make it clear that gamete donation is only relevant for artificial fertilization, not sexual intercourse. Similarly, the Regulations Relating to Artificial Fertilisation of Person (GN R 175 GG 35099/2-3-2012), made in terms of the National Health Act 61 of 2003, clearly define a gamete donor as a 'living person from whose body a gamete or gametes are removed or withdrawn, for the purpose of *artificial fertilisation*' (my italics). If a child is conceived through sexual intercourse, the biological father can never be relegated to the position of mere sperm donor. However, as revealed by the statement ('... gamete donors, in instances where intercourse is used ...'), the author of the article clearly labours under the incorrect belief that sperm donation can take place through sexual intercourse. This incorrect belief may explain the unlikely claim by the author that the Family Advocate recommended that a 'known sperm donor' be granted full parental rights and responsibilities against the mother's wishes, as this could actually simply be a recommendation by the Family Advocate that a biological father who conceived the child through sexual

intercourse with the mother be granted full parental rights and responsibilities against the mother's wishes.

A further point of concern is that the author suggests that the best interests of the child should not be applied to cases where the parties have previously agreed on a contact regime that is the subject of a legal dispute. Even if such agreement can be proven, it is trite that the best interests of the child standard must be applied and will be paramount. The author's suggestion that parents can contractually exclude their child's constitutional rights is untenable in our constitutional dispensation.

In conclusion, sound legal analysis of the case to which the author of the article was a party would require at the very least an objective rendering of all the relevant facts, and a legally accurate interpretation of the concept 'sperm donor'.

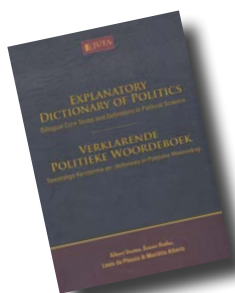
Dr Donrich Thaldar, senior lecturer,
Durban

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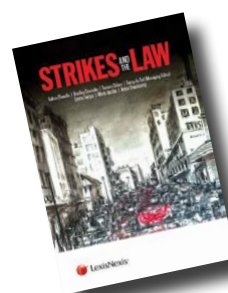
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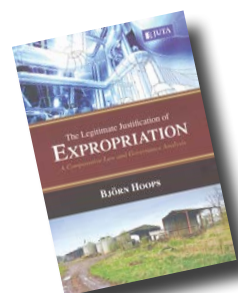
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BLA elects NEC

The Black Lawyers Association (BLA) reconvened the Elective Special General Meeting on 3 March in Durban. The special meeting was held to complete the adjourned Elective Annual General Meeting, which was held in October 2017 in Bloemfontein. The elective general meeting was adjourned due to technical glitches, which caused the delay in production of election materials.

According to a press release issued by the re-elected President of the BLA, Lutendo Sigogo, the elections were conducted by the Election Institute of South Africa (EISA), which delivered incident free elections as all the observers declared the elections free, fair and credible. The press release goes on to state that the newly elected National Executive Committee (NEC) is mandated to lead the organisation during the transition period of the legal profession.

The new NEC introduces three new portfolios, which are Head of Policy and Legislation; Head of Legal Education and



The newly elected NEC (from left): Head of Legal Education and Research: Vuyo Morobane; Treasurer: Mongezi Mpahlwa; Head of Events and Campaigns: Mabaeng Denise Lenyai; Deputy President: Baitseng Rangata; President: Lutendo Sigogo; General Secretary: Noxolo Maduba; Head of Policy and Legislation: Bayethe Maswazi; and Deputy General Secretary: Mduduzi Singwane.

Research, and Head of Events and Campaigns. The elected officials are as follows –

- Lutendo Sigogo (President);
- Baitseng Rangata (Deputy President);
- Noxolo Maduba (General Secretary);
- Mduduzi Singwane (Deputy General Secretary);
- Mongezi Mpahlwa (Treasurer);

- Bayethe Maswazi (Head of Policy and Legislation);
- Vuyo Morobane (Head of Legal Education and Research); and
- Mabaeng Denise Lenyai (Head of Events and Campaigns).

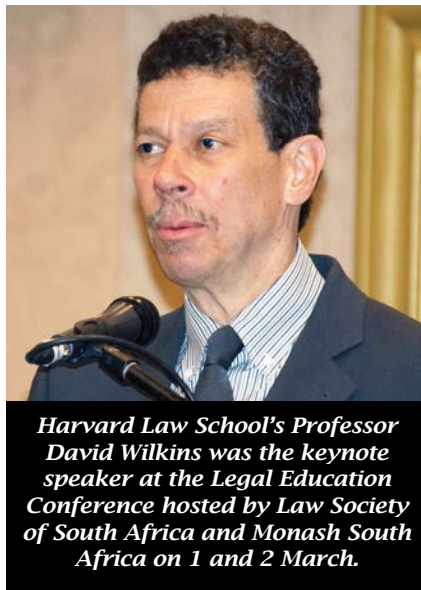
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Uniformed PVT discussed at Legal Education Conference

The Law Society of South Africa (LSSA) in collaboration with Monash South Africa, hosted a conference on 1 and 2 March in Johannesburg, under the theme 'From a Disjointed to an Integrated Legal Profession: The Design of the Appropriate and Relevant Practical Vocational Training for Legal Practitioners'.

Harvard Law School's Professor David Wilkins delivered the keynote address, which discussed how the legal education sector should respond to the changes in legal practice. He said that the topic of change in legal practice is a global topic. He added that a lot of people have asked if legal education is in a crisis. Prof Wilkins pointed out that South Africa (SA) is faced with some legal education challenges and noted that although he did not know much about the Legal Practice Act 28 of 2014 (LPA), the little that he has read on it, is that the LPA is about the unification of legal practitioners (attorneys and advocates).

Prof Wilkins said that legal practice has been specialised over-time. He add-



Harvard Law School's Professor David Wilkins was the keynote speaker at the Legal Education Conference hosted by Law Society of South Africa and Monash South Africa on 1 and 2 March.

ed that the idea behind having a unified profession is that it will increase the quality of service and better the costs of providing the service to the public. He pointed out that it will further integrate

advocacy with counselling. He said that legal education in SA is under pressure because of the tremendous changes that have happened in the country over the past 25 years. He said that as an emerging country, SA has gone through significant transformation in its relationship to the world and in particular, the global economy.

Prof Wilkins said transformation has opened the door for more foreign investments in the country, in terms of foreign companies, foreign transactions, cross-border mergers and the privatisation of foreign assets. He noted that macro changes in the economy, increases the demand for new laws, namely, more sophisticated investment laws, trade laws and competition laws. He added that these laws were not like the current laws, but these laws have to be much more sophisticated and have to link to the laws of other jurisdictions of global governance, because this is how things operate in the global economy.

Prof Wilkins pointed out that it will not take long to realise that with all these new laws, new legal practitioners

are needed, who have different skill sets and who know how to operate in modern times. He highlighted some of the challenges that could be faced in the future of the legal education. He spoke on the following points –

• *Specialisation versus mobility*

Prof Wilkins asked if legal practitioners should be trained for specialisation or mobility. He said that legal practice has become more specialised and law firms and other employers often want law schools to train candidate legal practitioners in a specific field. He said that the other thing is that young legal practitioners are moving around from one job to another with increasing frequency, because they want to know more. He added that young legal practitioners want to learn transferable skills in order to pursue the job they are going to get immediately after law school.

• *Education versus experience*

Prof Wilkins asked what is important between classroom education and practical vocational training (PVT). He asked if students should be taught by professional academics, who are trained academics or by legal practitioners who understand the latest changes in legal practice.

• *Socialisation versus criticism*

Prof Wilkins spoke about the challenge of legal education. He asked if it was to socialise people into the profession – by assimilating them to existing norms of practices of a legal practitioner – or is it to teach them to criticise the existing norms and try to create new ones?

• *Core competency*

Prof Wilkins pointed out that legal practitioners are required to learn new skills, such as –

- information technology;
- understand the sophisticated economic model;
- business strategies;
- social dynamics; and
- practising in the human rights field and understanding cross-culture sensitivity.

He added that there is a great deal legal practitioners have to do to be competent, but finding a balance between learning new things and understanding old core practices may be challenging.

• *Markets*

He pointed out that legal education should embrace the market and prepare legal practitioners so that they can succeed in the current market place. Prof Wilkins added that legal education should constrain the market and create the rules to access the market.

The youth and PVT

National Youth Convener of the National Association of Democratic Lawyers (NADEL), Ugeshnee Naicker said that the



National Youth Convener of the National Association of Democratic Lawyers, Ugeshnee Naicker, spoke at the conference.

youth had decided that there should be one uniformed PVT for both pupils and candidate attorneys. She highlighted some of the resolutions taken at NADEL's National Young Lawyers Summit. One resolution was that the LSSA must consult law students at tertiary levels to address issues regarding the curriculum of the LLB degree to create proper and able legal practitioners for the future. She added that PVT must include all skills that a legal practitioner would require, including business and finance skills.

- See 'Progress only achievable through a united profession discussed at NADEL's National Youth Lawyers Summit' (2018 (March) DR 9).

Challenges facing black graduates

The President of the Black Lawyers Association Student Chapter, Luyolo Mahambehlala, spoke about the challenges facing black graduates and the value of University Education. He said that black graduates encounter challenges from as early as high school, such as language



The President of the Black Lawyers Association Student Chapter, Luyolo Mahambehlala, said that language barriers can pose a challenge to university students.

barriers, scarce resources and the high number of students per class. He added that in order for acceptance into a Higher Learning Institution, or to qualify for an LLB degree, a student needs to obtain a certain percentage in language, particularly English, however, he pointed out that in some of the public schools black students are not taught in English.

Mr Mahambehlala said that the same students who are taught in vernacular languages are expected to do well when they reach tertiary level. He added that language is a barrier for black students in the legal fraternity. He pointed out that the disadvantages of language barriers haunt black students until they complete their LLB degrees. He said that the same student – who struggles with English or Afrikaans – has to write board examinations, which are offered in English or Afrikaans, and this affords their white counterparts an unfair disadvantage.

Mr Mahambehlala added that legal education is disappointingly abstract and highly impractical in SA. He said candidate legal practitioners are taught theory only and as a result they finish their qualification without any practical exposure to equip them to do their actual work. He noted that the issue of legal education has been met with little to no response from the institutions of higher learning. He pointed out that the none-uniformity of legal education is a contributing factor in the disparities and the quality of graduates in the country.

Challenges for women's advancement

The Director of Mabaeng Lenyai Attorneys, Mabaeng Denise Lenyai, spoke about the challenges women face in the legal profession and what needs to be done to change this. She noted that senior female legal practitioners face challenges of being undermined by their male colleagues.

Ms Lenyai said that female legal practitioners are also faced with the stereotype that they are mentally imbalanced, that they cannot deal with pressure and breakdown at the first instance of stress that comes along. She said stress for female legal practitioners is not caused because they cannot juggle their professional and private life at the same time, but, by the fact that they are being undermined.

Ms Lenyai said the topic of women's advancement and transformation has been discussed many times, but when it is time for implementation nothing happens. She encouraged female legal practitioners who have advanced in the profession to take it on themselves to mentor other young women in the profession and said that if mind-sets were changed the legal profession would transform.



The Director of Mabaeng Lenyai Attorneys, Mabaeng Denise Lenyai, discussed challenges faced by female legal practitioners in the legal profession.

Perspective on legal education and transformation

The President of the Black Lawyers Association (BLA), Lutendo Sigogo, said the BLA believes that PVT must be compulsory for both attorneys and advocates as they all receive the same primary legal education at university. He added that PVT must be accessible to all in terms of fees, one language of instruction and should be compliant with constitutional imperatives. However, he noted that PVT must be held in the hands of those who will not block the entry to the legal profession in terms of fees or language barriers. 'We believe that this part of education must not be commercialised. It must fully remain in the hands of the Legal Practice Council [LPC]'.

Mr Sigogo pointed out that a person who is admitted as an attorney has to have an LLB degree from a recognised university. He said that the Attorneys Act 53 of 1979 does not have a definition for private higher learning institutions with regards to the LLB. He added that these are topics that institutions such as Monash University and Varsity College should engage the profession on, so that there can be an understanding on how private institutions are going to help with accessing the legal profession. Mr Sigogo noted that the LPC - having understood the past injustices of black legal practitioners and black people - will come up with a mechanism that will assist in improving legal education, which will be transformative in nature.

Mr Sigogo spoke about the stipends of candidate legal practitioners. He said the LPA requires that all candidate legal practitioners should be paid a stipend. He noted that currently pupils do not get paid while candidate attorneys are

paid, although unacceptably low salaries. He pointed out that going forward the profession must find a way of paying a stipend to candidate legal practitioners in line with the LPA. Mr Sigogo said that there is a suggestion that the Attorneys Fidelity Fund (AFF) must pay candidate legal practitioners stipends. He added the BLA does not see how it is possible for the AFF to pay for both candidate attorneys and pupils, because advocates do not directly contribute to the AFF. He pointed out that should the AFF pay stipends for both candidate attorneys and pupils - while advocates are not contributing to it - the AFF's capital will be exhausted. He added that it should be thought through thoroughly on how pupils will be paid.



The President of the Black Lawyers Association, Lutendo Sigogo, spoke on legal education and transformation.

The future of the profession

The Deputy Chairperson of the National Forum on the Legal Profession (NF), Max Boqwana, said the issue of legal education is something that is pertinent within the legal profession and the matter has received a great deal of prominence within the discussions of the NF. He added that at the centre of the discussion is the fact that there has been disagreements and the inability for many to envision a future, which is a complete departure from the past and the present. He pointed out that in the future, legal practitioners need to be trained in a different way, because those legal practitioners must serve in the future as enshrined in the Constitution of the country.

Mr Boqwana said it is common cause that the legal profession in SA has some difficulties and there are divisions in the country in terms of race, gender, geography, class, culture and most importantly the division between attorneys and advocates. He said that the distinctions and division on education are quite ar-

tificial, because learners go to the same universities. He added that the problem with the lack of unity in regards to PVT is that current legal practitioners when they discuss issues of PVT they want to include themselves in the future. He pointed out that there were discussions with the late Chief Executive Officer of the LSSA and Director of School for Legal Education and Development (LEAD), Nic Swart, about a college of law that would deal with issues, where students would be taught social context, training of forensic skills, marketing and client management.

'We need to have a concrete plan designed in terms of how we can set up that law college, which really will be an elevated form of an education centre from what we have in terms of LEAD [Legal Education and Development], which is really almost 70% of the work done,' Mr Boqwana added.

Co-chairperson of the LSSA, Walid Brown, pointed out that it is not the intention of the LSSA to obtain fusion of the legal profession. He said the motivation for a uniformed PVT has nothing to do with fusion, but rather with the intention to create legal practitioners who are capable of adequately representing the public whether they are attorneys or advocates. He added that PVT should be uniformed to help make life easier for candidate legal practitioners.

Views of the legal practitioners and law academics

Convenor of Advocacy Training of the General Council of the Bar (GCB), advocate Jannie van der Merwe SC, said that the GCB is not of a view that a uniformed PVT for both attorneys and advocates is appropriate. He added that the GCB has disagreed on uniformed PVT and after training, candidates and pupils would decide on which side of the branch of the profession they want to pursue. He noted that the attorneys' profession and



The Deputy Chairperson of the National Forum on the Legal Profession, Max Boqwana, spoke on the future of the profession.



Convenor of Advocacy Training of the General Council of the Bar, advocate Jannie van der Merwe SC, spoke at the Legal Education Conference.

advocates' profession are two different branches of the legal profession, however, he said both branches are important.

Mr van der Merwe said advocates perform different functions to attorneys. He pointed out that the very existence of advocates depends on being instructed and briefed by attorneys. He added that advocates focus on litigation skills and pupils who want to practice as advocates need to be litigators who are able to do these fundamental things, which are to advocate in writing and to advocate orally. He said that pupils need to have skills to be able to persuade through a written argument, written drafting and through oral argument.

Mr Brown, said that the LSSA is trying to give a training model for all legal practitioners and not only for those who want to join the Bar. He said the GCB cannot isolate the legislation and added that the skills that advocates are given are the same skills attorneys need when they prepare for trials. He said the attorneys are not trained to be bookkeep-

ers, but are trained practically to analyse problems of clients and presentation. He added that another skill candidate attorneys are taught is for the management of a practice.

Indispensable skills of legal practitioners

A session titled 'Indispensable skills of legal practitioners' was chaired by Western Cape High Court Judge and Honorary Professor of Law at University of Cape Town, Judge Dennis Davis. Panellists included, attorney at Spoelstra Mediation, Corlene Spoelstra; Director at Gwina Attorneys Inc, Sandanathi Gwina; and Adjunct Lecturer for Civil Procedure at Monash South Africa, Rendani Nthambeleni. The panellist recommended the following skills as indispensable -

- problem solving;
- critical thinking;
- written and oral communication;
- constitutional thinking; and
- social justice skills.

The panel pointed out that the core skills mentioned above are skills required by both attorneys and advocates.

Role of academics and other institutions

At another breakaway session chaired by the Director at Wits Law Clinic, Daven Dass, which included the Head of School of Law from IIE Varsity College Fiona Kaplan; Professor and Clinician at Wits School of Law, Riette du Plessis; and Interim Coordinator: Unit for Applied Law at the Cape Peninsula University of Technology, Noeleen Leach, discussed the role of academics and other institutions. The key points made at the session was that the role of academic institutions - is in essence - to produce a graduate



Co-chairperson of the Law Society of South Africa, Walid Brown, said the legal profession must have a uniformed model training.

with the necessary base level skills or a graduate who possesses the core competencies required within the profession, namely -

- critical thinking or critical analysis;
- drafting and writing; and
- business acumen.

The question of how academic institutions can produce graduates with the above competencies was discussed.

The panel suggested the following:

- University-based law clinics could be of assistance.
- The introduction of experiential learning to all LLB courses.
- Focus on finding synergies between academic institutions and the LSSA's LEAD division to further education.
- Focus on the requirements of s 29 of the LPA that candidate legal practitioners perform community service and legal practice.

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Minister Masutha confident in new Sheriffs Board

The Minister of Justice and Correctional Services, Michael Masutha, has appointed new members to the South African Board for Sheriffs. According to the statement released by the Department of Justice and Development, the term of office of the new Board commenced on 1 March and will be for a period of three years. The Justice Department added that Mr Masutha extends his appreciation to the outgoing members of the Board, whose term expired on 28 February, for their contribution to the Sheriffs' profession, the justice sec-

tor and for obtaining clean audits during their term of office.

The Justice Department said that Mr Masutha is confident that the new Board will continue to promote a professional Sheriffs profession that is both accountable and committed to serving the public and the legal profession. The appointed Board members are:

- Ignatius Klynsmith - Sheriffs profession.
- Mmatholo Lephadi - Sheriffs profession.
- Allan Murugan - Sheriffs profession.
- Annah Ralehlaka - Sheriffs profession.
- Andrew Nkhumise - Sheriffs profession.

- Hisamodien Mohamed - Department of Justice and Constitutional Development.
- Phaswane Mogale - Law Society of South Africa.
- Lesiba Mashapa - The National Credit Regulator.
- Meko Magida - designated by the Minister.
- Khunjulwa Sigenu - designated by the Minister.
- Charmaine Mabuza - designated by the Minister.

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The Companies Tribunal held a Company Name Disputes seminar on the 16 February in Johannesburg. Among the speakers was the Commissioner of the Companies and Intellectual Property Commission (CIPC), advocate Rory Voller. In his presentation Mr Voller mentioned that the Companies Act of 71 of 2008 (the 2008 Act) will be going through some changes this year. He said the CIPC will be examining how it approves company names, because one of the changes is to lessen some of the rules when it comes to company names.

Mr Voller said the CIPC wants to make it easier for people to apply for company names. He said that the CIPC has to go through its processes to make sure it sticks to the policy of what is intended in the Companies Act. Mr Voller pointed out that CIPC has to be mindful of corporate identity theft. He said there were a number of scandals involving corporate identity theft a few years ago.

Mr Voller noted that a big challenge the CIPC is faced with are people who try and take known trade marks and put their own company names in them and that creates conflict. 'There is a lot of emphasis that entrepreneurs place on their company names,' Mr Voller added.

Mr Voller said under the 2008 Act names are reserved for six months while previously, names were reserved for four months. He added that the 2008 Act does not make provision for shortened form names because of the business name rules that came about in terms of the Consumer Protection Act 68 of 2008. He pointed out that another change in the 2008 Act is the transfer of company names.

Companies Tribunal member, Prof Kasturi Moodaliyar, said that since the inception of the tribunal, the majority of the cases that have been received are



President of South African Institute of Intellectual Property Law, Debbie Marriott, spoke at the Companies Tribunal Seminar in Johannesburg.

CIPC to re-examine how it approves company names



The Commissioner of the Companies and Intellectual Property Commission, advocate Rory Voller, spoke at the Companies Tribunal seminar on 16 February in Johannesburg.

with name disputes. She added that, to date the number of name dispute cases, has been increasing. She noted that in the 2015/2016 financial year there have been 176 applications of such cases, of which 157 were finalised. She said that it was not alarming that the company name disputes had increased as many company names have some economic or sentimental value attached to them. 'Company names are also vital for branding and they distinguish the company from others and are also used for identity of products of a particular use or service,' she said.

Prof Moodaliyar added that most applications of name disputes received by the tribunal are based on s 11(2)(b) and s 11(2)(c)(1) of the 2008 Act. She said that a company name dispute can occur when the name is the same or confusingly similar among, existing companies, close corporations, registered business or a well-known trade mark in terms of the Trade Marks Act 194 of 1993 or protected under the Merchandise Marks Act 17 of 1941.

Prof Moodaliyar said it will therefore be possible to file a name dispute, where the names suggest or falsely implies that the company is associated with another person or entity. She pointed out that s 160 of the 2008 Act concerns name objections. She noted that provision has been made for applications to be lodged with the Companies Tribunal of South Africa. She added that name objections can emanate from one of the following two scenarios:

- In terms of s 160(1) of the 2008 Act,

the commission can serve a written notice in the applicant to any person who has an interest in the name.

- An applicant includes anyone who is seeking the reservation of the name, the registration of the defensive name of the company name or anyone who wishes to transfer the registration of the name or registration of the defensive name.

Prof Moodaliyar pointed out that a dispute lodged with the tribunal will determine if the name dispute is confusing or similar to that of the applicant. She said that companies are urged to bring disputes to the tribunal.

President of South African Institute of Intellectual Property Law (SAIIPL), Debbie Marriott, said that company names are assets and they are essentially a brand that helps consumers identify the entity or company that they are dealing with. She added that names serve as a badge of origin, the same way they are used to identify specific products that the company provides.

Ms Marriott said that company names were labelled as undesirable in the previous Companies Act, if it contained another person's name or trade mark. It would be rejected if it was seen to be calculated to cause damage or if it was to cause deception, confusion or if it resulted in the tarnishing of another company. She added that many company name objections were lodged over the years on the basis that there were prior registered or prior used trade marks, which people had built-up. She noted that any person can lodge a company name objection, if the person has an interest in the name. She pointed out that this particular person would be a licensee and not necessarily just a person who owned the trade mark.

Ms Marriott said the person objecting to the company name would have to apply for objection and then the tribunal will consider whether the name satisfies the 2008 Act. She added that the regulation says company name objections must be filed with the CIPC, who will within five business days serve the application to the respondent. She pointed out that it is important that the applicant verify the address of the respondent as registered on the CIPC records. She said should the respondent not be served within five days after the application the objection might be blocked on procedural grounds.

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LSSA information session roadshows kick-start dialogue on a new representative professional body for practitioners

Practitioners attending the Law Society of South Africa (LSSA) roadshows across the country have indicated their support for the continuation of the LSSA for a three-year transitional period in order to set up a representative professional body for legal practitioners. Outgoing LSSA Co-chairpersons, Walid Brown and David Bekker, as well as other members of the LSSA's Management and Transitional Committees, have been speaking to practitioners about the changes that the full implementation of the Legal Practice Act 28 of 2014 (LPA) – expected to come into operation at the end of October this year – will bring about in the profession.

One of the most fundamental changes will be that the four statutory, provincial law societies will cease to exist on 31 October 2018 with the coming into being of the national regulatory Legal Practice Council (LPC) that will regulate both attorneys and advocates in terms of the LPA. The law societies have been the first point of contact for most attorneys, and with those gone, the LSSA will step into the breach to provide representation and support. During the three-year transitional phase from 2018 to 2020, the LSSA's mission, role and core functions will be adapted to create a professional body to support, promote and represent legal practitioners. This will form a counterweight to the purely regulatory LPC, whose primary function will be to protect the public.

During February and March 2018, roadshow information sessions were held in Pretoria, Kempton Park, Port Elizabeth, Kimberley, Bloemfontein,



Krish Govender, Lutendo Sigogo and Richard Scott engage Pietermaritzburg practitioners.

Rustenburg, Potchefstroom and Pietermaritzburg. Further sessions will be held in April and May. The LSSA's annual conference, scheduled to be held in Cape Town on 23 and 24 March, also focused on the transitional role of the LSSA.

Presenters at the roadshow sessions outlined the current service provided by the LSSA to practitioners, including providing *De Rebus*, other communication channels, cost-effective training through LEAD for attorneys and candidate attorneys, stakeholder and government liaison through its Professional Affairs department, as well as the guidance and legislative comments provided by the 32 specialist committees (see also 'So what does the LSSA do for you?' 2017 (Dec) DR 20).

Presenters then dealt with the timelines for the implementation of the LPA, as well as other challenges in the Act,

such as the difficulty that practitioners may experience in applying s 35 of the LPA, which introduces a new fee regime, as well as changes to the disciplinary process, which will see lay representation on disciplinary committees, open hearings, the publication of outcomes and the role of the Legal Services Ombud.

The role that a future representative body ought to play was canvassed. This could provide –

- practice support for practitioners, along with cost-effective compulsory professional training courses;
- assist practitioners facing disciplinary processes, particularly during the investigation stage, as well as providing a national, united voice for the profession;
- undertaking litigation on behalf of the profession (such as the LSSA has done with the *Proxi Smart* matter); and

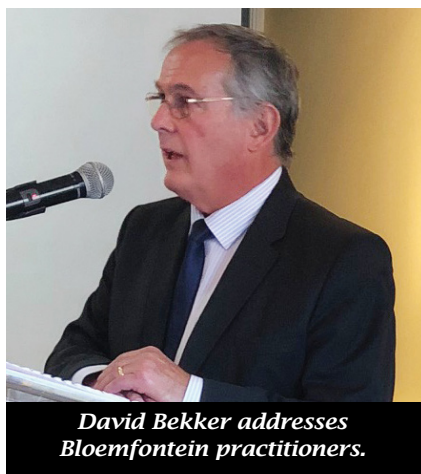
Legal Practice Act timeframes (anticipated)

January 2018	February 2018	April 2018	July 2018	August 2018	September 2018	October 2018	November 2018
<ul style="list-style-type: none"> • Transfer agreements finalised between National Forum on the Legal Profession (NF) and provincial law societies. 	<ul style="list-style-type: none"> • Rules published for comment. 	<ul style="list-style-type: none"> • Rules comment deadline: 5 April. • NF finalises and gazettes rules. 	<ul style="list-style-type: none"> • Minister published regulations. • President gazettes coming into effect of ch 2. 	<ul style="list-style-type: none"> • Ch 2 of the LPA comes into effect. • Call for nominations for LPC. • Nominations close. 	<ul style="list-style-type: none"> • Ballot papers distributed. • Elections. • LPC announced. 	<ul style="list-style-type: none"> • NF dissolved. • Provincial law societies dissolved. • All other LPA chapters come into operation. 	<ul style="list-style-type: none"> • LPC regulates the profession.
Provincial law societies continue to regulate attorneys							

- lobbying the Legal Practice Council, governments and other stakeholders in the profession's interest.

Practitioners were also asked whether the representative body should include attorneys only, or other legal practitioners such as advocates, corporate lawyers and government lawyers; or whether membership should include interest groups in the profession, as well as individuals. There were different views on this.

Practitioners attending the sessions raised their concerns about the reputational damage that could be suffered by individual and firms through open disciplinary hearings, the costs related to the increasing practice compliance –



David Bekker addresses Bloemfontein practitioners.

including the possibility of practitioners having to carry the cost of professional indemnity insurance as the Attorneys Insurance Indemnity Fund intended to reduce free basic cover and phase in payment by attorneys over the next few years – and subscriptions to the LPC; the impact of advocates with trust accounts who would be permitted to take instructions direct from the public.

The LSSA is collating all the issues raised at the information sessions and will produce a comprehensive guide of responses. It will also send out electronic surveys to enable practitioners to make a direct input into the consultation process, which will shape the future representative professional body.

LSSA welcomes SADC Tribunal judgment as a victory for all South Africans

The Law Society of South Africa (LSSA) has welcomed the judgment on 1 March by the Gauteng Division of the High Court in Pretoria relating to the Southern African Development Community (SADC) Tribunal. The court declared that former President Jacob Zuma's decision to sign the 2014 SADC Protocol, suspending the right of South African citizens to take disputes to the SADC Tribunal, was declared to be unlawful, irrational and thus unconstitutional.

'Pending confirmation by the Constitutional Court, this judgment is a victory for all South Africans, and we hope it will be so for all SADC citizens,' said outgoing LSSA Co-chairpersons Walid Brown and David Bekker in a press release following the judgment. They added: 'As we said when we instituted the case against the president and the Ministers of Justice and International Relations in 2015, by signing the 2014 SADC Protocol, the president infringed the right of South Africans by agreeing to limit the jurisdiction of the SADC Tribunal to disputes only between member states – and no longer between individual citizens and states, without consultation.'

The Co-chairpersons noted: 'As the court has said, by signing the Protocol, the president "severely undermined the crucial SADC institution, the Tribunal. It detracted from SADC's own stature and institutional accountability and violated the SADC Treaty itself". The court also added that the president had no authority to participate in a decision in conflict with South Africa's binding obligations and that if the intention was to withdraw from South Africa's obligations under the Treaty and the Protocol, the consent of Parliament would have to be obtained first. The president's failure to do so is unlawful and irrational.'



The Law Society of South Africa's counsel in the SADC Tribunal matter, advocate Dumisa Ntsebeza SC (right) and advocate Tembeka Ngcukaitobi.

The LSSA urged President Cyril Ramaphosa to note the judgment and rectify this unlawful and irrational action, once the judgment has been confirmed by the Constitutional Court.

The LSSA launched the application in the High Court on 19 March 2015. Unlike the previous Protocol, the 2014 Protocol deprives citizens in the SADC region – including South Africans – of the right to refer a dispute between citizens and their government to a regional court if they fail to find relief in their own courts. By signing the 2014 Protocol, the president infringed the right of South African citizens to access justice in terms of our Bill of Rights. As the Protocol now stands, it limits the jurisdiction of the SADC Tribunal to disputes only between member states – and no longer between individual citizens and states – in the SADC region.

Four Zimbabwean farmers, Luke Thembanani, Ben Freeth, Richard Etheredge, Chris Jarret, as well as two Zimbabwean farming estates, Tengwe Estates and France Farm, were admitted as applicants, and the Southern Africa Litigation Centre and the Centre for Applied Legal Studies as *amicus curiae*. The matter was heard in the High Court on 5 February 2018 before Judge President Dustin Mlambo, Judge Nomonde Mngqibisa-Thusi and Judge Hans Fabricius. The court ruled that the applicants and *amicus* were entitled to the costs of the application, including costs of two counsel.

In its statement, the LSSA thanked its legal team, advocate Dumisa Ntsebeza SC and advocate Tembeka Ngcukaitobi, as well as Pretoria law firm Mothle Jooma Sabdia Inc – the latter acted *pro bono* for the LSSA in this matter.



People and practices

Compiled by Shireen Mahomed

Hogan Lovells in Johannesburg has seven promotions and two new appointments.



Chantal Murdock has been promoted as a senior associate. She specialises in commercial litigation and mining regulatory compliance.



Refiloe Vengeni has been promoted as a senior associate. She specialises in mining law, and health and safety in the mining sector.



Danika Balusik has been promoted as a senior associate. She specialises in litigation, construction and engineering law.



From left: Julia Sham, Mzimasi Mabokwe, Kylen Weyers and Ansie Erasmus.

Julia Sham has been promoted as a senior associate. She specialises in competition law. Mzimasi Mabokwe has been promoted as a senior associate. He specialises in construction and commercial litigation. Kylen Weyers has been promoted as a senior associate. She specialises in business restructuring and insolvency. Ansie Erasmus has been promoted as a senior associate. She specialises in commercial litigation and alternative dispute resolution.



From left: Lerothodi Mohale and Haroon Laher.

Haroon Laher has been appointed as a partner and Lerothodi Mohale as a senior associate, both in the business restructuring and insolvency department.

Jurgens Bekker Attorneys has two new appointments.



Marieke Eloff has been appointed as a junior associate in Bedfordview.



Anouk Heyns has been appointed as a junior associate in Cape Town.

Stein Scop Attorneys in Johannesburg has two new promotions.



Sian van der Weele has been promoted as a director in the commercial litigation department.

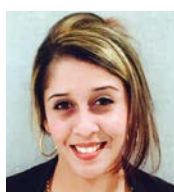


Safiyyah Buckas has been promoted as a senior associate in the employment law department.

Matthew Francis Inc in Pietermaritzburg has two new appointments.



Janine Mahlangu has been appointed as a director.



Nadia Meintjies has been appointed as a director.

Werkmans Attorneys in Johannesburg has two new director appointments.



Janene Meiring has been appointed as a director in the commercial department.



Anele Khumalo has been appointed as a director in the litigation department.

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

Norton Rose Fulbright has four new appointments.



Dale Cridlan has been appointed as the head of the tax department in Johannesburg. He specialises in corporate tax, corporate restructuring, mergers and acquisitions, and structured finance.



Richard de la Harpe has been appointed as the knowledge director for corporate mergers and acquisitions and as a director in the corporate mergers and acquisitions department in Cape Town.



Bester Ngoepe has been appointed as a director in the corporate mergers and acquisition department in Johannesburg. He specialises in mergers and acquisitions, corporate finance and corporate restructurings.



Jackie Midlane has been appointed as practice group leader in the banking and finance department in Johannesburg.

VDT Attorneys in Pretoria has four new appointments.



Wim Cilliers has been appointed as a director in the litigation department.



Bridget Moatshe has been appointed as an associate director in the litigation department.



PR de Wet has been appointed as an associate director in the commercial department.



Karien Coetzee has been appointed as an associate director in the conveyancing department.

Eversheds Sutherland in Johannesburg has two promotions.



Helen Westman has been promoted as a partner in the litigation department.



Kelly Hutchesson has been promoted as a senior associate in the commercial department.

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



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By the
Practitioner
Support Unit of
the Attorneys
Fidelity Fund

Exposed through passing of journal entries?

There are various definitions to what journals are, and for the purpose of this article, we will simplify the general definition of a journal entry (journal) to refer to the entries made in the trust accounting records of a legal firm, to adjust or correct an entry that has already been made. It is effectively movement of money from one account to another within the trust account of an attorney. While passing a general journal is an acceptable way of correcting or adjusting entries that are incorrectly entered in the accounting records, they are also prone to exposing firms to risks of misappropriation and fraud.

Please note that journals are not limited to trust accounts, but can also exist in the business accounts of the firm.

Before we look at various hypothetical scenarios of when journals are passed, we need to make the point that all journals passed must be overseen by a senior person, preferably a legal practitioner, and approved before they are passed. It is important though that the practitioner fully understands what the entries presented to them mean, the reasons for passing the journal, as well as establishing and satisfying themselves that the trust creditor/s (client/s) affected have authorised the passing of the journals between accounts, where applicable.

In the article 'The ABC of Trust Audits' (2018 (Jan/Feb) DR 18), the Practitioner Support Unit of the Attorneys Fidelity Fund indicated that trust journals should occur for related matters, and should be authorised by the trust creditor concerned. For every debit reflecting in a journal, there should be a corresponding credit or credits. We will now delve further on the various aspects of passing journals.

What should exist when passing a general journal?

- There must be an existing entry in the accounting books.
- There must be a compelling and valid reason to adjust or correct the entry.
- Where a journal is passed between trust creditor/s accounts, the entries must be authorised by the trust creditor/s concerned.
- Journals must be approved by a senior person, preferably a legal practitioner before they are passed.
- For every journal passed, there must be a debit entry in one account, and at least one credit entry in another, so that the balance is nil when taking the debit and the credit/s. These entries must be recorded and reflected in a journal book.
- The general ledgers of the accounts that have been affected by the journal must clearly reflect the entries that took place and make reference to the journal passed to correct or adjust the entry.

Readers are encouraged to read 'Do you know whose money it was?' (2015 (March) DR 14), where the Financial Forensic Investigation Team of the Attorneys Fidelity Fund discussed suspense accounts.

A suspense account in the trust accounting records is an account used to temporarily allocate money received into the trust bank account and that cannot be immediately allocated to a specific account. The main reason the money cannot be allocated is that the depositor perhaps did not put on a reference when making the deposit or put on an incorrect reference, therefore, making it difficult for the firm to know whose money it is. The money so received in the trust bank account gets

allocated to the suspense account, until the depositor comes forth to claim the money as theirs by providing satisfactory proof thereof.

We will now explore various scenarios where journals are passed.

Scenario 1 – the correct way of adjusting entries

On 13 March 2017, client 'A' entrusted a legal firm, SKM Attorneys, with an amount of R 63 000 for a matter that the firm was engaged with. The firm, in their trust accounting records, opened an account referred to as 'SKM – A' for the client. However, on paying this amount into the trust bank account of SKM Attorneys, the client did not reflect their reference with the firm, and the firm could, therefore, not allocate the money received to its account. The firm allocated the received amount of R 63 000 to a suspense account, referenced 'SKM – queries' in the trust accounting records, pending identification of the owner of the money, by crediting that account with R 63 000.

The client later realised their mistake, and on 29 March 2017, the client informed the legal firm that they made the deposit for that amount, on 13 March 2017, but forgot to put a reference, and submitted proof of the deposit to SKM Attorneys. On receipt of the proof of payment by the firm, and on the firm satisfying themselves that the money belonged to client A, the money was moved out of the suspense account, and reallocated to client A's account.

Based on this scenario, the following entries will be evident in the trust accounting records of SKM Attorneys:

In the trust journal book

Date	Description	Debit	Credit	Narration
29-3-2017	ADJ269 – (SKM – queries)	R 63 000		Previously unidentified receipt has been identified.
29-3-2017	ADJ269 – (SKM – A)		R 63 000	

In the affected individual ledger accounts

Date	Description	Debit	Credit	Balance
SKM – queries:				
Opening balance				R 10 000
13-3-2017	Receipt		R 63 000	R 73 000
29-3-2017	Reallocation – ADJ269 (SKM – A)	R 63 000		R 10 000
SKM – A:				
Opening Balance				R 5 436
29-3-2017	Reallocation – ADJ269 (Queries)		R 63 000	R 68 436

As it can be seen from the foregoing, the movements are recorded in the trust journal book to reflect which account was debited and which was credited with the full amount, and

the two affected ledger accounts, the suspense and client A accounts, also reflect all the transactions.

Scenario 2 – the correct way of adjusting entries

Client 'C' has two matters that SKM Attorneys have dealt with. The first matter is a litigation matter, account 'SKM – C (Lit)' with a credit balance of R 645 235, and the second is a transfer matter 'SKM – C (Conv)' with a credit balance of R 2 503. On 24 October 2017, SKM Attorneys required the client to make a deposit of R 12 856 for the transfer matter that is about to register as there is not sufficient funds in that account.

Although SKM Attorneys are aware of the huge balance sitting in the litigation matter account, and the fact that the matter is far from completion, the client's authorisation is required to move the amount from one account to another. On the same day, the client instructs SKM Attorneys to transfer the funds from the litigation matter, as there are no fees imminent in the near future.

The following is evident:

- The instruction by the client to transfer money from the litigation account to the transfer account. Preference is given to a written instruction rather than a verbal or telephonic instruction.
- The entries in the trust journal book, and in the two individual ledger accounts are affected as follows:

In the trust journal book

Date	Description	Debit	Credit	Narration
24-10-2017	ADJ423 – (SKM – C (Lit))	R 12 856		Authorised by the client.
24-10-2017	ADJ423 – (SKM – C (Conv))		R 12 856	

In the affected individual ledger accounts

Date	Description	Debit	Credit	Balance
SKM – C (Lit):				
	Opening balance			R 645 235
24-10-2017	Reallocation – ADJ423 (SKM – C (Conv))	R 12 856		R 632 379
SKM – C (Conv):				
	Opening Balance			R 2 503
24-10-2017	Reallocation – ADJ423 (SKM – C (Lit))		R 12 856	R 15 359

In this case, the client who is the owner of the money in the trust account has authorised the transaction that happened.

Scenario 3 – an incorrect way of adjusting entries

Client 'C' has two matters that SKM Attorneys have dealt with. The first matter is a litigation matter, account 'SKM – C (Lit)' with a credit balance of R 645 235, and the second is a transfer matter 'SKM – C (Conv)' with a credit balance of R 2 503. On 24 October 2017, SKM Attorneys required the client to make a deposit of R 12 856 for the transfer matter that is about to register as there is not sufficient funds in that account.

SKM Attorneys is providing legal services to another client, client 'H' in another commercial matter, 'SKM – H (Com)'. Client H is a nephew to client C, and this is common knowledge to the firm, since client C introduced client H to the firm as such.

The commercial matter for client H was concluded on 14 September 2017, and the client was called on to make a payment towards the attorney's fees for an amount of R 58 964. The firm sent numerous reminders to client H to no avail. As at 24 October 2017, the balance in client H's account was R 500, and no money was received from client H towards the attorney's fees as required.

On 24 October 2017, client C instructs SKM Attorneys to transfer the required amount of R 12 856 from the litigation account to the transfer account. SKM Attorneys remembers that client C's nephew has not paid in the amount required for the commercial matter. The firm therefore resorts to taking the amount from the uncle's account, by including this amount to that which client C authorised the firm to transfer. The aim is to refund that amount when client H hopefully pays in the required amount. Note that the firm has not received any authority from client C to take the fees for client H's matter, but acts purely on their knowledge of the relations between the two clients, and the fact that client H was introduced to the firm by client C.

The written instruction received from client C explicitly authorises the transfer of the R 12 856 from the litigation account to the transfer account. However, the following transactions are evident in the trust accounting books of SKM Attorneys:

In the trust journal book

Date	Description	Debit	Credit	Narration
24-10-2017	ADJ426 – (SKM – C (Lit))	R 71 820		Authorised by the client.
24-10-2017	ADJ426 – (SKM – C (Conv))		R 12 856	
	ADJ426 – (SKM – H (Com))		R 58 964	

In the affected individual ledger accounts

Date	Description	Debit	Credit	Balance
SKM – C (Lit):				
	Opening balance			R 645 235
24-10-2017	Reallocation – ADJ426 (SKM – C (Conv))	R 71 820		R 573 415
SKM – C (Conv):				
	Opening Balance			R 2 503
24-10-2017	Reallocation – ADJ426 (SKM – C (Lit))		R 12 856	R 15 359
SKM – H (Com):				
	Opening Balance			R 500
24-10-2017	Reallocation – ADJ426 (SKM – C (Lit))		R 58 964	R 59 464

In this case, while there is a clear debit and credits of accounts affected, and the fact that the full amount debited was credited, the amount transferred from the client's account is not in line with the client's instruction. As a result, the narration in the journal books is incorrect and misleading as the client only authorised a portion of the amount, and not the full amount.

The firm has acted on the knowledge at the firm's disposal

about the two clients, and that is unacceptable. In some cases, a similar scenario could happen but with an unrelated client, who is unknown to the client or does not even exist, and that is equally unacceptable. These scenarios amount to misappropriation of trust money.

Assuming that the firm decided to reflect only the authorised transfer of R 12 856 on the credit side of the transaction, the transaction would have been out by R 58 964, which is also unacceptable. For every debit, there must be corresponding credit or credits.

Conclusion

Practitioners should at all times be alert to the risk of misappropriation of clients' funds through passing of journals. This is a very common way of misappropriating trust funds, which the Attorneys Fidelity Fund have seen in practise when conducting investigations. At times there will be so many journal entries, which are clearly aimed at confusing the practitioner. Practitioners should always keep their cool, piece the transactions, and follow up on each and every journal

individually, before approving journals.

Practitioners should never shy away from asking all the pertinent questions before approving journals, and should have controls that prevent the passing of journals without proper approvals in place.

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By
Emmie
de Kock

Is work-life balance possible for legal practitioners?

Have you wondered why it is called 'work-life balance'? A scale only balances if objects with the same weight are placed on both sides. Considering that you cannot work or enjoy your life while you are sleeping, it has been suggested that we should rather refer to a 'work-life-sleep' balance. Would it not be easy, if we could all commit eight hours to work, spend eight hours by ourselves or others, and sleep for eight hours, every 24 hours? After all, do legal practitioners not each get the same number of hours in a day, in a week, in a month or in a year, to spend as they choose?

Most legal practitioners will agree, that a law practice, by its very nature, does not lend itself well to a balanced work-life schedule that allows legal practitioners to balance their work obligations with rewarding personal or family lives. Although the majority of legal practitioners may even believe that work-life balance cannot exist or is a myth, it is something legal practitioners should strive for.

Why is it important to strive for work-life balance? The main reason to strive for work-life balance is to avoid burn-out and other health issues. In this regard, according to an article by Ana Sandoiu, several studies have shown that long working hours are bad for a person's health, in particular, with adverse effects on cardiovascular and mental health. According to this article, damaging effects include a higher risk of stroke, coronary heart disease, and mental disorders, such as anxiety and depression (see A Sandoiu 'Poor work-life balance leads to poor health later in life' www.medicalnewstoday.com, accessed 26-2-2018).

As a hardworking legal practitioner,

you should take care of yourself and prioritise personal time for friends, family and finding and doing things you enjoy outside of work.

If a crime has been committed, it is the job of law enforcement to find the culprits. Similarly, if a legal practitioner struggles with work-life balance, it is the legal practitioner's job to assess what is causing the imbalance. Be your own detective and consider which of the following aspects may be causing challenges in achieving or maintaining your work-life balance.

Behaviours based on personality

There are hundreds of recognised personality theories and types. Due to the scope of this article, only one personality theory will be referred to.

Take this short quiz by answering 'yes' or 'no':

- Are you competitive?
- Are you ambitious?
- Are you impatient?
- Are you aggressive?
- Do you feel guilty if you take spare time to relax?
- Do you generally move, talk and walk rapidly?
- Do you often try to do more than one thing at a time?

If you answered 'yes' to most of these questions, you may be a so called Type A personality type. Extreme Type B personality type people are often described as relaxed, non-competitive and are generally more expressive of their feelings.

According to Saul McLeod 'Type A personality' (www.simplypsychology.org, accessed 26-2-2018), Dr Meyer Friedman and Dr Ray Rosenman were cardiologists who developed the 'Type A and Type B

personality type theory' in the 1960s, while conducting research on the potential risk of heart disease of 3 154 healthy men between the ages 39 and 59 over a period of eight and a half years. This theory relates to contrasting personality types on a continuum, with extreme Type A and B individuals at both ends. Researchers' findings were that twice as many Type A personality individuals developed coronary heart disease. In this regard, the behaviour of a person with a Type A personality makes them more prone to stress-related illnesses.

Interestingly, similar studies conducted on women revealed a less major difference between Type A and B personality types, and subsequent health risks.

Most legal practitioners are degrees of Type A personality types, which means that certain of their behaviours are driven by personality traits ascribed to Type A personality types, based on this particular personality theory. Strong Type A personality legal practitioners may thus be driven to work harder, and possibly lose work-life balance more easily.

Work addiction

Once you have decided that you want to be a legal practitioner, it is easy to fall in love with law. Is law not great? Does it not give you great satisfaction to know the law and solve problems for clients? Is it not super to complete a case successfully? It is wonderful to be a legal practitioner and enjoy being engaged in important and stimulating work.

However, if you have been a legal practitioner for a few years, the thought of ever leaving private practice, or retiring one day, can create anxiety. Legal practitioners become addicted to working, because they initially like -

- helping clients;
- making a difference;
- learning continuously;
- making money; and
- being part of a profession.

Qualifying as a legal practitioner gives status, identity and structure, which is sometimes difficult to find in other areas of life. Work could become an extension of self to such an extent that self-worth or self-esteem derives from it. Personal interests and relationships fall lower on the priority list and you may feel like you have little or no control over your private life.

Due to the nature of work legal practitioners do, and the impact legal practitioners' input have on their clients' lives and businesses, it is easy to become over-responsible. This could lead to feelings of guilt, perfectionism or obsessive compulsive working, which could lead to exhaustion, continuous stress and eventually burnout. Are you working more than 50 hours a week? Do you work regularly over weekends?

According to Prof Adrian Furnham, the originators of the concept 'workaholism' pointed out the similarities between the workaholic and the alcoholic. In this regard, these experts indicate that both, *inter alia*, neglect their families, personal relationships and other responsibilities; both feel better when partaking in the addictive activity; both indulge to numb or avoid certain feelings; both can show physical withdrawal when away from their preferred activity; and both deny the problem (A Furnham 'What is Workaholism?' www.psychologytoday.com, accessed 26-2-2018).

Prof Furnham further points out that workaholism mostly affects 'white-collar workers', as you are unlikely to come across, for example, a car attendant or shelf packer who suffers from work addiction.

Like any addiction, workaholism is 'treatable' and manageable and possible to overcome. The first step, however, is to acknowledge the problem and to commit to a plan to change certain habits and behaviours, even if it brings discomfort and anxiety at first.

Technology

Due to technology, which includes, e-mails, WhatsApps, SMS, and Skype, communication between legal practitioners and clients could easily become instant and non-stop. This may raise expectations of clients and can place additional

pressure on legal practitioners who do not set boundaries.

Although these new technologies brought many benefits, they have also brought about new negative behaviours. An example, relates to the term FOMO (fear of missing out), which was coined in 2004. In the context of social media, FOMO was initially used to refer to the fear of missing out on fun events. However, in the context of a law firm, the term FOMO could perhaps refer to the anxiety a legal practitioner can experience when disconnected from means of receiving and sending communication to and from clients, opposing parties, or staff. In this regard, excessive use of WhatsApp or social media could become time wasters and end up being addictive.

Ask yourself the following:

- Does your firm have a clear ITC policy for legal practitioners?
- Do you limit the use of staff technology?
- Do you manage your clients by setting technology boundaries?
- Do you find yourself staying longer at the office to catch up on e-mails and social media?
- Do you find yourself taking longer to tackle difficult work using e-mails or your cell phone messages as excuse?

What if you are a Type A workaholic suffering from FOMO?

The nature of a legal practitioner's job is not likely to change soon, although new technologies may assist to work faster. A strong Type A workaholic suffering from FOMO may be resistant to change and deny having any problem. However, if such a legal practitioner would like to be happier and improve work-life balance, there are a number of ways to regain or create balance. Here are some tips:

- Resolve and commit to making changes. Start with small changes. Believe that you have the potential to change any of the behaviours listed above. They are just habits, which have been formed over time and are perhaps encouraged by your work environment or social influences. Behaviours can change if you really want them to.
- Similarly, when going on a diet, sometimes our 'willpower' is just not enough to help us make necessary changes successfully. Sometimes we need a non-judgmental empathetic person, to make us aware of other options, and support

us through such a process. Professional coaching may be a very good support for work addicted and over-worked legal practitioners. Professional coaching is a process, which could assist legal practitioners in setting goals, designing action plans and keeping the legal practitioners accountable to themselves, in changing behaviours which are preventing a healthy work-life balance. Professional coaching could also allow legal practitioners space to explore options to improve processes, systems and marketing, to save time and money.

- If you experience continuous high levels of stress, over a long period of time, feel over-exhausted, or burnt out, you may develop anxiety disorder or clinical depression, which is best treated by a psychologist and/or psychiatrist. Seek help if you continuously feel overwhelmed.
- Take care of your body. Make time to exercise to reduce stress. Do not skip meals. Try to eat healthily. Limit alcohol. Drink lots of water. Aim to sleep at least seven hours every night. Visit a doctor (general practitioner), if you suffer from severe stress or stress-related illnesses.
- Plan and commit regularly to do something fun outside of work to look forward to. Plan a holiday.

Conclusion

It is wonderful to be a legal practitioner who enjoys being engaged in law and helping clients. However, as legal practitioners' careers progress and their practices grow, pressures and responsibilities are likely to increase as well. It is easy for legal practitioners to develop behaviours and habits to keep them longer at the office and in front of their computers. Due to the nature, performance pressures financial pressures, unpredictability, and often urgency of legal work, most legal practitioners are likely to struggle with work-life balance at some point in their careers.

The aim of this article is to encourage legal practitioners to regularly create opportunities for balance, to take care of themselves, and to consider external help to destress and change continuous unhealthy work behaviour patterns.

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

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By the
Practitioner
Support Unit of
the Attorneys
Fidelity Fund

Exposed through passing of journal entries?

There are various definitions to what journals are, and for the purpose of this article, we will simplify the general definition of a journal entry (journal) to refer to the entries made in the trust accounting records of a legal firm, to adjust or correct an entry that has already been made. It is effectively movement of money from one account to another within the trust account of an attorney. While passing a general journal is an acceptable way of correcting or adjusting entries that are incorrectly entered in the accounting records, they are also prone to exposing firms to risks of misappropriation and fraud.

Please note that journals are not limited to trust accounts, but can also exist in the business accounts of the firm.

Before we look at various hypothetical scenarios of when journals are passed, we need to make the point that all journals passed must be overseen by a senior person, preferably a legal practitioner, and approved before they are passed. It is important though that the practitioner fully understands what the entries presented to them mean, the reasons for passing the journal, as well as establishing and satisfying themselves that the trust creditor/s (client/s) affected have authorised the passing of the journals between accounts, where applicable.

In the article 'The ABC of Trust Audits' (2018 (Jan/Feb) DR 18), the Practitioner Support Unit of the Attorneys Fidelity Fund indicated that trust journals should occur for related matters, and should be authorised by the trust creditor concerned. For every debit reflecting in a journal, there should be a corresponding credit or credits. We will now delve further on the various aspects of passing journals.

What should exist when passing a general journal?

- There must be an existing entry in the accounting books.
- There must be a compelling and valid reason to adjust or correct the entry.
- Where a journal is passed between trust creditor/s accounts, the entries must be authorised by the trust creditor/s concerned.
- Journals must be approved by a senior person, preferably a legal practitioner before they are passed.
- For every journal passed, there must be a debit entry in one account, and at least one credit entry in another, so that the balance is nil when taking the debit and the credit/s. These entries must be recorded and reflected in a journal book.
- The general ledgers of the accounts that have been affected by the journal must clearly reflect the entries that took place and make reference to the journal passed to correct or adjust the entry.

Readers are encouraged to read 'Do you know whose money it was?' (2015 (March) DR 14), where the Financial Forensic Investigation Team of the Attorneys Fidelity Fund discussed suspense accounts.

A suspense account in the trust accounting records is an account used to temporarily allocate money received into the trust bank account and that cannot be immediately allocated to a specific account. The main reason the money cannot be allocated is that the depositor perhaps did not put on a reference when making the deposit or put on an incorrect reference, therefore, making it difficult for the firm to know whose money it is. The money so received in the trust bank account gets

allocated to the suspense account, until the depositor comes forth to claim the money as theirs by providing satisfactory proof thereof.

We will now explore various scenarios where journals are passed.

Scenario 1 – the correct way of adjusting entries

On 13 March 2017, client 'A' entrusted a legal firm, SKM Attorneys, with an amount of R 63 000 for a matter that the firm was engaged with. The firm, in their trust accounting records, opened an account referred to as 'SKM – A' for the client. However, on paying this amount into the trust bank account of SKM Attorneys, the client did not reflect their reference with the firm, and the firm could, therefore, not allocate the money received to its account. The firm allocated the received amount of R 63 000 to a suspense account, referenced 'SKM – queries' in the trust accounting records, pending identification of the owner of the money, by crediting that account with R 63 000.

The client later realised their mistake, and on 29 March 2017, the client informed the legal firm that they made the deposit for that amount, on 13 March 2017, but forgot to put a reference, and submitted proof of the deposit to SKM Attorneys. On receipt of the proof of payment by the firm, and on the firm satisfying themselves that the money belonged to client A, the money was moved out of the suspense account, and reallocated to client A's account.

Based on this scenario, the following entries will be evident in the trust accounting records of SKM Attorneys:

In the trust journal book

Date	Description	Debit	Credit	Narration
29-3-2017	ADJ269 – (SKM – queries)	R 63 000		Previously unidentified receipt has been identified.
29-3-2017	ADJ269 – (SKM – A)		R 63 000	

In the affected individual ledger accounts

Date	Description	Debit	Credit	Balance
SKM – queries:				
Opening balance				R 10 000
13-3-2017	Receipt		R 63 000	R 73 000
29-3-2017	Reallocation – ADJ269 (SKM – A)	R 63 000		R 10 000
SKM – A:				
Opening Balance				R 5 436
29-3-2017	Reallocation – ADJ269 (Queries)		R 63 000	R 68 436

As it can be seen from the foregoing, the movements are recorded in the trust journal book to reflect which account was debited and which was credited with the full amount, and

the two affected ledger accounts, the suspense and client A accounts, also reflect all the transactions.

Scenario 2 – the correct way of adjusting entries

Client 'C' has two matters that SKM Attorneys have dealt with. The first matter is a litigation matter, account 'SKM – C (Lit)' with a credit balance of R 645 235, and the second is a transfer matter 'SKM – C (Conv)' with a credit balance of R 2 503. On 24 October 2017, SKM Attorneys required the client to make a deposit of R 12 856 for the transfer matter that is about to register as there is not sufficient funds in that account.

Although SKM Attorneys are aware of the huge balance sitting in the litigation matter account, and the fact that the matter is far from completion, the client's authorisation is required to move the amount from one account to another. On the same day, the client instructs SKM Attorneys to transfer the funds from the litigation matter, as there are no fees imminent in the near future.

The following is evident:

- The instruction by the client to transfer money from the litigation account to the transfer account. Preference is given to a written instruction rather than a verbal or telephonic instruction.
- The entries in the trust journal book, and in the two individual ledger accounts are affected as follows:

In the trust journal book

Date	Description	Debit	Credit	Narration
24-10-2017	ADJ423 – (SKM – C (Lit))	R 12 856		Authorised by the client.
24-10-2017	ADJ423 – (SKM – C (Conv))		R 12 856	

In the affected individual ledger accounts

Date	Description	Debit	Credit	Balance
SKM – C (Lit):				
	Opening balance			R 645 235
24-10-2017	Reallocation – ADJ423 (SKM – C (Conv))	R 12 856		R 632 379
SKM – C (Conv):				
	Opening Balance			R 2 503
24-10-2017	Reallocation – ADJ423 (SKM – C (Lit))		R 12 856	R 15 359

In this case, the client who is the owner of the money in the trust account has authorised the transaction that happened.

Scenario 3 – an incorrect way of adjusting entries

Client 'C' has two matters that SKM Attorneys have dealt with. The first matter is a litigation matter, account 'SKM – C (Lit)' with a credit balance of R 645 235, and the second is a transfer matter 'SKM – C (Conv)' with a credit balance of R 2 503. On 24 October 2017, SKM Attorneys required the client to make a deposit of R 12 856 for the transfer matter that is about to register as there is not sufficient funds in that account.

SKM Attorneys is providing legal services to another client, client 'H' in another commercial matter, 'SKM – H (Com)'. Client H is a nephew to client C, and this is common knowledge to the firm, since client C introduced client H to the firm as such.

The commercial matter for client H was concluded on 14 September 2017, and the client was called on to make a payment towards the attorney's fees for an amount of R 58 964. The firm sent numerous reminders to client H to no avail. As at 24 October 2017, the balance in client H's account was R 500, and no money was received from client H towards the attorney's fees as required.

On 24 October 2017, client C instructs SKM Attorneys to transfer the required amount of R 12 856 from the litigation account to the transfer account. SKM Attorneys remembers that client C's nephew has not paid in the amount required for the commercial matter. The firm therefore resorts to taking the amount from the uncle's account, by including this amount to that which client C authorised the firm to transfer. The aim is to refund that amount when client H hopefully pays in the required amount. Note that the firm has not received any authority from client C to take the fees for client H's matter, but acts purely on their knowledge of the relations between the two clients, and the fact that client H was introduced to the firm by client C.

The written instruction received from client C explicitly authorises the transfer of the R 12 856 from the litigation account to the transfer account. However, the following transactions are evident in the trust accounting books of SKM Attorneys:

In the trust journal book

Date	Description	Debit	Credit	Narration
24-10-2017	ADJ426 – (SKM – C (Lit))	R 71 820		Authorised by the client.
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In this case, while there is a clear debit and credits of accounts affected, and the fact that the full amount debited was credited, the amount transferred from the client's account is not in line with the client's instruction. As a result, the narration in the journal books is incorrect and misleading as the client only authorised a portion of the amount, and not the full amount.

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Qualifying as a legal practitioner gives status, identity and structure, which is sometimes difficult to find in other areas of life. Work could become an extension of self to such an extent that self-worth or self-esteem derives from it. Personal interests and relationships fall lower on the priority list and you may feel like you have little or no control over your private life.

Due to the nature of work legal practitioners do, and the impact legal practitioners' input have on their clients' lives and businesses, it is easy to become over-responsible. This could lead to feelings of guilt, perfectionism or obsessive compulsive working, which could lead to exhaustion, continuous stress and eventually burnout. Are you working more than 50 hours a week? Do you work regularly over weekends?

According to Prof Adrian Furnham, the originators of the concept 'workaholism' pointed out the similarities between the workaholic and the alcoholic. In this regard, these experts indicate that both, *inter alia*, neglect their families, personal relationships and other responsibilities; both feel better when partaking in the addictive activity; both indulge to numb or avoid certain feelings; both can show physical withdrawal when away from their preferred activity; and both deny the problem (A Furnham 'What is Workaholism?' www.psychologytoday.com, accessed 26-2-2018).

Prof Furnham further points out that workaholism mostly affects 'white-collar workers', as you are unlikely to come across, for example, a car attendant or shelf packer who suffers from work addiction.

Like any addiction, workaholism is 'treatable' and manageable and possible to overcome. The first step, however, is to acknowledge the problem and to commit to a plan to change certain habits and behaviours, even if it brings discomfort and anxiety at first.

Technology

Due to technology, which includes, e-mails, WhatsApps, SMS, and Skype, communication between legal practitioners and clients could easily become instant and non-stop. This may raise expectations of clients and can place additional

pressure on legal practitioners who do not set boundaries.

Although these new technologies brought many benefits, they have also brought about new negative behaviours. An example, relates to the term FOMO (fear of missing out), which was coined in 2004. In the context of social media, FOMO was initially used to refer to the fear of missing out on fun events. However, in the context of a law firm, the term FOMO could perhaps refer to the anxiety a legal practitioner can experience when disconnected from means of receiving and sending communication to and from clients, opposing parties, or staff. In this regard, excessive use of WhatsApp or social media could become time wasters and end up being addictive.

Ask yourself the following:

- Does your firm have a clear ITC policy for legal practitioners?
- Do you limit the use of staff technology?
- Do you manage your clients by setting technology boundaries?
- Do you find yourself staying longer at the office to catch up on e-mails and social media?
- Do you find yourself taking longer to tackle difficult work using e-mails or your cell phone messages as excuse?

What if you are a Type A workaholic suffering from FOMO?

The nature of a legal practitioner's job is not likely to change soon, although new technologies may assist to work faster. A strong Type A workaholic suffering from FOMO may be resistant to change and deny having any problem. However, if such a legal practitioner would like to be happier and improve work-life balance, there are a number of ways to regain or create balance. Here are some tips:

- Resolve and commit to making changes. Start with small changes. Believe that you have the potential to change any of the behaviours listed above. They are just habits, which have been formed over time and are perhaps encouraged by your work environment or social influences. Behaviours can change if you really want them to.
- Similarly, when going on a diet, sometimes our 'willpower' is just not enough to help us make necessary changes successfully. Sometimes we need a non-judgmental empathetic person, to make us aware of other options, and support

us through such a process. Professional coaching may be a very good support for work addicted and over-worked legal practitioners. Professional coaching is a process, which could assist legal practitioners in setting goals, designing action plans and keeping the legal practitioners accountable to themselves, in changing behaviours which are preventing a healthy work-life balance. Professional coaching could also allow legal practitioners space to explore options to improve processes, systems and marketing, to save time and money.

- If you experience continuous high levels of stress, over a long period of time, feel over-exhausted, or burnt out, you may develop anxiety disorder or clinical depression, which is best treated by a psychologist and/or psychiatrist. Seek help if you continuously feel overwhelmed.
- Take care of your body. Make time to exercise to reduce stress. Do not skip meals. Try to eat healthily. Limit alcohol. Drink lots of water. Aim to sleep at least seven hours every night. Visit a doctor (general practitioner), if you suffer from severe stress or stress-related illnesses.
- Plan and commit regularly to do something fun outside of work to look forward to. Plan a holiday.

Conclusion

It is wonderful to be a legal practitioner who enjoys being engaged in law and helping clients. However, as legal practitioners' careers progress and their practices grow, pressures and responsibilities are likely to increase as well. It is easy for legal practitioners to develop behaviours and habits to keep them longer at the office and in front of their computers. Due to the nature, performance pressures financial pressures, unpredictability, and often urgency of legal work, most legal practitioners are likely to struggle with work-life balance at some point in their careers.

The aim of this article is to encourage legal practitioners to regularly create opportunities for balance, to take care of themselves, and to consider external help to destress and change continuous unhealthy work behaviour patterns.

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By
Marlene
Lamprecht

Maintenance Act: May the prosecution decline to prosecute a s 31(1) matter?

Section 31(1) of the Maintenance Act 99 of 1998 creates the offence of failing to make payment in accordance with a maintenance order.

Section 31(1) states: 'Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine.'

Section 31(2) states that a defence of 'lack of means', will not succeed if the prosecution proves that the failure to pay was due to the accused's 'unwillingness to work or misconduct'.

Regulation 22 of the Maintenance Act sets out the procedure that the complainant must follow in instituting a prosecution for failing to comply with a maintenance order: 'A complaint regarding a failure to make a payment in accordance with a maintenance order shall substantially correspond with Form Q of the Annexure.'

Form Q requires the complainant to state under oath, *inter alia*: 'The complainant is in arrears with his/her maintenance payments to the following extent.'

Form Q further requires the complainant to either: Attach 'A certified copy of the existing maintenance order' or to indicate that the order is 'on file at the Maintenance Court'.

Section 31(1) sets out two requirements for institution of a prosecution, namely:

- A court order.
- Evidence that the respondent has failed to comply with the court order.

May the prosecution insist on further and better evidence?

In many courts the practice has arisen that the National Prosecuting Authority (NPA), before instituting a s 31(1) prosecution, will require evidence that the defaulting party, at the time of the default, had the means to comply with the court order.

This additional requirement conflicts with the provisions of s 31(2).

The NPA relied on *S v Magagula* 2001

(2) SACR 123 (T) as being the authority, which introduced this additional requirement.

The Magagula case

At para 105, Stegmann J held in order to establish a contravention by the accused of failing to comply with maintenance order that the following elements must be proved –

'(1) a maintenance order directed to the accused;

(2) a failure by the accused to make a particular payment required by the order;

(3)(a) that at the time of his default, the accused had the means to comply with the order; or

(b) ... if the accused has raised the defence of a lack of means, that the accused's lack of means was caused by his own unwillingness to work, or by his misconduct; and

(4) a guilty mind on the part of the accused (including knowledge of unlawfulness).'

It appears as though the NPA – when insisting on this additional requirement – did not distinguish between the institution of a prosecution and a conviction for the contravention.

Effect of the additional requirement

The practical difficulty of this additional requirement is that it is not always easy to produce satisfactory evidence that the defaulter had the means to comply with the court order. This is knowledge that is peculiarly within the knowledge of the defaulter.

Often, when the NPA is of the opinion that there is insufficient evidence to prove that 'the accused had the means to comply with the order', it will decline to prosecute the matter.

Effect of a *nolle prosequi*

The institution of criminal proceedings is usually the last resort of the complainant. It comes after the civil remedies for defaulting on a maintenance order, warrant of executions, emoluments attachment orders and attachment of debts have been unsuccessful or have not been able to be utilised.

Once the NPA has declined to prosecute the matter the applicant is often left without any relief. The ball is now in

the hands of the defaulting respondent. The respondent may, in theory, apply in terms of s 19 of the Maintenance Act for the order to be varied or set aside. The difficulty with this solution is:

- Does the respondent know this should be done?
- Does the respondent want to do this?
- Is the respondent not paying because of inability or because they do not want to pay?
- Does the respondent's conduct amount to misconduct?
- Does the respondent have a guilty mind?

A *nolle prosequi* also means that the respondent is denied the opportunity of showing the criminal court that the lack of means was not due to any 'unwillingness to work or misconduct' on their part.

The practical effect of a *nolle prosequi* decision is that the maintenance court proceedings grind to a halt. Often the only hope available to the complainant is for the respondent to change their mind, to resign or retire and to receive a lump payment or to die and leave something of value in the estate.

What about a s 41 conversion?

Section 41(a) provides for the conversion of criminal proceedings into a maintenance inquiry.

If during the course of any proceedings in a magistrate's court in respect of an offence referred to in s 31(1) it appears on good cause shown that it is desirable that a maintenance inquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such inquiry.

The institution of a criminal prosecution for failing to comply with a maintenance court order is distinguishable from an ordinary prosecution because the purpose of the prosecution is two-fold –

- to determine whether the respondent committed an offence; or
- to determine whether the matter should be converted into a maintenance inquiry.

The institution of a criminal prosecution should not be seen only as a punitive measure, but also an opportunity of providing the respondent the right to have the maintenance inquiry re-opened.

The NPA by insisting on proof, before instituting a prosecution, that the respondent had the means to comply with the order, is limiting the application of the s 41 conversion and this has the effect of frustrating the purpose of s 41.

One of the main purposes of s 41 is to identify and assist respondents who either do not have the means to pay the maintenance court order or who have been wrongly ordered to make such a payment. A s 41 conversion may sometimes be seen as tantamount to a review of the original decision.

In criminal proceedings s 41 conversions are unique to maintenance defaulters.

Benefits of a s 41 conversion

A maintenance court, after hearing evidence, may substitute the original order or even discharge it. A criminal court, even if a person is found, 'not guilty', does not have the authority to discharge or substitute the maintenance order.

The role of the NPA in the *Magagula* decision

In the *Magagula* case, no fault was found on the part of the NPA in charging the accused for failing to comply with the maintenance order and relying only on –

- existence of a court order, and
- evidence under oath of a failure to comply with the court order.

The role of the magistrate in the *Magagula* decision

Criticism was leveled against the magistrate for –

- failing to establish that all the elements necessary for a conviction were either admitted or proved during the course of the criminal proceedings; and
- failing to convert the proceedings into an inquiry.

What if the NPA had declined to prosecute in *Magagula*?

If the NPA had declined to institute proceedings against Mr Magagula, the maintenance order would have continued to be of force and effect until set aside by a maintenance court. The arrear maintenance would have continued to accumulate. The complainant would have been entitled to institute civil proceedings for the recovery of the arrear maintenance. Should Mr Magagula have resigned or retired and received a lump sum payment the complainant would have been entitled to apply for an attachment of debt.

All in all, the best thing that happened to Mr Magagula and his other dependents was the institution of criminal proceedings.

Focus of the NPA

A policy of the prosecution aimed more at securing convictions rather than in-

stituting a prosecution is problematic in the case of maintenance defaulters. A successful prosecution is not always the best outcome. Sometimes the best outcome is a conversion.

Rights of the child

One must not lose sight of the fact that a maintenance order is more than a civil judgment; it is the basis of a relationship between a child and the parents. A maintenance order is the embodiment of the right of a child to be maintained by their parents.

All organs of state must endeavour to ensure that there is compliance of s 9 of the Children's Act 38 of 2005.

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

Conclusion

The NPA does not have the right to decline to prosecute a s 31(1) complaint if there is evidence of a valid court order and evidence under oath that the accused has failed to comply with the court order.

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By Luyolo Ntikanca and Sihlulelwe Reward Nxumalo

Litigation costs in constitutional matters

The Constitution makes provision for a Bill of Rights. The Bill of Rights is the cornerstone of democracy in South Africa (SA). It enshrines the right of all people in SA and affirms the democratic values of human dignity, equality and freedom. The Constitution further provides that the state must respect, protect, promote and fulfil the rights mentioned in the Bill of Rights.

The enforcement of constitutionally protected rights is often reduced by the costs of litigation. This article seeks to address how the Constitutional Court (CC) is making access to justice readily available without the anxiety of having to stomach expensive legal fees.

In the case of *Harrielall v University of KwaZulu-Natal* 2018 (1) BCLR 12 (CC), the CC considered the *Biowatch* principle as was formulated in the case of *Trustees, Biowatch Trust v Registrar: Genetic*

Resources, and Others 2005 (4) SA 111 (T).

Background of the *Harrielall* case

Niekara Harrielall, a student at the University of KwaZulu-Natal, lodged an application for leave to appeal against the order of the Supreme Court of Appeal (SCA), on the basis that the applicant's appeal was dismissed with costs. In her application she cited the university as a respondent.

In 2015 the applicant applied for admission at the University to study for an MBChB degree, as she aspires to be a medical doctor. However, her application was unsuccessful. To improve her prospects for admission, the following year, the applicant registered for the degree of Bachelor of Medical Science (Anatomy) in 2015. When applications for the 2016 intake were open, she ap-

plied again under the policy described as 'mature students', which is defined in these terms:

'Mature students will comprise 20% (40 students) of the class.

Mature students are categorised as follows:

a) Candidates who have completed their Matriculation/Grade 12 examination and exceeding the minimum standards for entry into the MBChB programme as defined above; and have done a year or more of a degree course at a recognised university in South Africa; and achieved outstanding results (open). Twenty five percent (10 students) will be from this open competitive category.'

Ms Harrielall's application was based on the above-mentioned provision, which applies to candidates who have completed matric and have also done a year or more of a degree course at a recognised university in SA. In addition to her matric qualification, the applicant

had done a one year course in the Bachelor of Medical Science (Anatomy) at the same university. When the selection in that category was made the applicant was again unsuccessful. The applicant in the matter logged an application to review the decision, the KwaZulu-Natal Division of the High Court dismissed her application. She then appealed the matter at the SCA and her appeal was dismissed with costs.

Issue of legal costs

The CC held that, the court was satisfied that the application had to fail as it had no prospects of success, the issue of litigation costs had to be considered. The CC held that the High Court and the SCA were not entitled to depart from the *Biowatch* principle, which requires that an unsuccessful party in legal proceedings against the state be spared from paying the state's costs in constitutional matters.

The principle was laid down in the *Biowatch* case, in this case the CC avowed that this rule applies to every constitutional matter involving organs of state.

The purpose of the *Biowatch* principle is to shield unsuccessful litigants from the obligation of paying costs to the state. In litigation between the government and a private party seeking to assert a constitutional right, the case of *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.

This rule is, however, subject to exceptions. These exceptions were formulated in the *Affordable Medicines* case where Ngcobo J said that: 'There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves disapproval by the Court which may influence the Court to order an unsuccessful litigant to pay costs.'

The question of whether parties should bear their own costs or not was discussed in *Ferguson and Others v Rhodes University* 2018 (1) BCLR 1 (CC), where the court dealt with the enforcement of rights as enshrined in the Bill of Rights.

In this case the High Court ordered that the applicants should bear the cost of the proceedings, the SCA upheld the decision of the High Court. The CC expressed discontent in that both the High Court and the SCA failed to exercise their judicial discretion in the constitutional context in light of the application of the *Biowatch* principle.

The *Ferguson* case dealt with the right to freedom of expression, the right to assembly, picket and present petitions.

Background of the *Ferguson* case

In April 2016, a student chapter called, Chapter 2.12 Movement comprising predominantly of Rhodes University students, embarked on a campaign to address the issue of rape culture and gender-based violence at Rhodes University. The High Court expressed the view that the issue was 'deeply emotional, relevant and challenging.'

In pursuit of this campaign, it led to some instances of unlawful conduct, which included the kidnapping and assault of two male students who were suspected of rape or sexual assault.

Rhodes University approached the High Court and obtained an urgent interim interdict. The court accepted oral evidence in support of the relief sought and granted the same. The relief granted was extremely wide in its scope, as well as in its designation of whom the relief covered and was extended to.

The first respondent was cited as the 'Student Representative Council of Rhodes University'; the second respondent was cited as the 'students of Rhodes University engaging in unlawful activities on the applicant's campus'; while the third respondent was cited as 'those persons engaging in or associating themselves with unlawful activities on the applicants' campus'.

In these proceedings, the relief sought is pursued only by the applicants. They were cited as the fourth, fifth, and sixth respondents, respectively, in the High Court. The CC referred to them as the 'applicants'.

The applicants applied for leave to appeal against the High Court's order. This application was dismissed by the High Court and the applicants were ordered to pay the costs of the respondent.

The applicants subsequently applied for leave to appeal to the SCA. Their application was dismissed with costs.

It was the submission of the applicants that the matter before the court raises significant constitutional issues on the right to freedom of expression and protest as provided for in ss 16 and 17 of the Constitution.

The CC followed the *Biowatch* principle, and recited the 'chilling effects' of court orders that could have on parties seeking to assert their constitutional rights even where unsuccessful.

The assertion of constitutional rights is inextricably linked to the transformative process the Constitution contemplates. The CC failed to reason why the *Biowatch* principle could not be followed in this case. In support of this deviation the SCA applied the criterion of fairness in making its determination on costs, even though the *Biowatch* principle was clearly applicable.

The applicants were proclaiming their constitutional rights of freedom of expression and association in challenging the interim interdict, which was ultimately found to be overly wide.

Unambiguously the CC articulated that these 'proceedings activated the principle enunciated in *Biowatch* with regard to costs. Thus, despite the High Court granting a cost order that is consistent with *Biowatch*, to the extent that it premised its order on the consideration of fairness alone, this constitutes an error on its part even though the result arrived at was the same.'

In conclusion, this rule does not apply in cases of private individuals. Bona fide constitutional litigation between individuals and organs of state should be encouraged without the fear of 'chilly' legal costs where the individuals lose the case against an organ of state.

In the very same tone, legal representatives should also take the initiative in reducing their legal fees, where possible. This would also encourage the spirit of 'access to justice'.

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

www.salvationarmy.org.za

By
Nkateko
Nkhwashu

The need to use reliable independent third-party sources during customer identification and verification within the risk-based approach system

The Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act) introduces a risk-based approach (RBA) to customer identification and verification (or Customer Due Diligence as it is now referred to in the Amendment Act). This is opposed to the previous 'tick-box' approach used under the Financial Intelligence Centre Act 38 of 2001 (FICA). The former entails a situation wherein accountable institutions have to first identify, assess and understand the risks they are being exposed to, namely, money laundering, terrorist financing etcetera, and thereafter, put measures or controls in place to deal with them. The latter, on the other hand entails a situation wherein a financial regulator or supervisory body, namely, the Financial Intelligence Centre (FIC) or South African Reserve Bank, through secondary legislation, prescribe ways that will be used by accountable institutions in identifying and verifying customers' identities by, for example, regulations or guidance notes etcetera.

In a RBA regime, resources to address risks are targeted where needed the most, thus ensuring the approach's efficiency and flexibility. This is part of the reason why throughout the consultation period to the Amendment Act it was emphasised that the RBA's flexibility will remove some of the anomalies currently experienced in trying to comply with some of the rigid requirements of a 'tick-box' approach to customer identification and verification. One example of such a rigid requirement is the need for proof of a residential address when a customer has to access certain financial products or services. This requirement has been a headache to all for quite some time as the majority of the South African citizens do not have physical proof of residential addresses for various reasons.

It is hoped that the above challenge will be dealt with or solved under the new RBA regime. Previously various attempts were made to solve this issue, for example, by exempting accountable institutions from having to verify the information provided by customers at on-boarding stage or other moves by local branches (of banks, for example) wherein municipalities were forced to

issue customers with documents purporting to be proof of residence coupled with an affidavit from the police. The challenge with the first attempt is that accountable institutions were later required by the regulator or supervisory body, to verify the information provided by the customer at on-boarding. More often than not, this proved difficult and as a result customer accounts had to be closed. Lastly, the challenge with the second attempt remains that the content or information contained in the purported 'municipal proof of residential address' could not be relied on for the purposes of complying with FICA as it is, both given and confirmed by the customer themselves. This information cannot be said to be from a 'reliable and independent third-party source' (Guidance Note 7 on The Implementation of Various Aspects of The Financial Intelligence Centre Act, 2001 (Guidance Note 7) (www.fic.gov.za, accessed 13-3-2018) at para 83).

It is further hoped that the new RBA will 'bring previously excluded sectors of society into the formal economy' and as a result 'improve the efficacy of measures to combat terrorism financing and money laundering, while also promoting financial inclusion' (Louis de Koker *South African Money Laundering and Terror Financing Law* (Durban: LexisNexis 2016)). Going through some of the documents on the Amendment Act, for example, Memorandum on the objects of the Financial Intelligence Centre Amendment Bill 2015 etcetera, one gets the sense that much hope was placed on the supposed 'flexibility' of the RBA when it comes to dealing with some of the challenges outlined above, especially those related to customer identification and verification, as well as access to financial services (or financial inclusion). Furthermore, it was as if accountable institutions were going to be spoilt for choice when it came to sources or ways to use when identifying and verifying customers, but the revised Draft Guidance on the Implementation of Various Aspects of the Financial Intelligence Centre Act 38 of 2001 (Guidance Note) issued for public comment on 30 August 2017, called for caution as it clearly showed that it is not 'all systems go' when it comes to sources that will be used for customer identification and verification.

Things to be cautious of when identifying and verifying customers

It is imperative to note that in most developing countries, including South Africa (SA), one of the key challenges to accessing financial services or products, is the fact that most people find it difficult or are unable to get government issued identity documents or even worse, some countries do not have a national identification system. Poor people are usually affected the most by these situations. In certain countries, however, due to technological advancements and flexibility in their regulatory frameworks, which allows for innovation. Access to financial services has since improved without the need to rely on government issued documents and/or sources, for example, the Kenyan success story of M-Pesa.

The Guidance Note provides examples on how accountable institutions are expected to identify and verify customers. It also provides a non-exhaustive list of reliable sources that can be used as well. What is important – for the purposes of this article – is that it also cautions accountable institutions on which sources or ways that may not be used or relied on for the purposes of complying with the Amendment Act. All the suggested sources or reliable ways of identifying and verifying customers seem to suggest that only government issued documents or sources should be heavily relied on, as they seem to meet the standard of being 'independent reliable third-party sources' (Guidance Note 7 at para 87). The use of electronic sources is also acknowledged, however, such use or the use of other innovative ways like biometrics or personal attributes/physical appearance, seem to be suggested as 'supplements' rather than initial sources, which may be used.

The language of the Guidance Note is couched in a cautious, prescriptive and not so-flexible manner. It is conceded that some of the basic attributes, which can only be verified by using government issued sources will remain, however, the suggested general rule should not be that only 'government issued or controlled sources be used as the means of verification when verifying basic identity

attributes' (Guidance Note 7 at para 88). The Guidance Note is for the use of pro-government issued sources, as opposed to electronic and other methods of verification. For example, in certain parts of the Guidance Note where electronic means of verification are suggested, a 'disclaimer' of some sort is provided. One such is as follows:

'Accountable Institutions making use of electronic data sources to verify a prospective client's identity remain responsible and accountable in their own capacity for compliance with the requirements of the FIC Act. The use of electronic data sources ... does not provide automatic indemnity from regulatory action relating to the institution's compliance with these requirements. It is important therefore that accountable institutions apply due diligence in choosing electronic solutions as a means to enable verification of a prospective client's identity' (Guidance Note 7 at para 90).

It is further conceded that the standard or requirement of using reliable independent third-party sources when verifying customer's identities is in line with international best practice. However, in developing countries, more often than not, corroborating these sources entails relying on government-related data or sources, for example, the Department of Home Affairs, Companies and

Intellectual Property Commission, South African Revenue Services and others. The challenge, especially for the poor living in remote parts of the country, is that customers/citizens do not have these documents or the records are not accurate and up to date. Despite all these examples, the question remains whether the new regulatory framework is going to be conducive enough for efforts aimed at realising the objective of financial inclusion. Furthermore, will accountable institutions be bold and daring enough when it comes to coming up with innovative ways of identifying and verifying customers given the cautious way in which the Guidance Note is couched or will accountable institutions opt for the safe 'conservative corporate compliance' route by sticking to the suggested ways and sources, thus shunning innovation and the use of electronic sources?

Conclusion

It short, the adoption of an RBA is a very welcome development within the regulatory framework of SA. The discretion now given to the accountable institutions on how to go about identifying and verifying customers will surely help in dealing with some of the challenges currently faced by the majority of citizens when trying to get access to financial services and products, provided that the

expectations of the regulators, supervisory bodies and accountable institutions are aligned. Furthermore, the regulatory environment should be user-friendly and the use of electronics should be encouraged. However, after having had sight of the language in which the Guidance Note is couched, it remains to be seen whether in practice accountable institutions will be bold and flexible enough to think outside of the box or be innovative and still be able to meet the expectations of the regulatory authorities. After all, it has been stated countless times by the Financial Action Task Force representatives that a risk-based approach and financial inclusion are not mutually exclusive.

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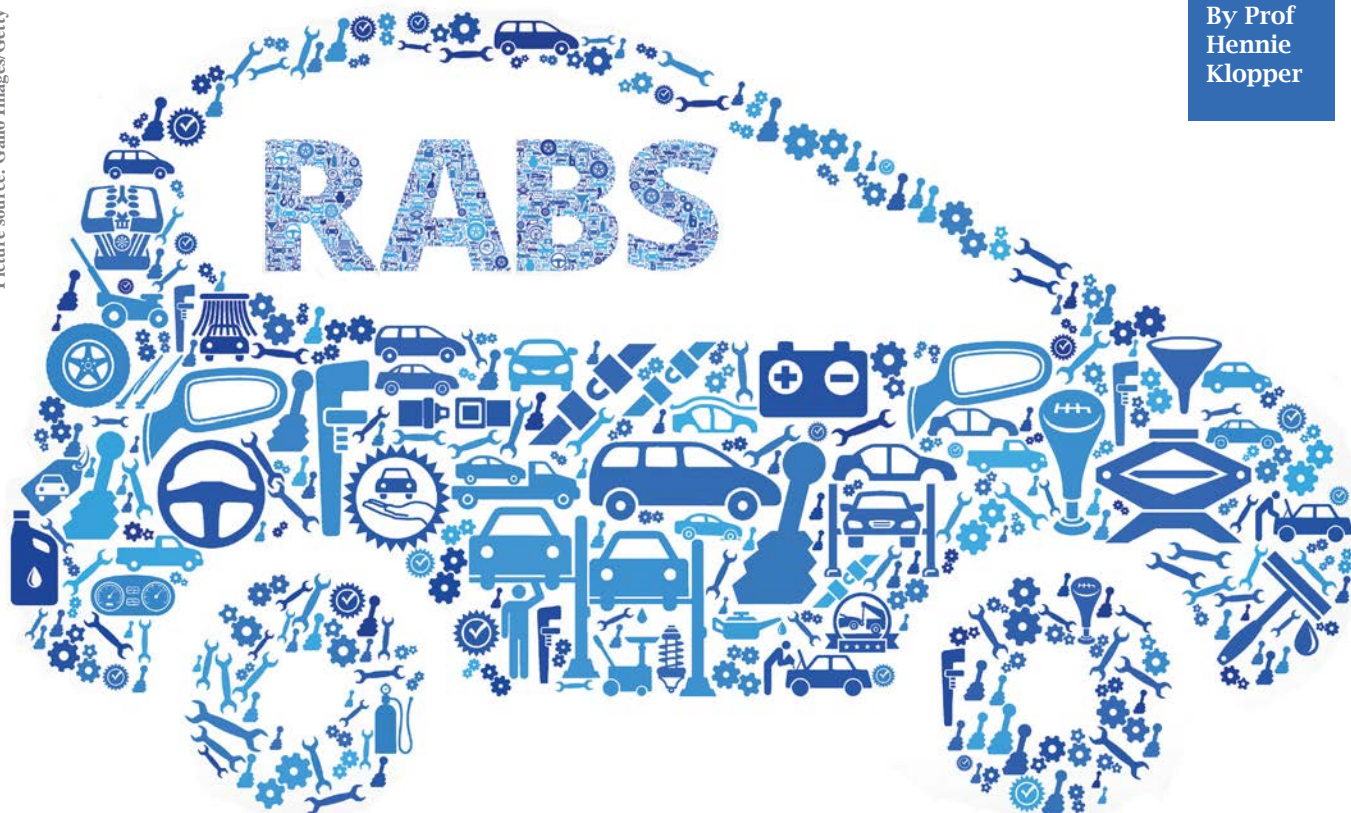
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A critical evaluation of the RABS Bill and the common law right to delictual claims

By Prof
Hennie
Klopper

Picture source: Gallo Images/Getty



In April 2017 the Minister of Transport gave notice in the *Government Gazette* (GenN 302 GG40788/18-4-2017) of the intention to introduce the Road Accident Benefit Scheme Bill, 2017 (RABS Bill) into Parliament in terms of r 241(1)(b) of the National Assembly. The RABS Bill excludes non-patrimonial benefits. It has been suggested that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) presents a basis for RABS justifying the abolition of non-patrimonial compensation and the common law right to recover statutory regulated insufficient compensation. This point of view calls for critical evaluation.

Similarity

If the subject matter of the two Acts is considered, one may be forgiven for con-

cluding that the Acts are similar. COIDA provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees or for death in the course of their employment. The Road Accident Fund Act 56 of 1996 (the RAF Act) deals with the establishment of the Road Accident Fund (the Fund) and matters connected therewith. The object of the Fund is the payment of compensation in accordance with the RAF Act for loss or damage wrongfully caused by the driving of motor vehicles. The RAF Act provides that a third-party claimant is entitled to recover loss or damage, which the third party has suffered as a result of any bodily injury to themselves or the death of or any bodily injury to any other person, caused by or arising from the negligent driving of a motor vehicle.

These Acts have common ground in

that both deal with compensation for bodily injury and death, albeit in different circumstances. But is this similarity conclusive?

Objects

• *Determination essential*

The fundamental difference between Acts of Parliament is to be primarily found in the purpose and in the field of application of the Acts.

COIDA

• *Historical background*

The basic premises of the Acts preceding COIDA varied from a choice to pursue common law or statutory remedies following an injury during employment (requiring either no fault or fault) to purely statutory prescribed compensation out of a statutorily created fund on a no

fault basis with the absolution of liability of the employer but with retention of defined common law rights. A very important recurring common principle of all these Acts was that an employee could not claim where the injury or death was of their own doing, which emphasises the common law basis for liability (see Wilhelm Coetzee *Die Toepassingsterrein van Ongevalle-wetgewing in die Suid-Afrikaanse reg* (unpublished LLD thesis University of Pretoria 1981) 8ff).

• Philosophy

Work-related injuries affect a person's ability to earn and provide for their dependents leading to the creation of socio-economic problems, which become a societal burden. Based on the governmental obligation to govern and create order, it can be said that government is called on to create measures to counteract the negative impact of occupational injuries, death and diseases. The financial means to ensure such measures fall on the employers as they have the means, have control over the workplace and are, therefore, the best placed to shoulder the financial implications of such measures.

• Purpose

This Act is the product of a long development of enactments having their genesis with the Employer's Liability Act 35 of 1886 (Cape of Good Hope) and culminating in the Workmen's Compensation Act 30 of 1941. COIDA is the successor to the latter Act and essentially consolidated legislation dealing with occupational injuries and diseases into one Act. The legislation seeks to partially compensate employees for loss of income caused by occupational accidents and diseases (see Coetzee (*op cit*) 52; *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) at 109; *McDonald v Enslin* 1960 (2) SA 314 (O) at 317-8 and *Birkett v Ongevallefonds en 'n Ander* 1965 (2) SA 630 (A) at 635).

A coincidental consequence of the protection of employees is that s 35(1) absolves the employer from any liability regarding occupational injuries and diseases. It must be noted that the s 35(1) exclusion only relates to claims caused by the negligence of the employer. Section 36(1)(a) authorises the recovery of common law damages caused by a person other than the employer. Clearly the common law right of an employee to claim damages from other parties other than the employer remains intact. Compensation received in terms of COIDA must be deducted from any common law damages recovered by the employee (s 36(2)).

Viewed from this perspective an ancillary purpose and/or effect can be construed. The protection of the employer

is essential to ensure job security. This is illustrated by the unintended practical outcome of *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) where it was held that an employee was entitled to claim non-patrimonial damages from the employer for a respiratory occupational disease contracted during his employment. The added liability for occupational disease has put more pressure on an already financially beleaguered gold mining industry and will ultimately result in further job losses – a consequence which the legislator could not have intended (see 'Costs related to layoffs, lawsuit, take toll on AngloGold results' www.mining.com, accessed 29-1-2018).

The RAF Act

• Historical background

The Motor Vehicle Insurance Act 29 of 1942 (the MVA Act) became law in 1942. It was succeeded by the Compulsory Motor Vehicle Insurance Act 56 of 1972, The Motor Vehicle Accidents Act 84 of 1986, the Multilateral Motor Vehicle Accidents Fund 93 of 1989 and finally, the RAF Act. In 1986 all reference to insurance was removed from the title because the compensation system was no longer funded by insurance – premiums previously paid by the owner or driver of a motor vehicle was now funded by a fuel levy. Essentially the basic structure and mechanisms of these Acts have over time remained unchanged. The initial Act was introduced in reaction to the potential danger created by motor vehicles to, initially, protect mainly pedestrians against the consequences of motor vehicle accidents (see A Suzman, G Gordon and LH Hodes *The Law of Compulsory Motor Vehicle Insurance in South Africa* (Cape Town: Juta 1982) at 1 *et seq*; the report of the Commission of Inquiry into certain aspects of compulsory motor vehicle insurance (the Grosskopf Commission) (1981) at 3 *et seq*). The objects of all the Acts impliedly indicate that the socio-economic interests of the motor vehicle accident victim were at stake. The system has recently been correctly classified as 'social security' (see *Law Society of South Africa [LSSA] and Others v Minister for Transport and Another* 2011 (2) BCLR 150 (CC) at para 50). Prior to 1986, insurance was employed as a vehicle to deliver the security benefits. The actual rights afforded a victim were not created by the insurance contract. The right of the road accident victim was their common law delictual right to compensation. Legislation only regulated access to the social security engineered by the insurance based acts using compulsory insurance as a funding mechanism. The RAF Act employs a fuel levy but uses the same structure as before 1986.

• Philosophy

The philosophy behind the introduction of the MVA Act of 1942 and its successors is like that of COIDA – protection of society against the socio-economic consequences of road crashes by providing full compensation for injury or loss caused by or arising from the driving of motor vehicles. The state has exercised its regulatory function by retaining and using the common law right of a road accident victim, but legislating for security of recovery of such damages by substituting the original wrongdoer by a deep-pocket defendant (currently the Fund). The burden of providing social security is spread among the actors in society who create the socio-economic consequences of road crashes – namely, drivers by requiring them to contribute through a fuel levy to the funding of the Fund.

• Purpose: Widest possible protection

It is settled law that the purpose of third party compensation legislation is the protection of the road accident victim. In this regard it has often been stated that the road accident victim is afforded 'the greatest possible protection' against the inability to recover delictual common law damages due to the impecuniosity of the wrongdoing driver (see *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285 and, also *inter alia*, *Rose's Car Hire (Pty) Ltd v Grant* 1948 (2) SA 466 (A) at 471; *Op't Hof v SA Fire and Accident Insurance Co Ltd* 1949 (4) SA 741 (W); *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (A)). The RAF Act has no possible ancillary or concomitant purpose. Full indemnification of a crash victim does not have any beneficial ancillary socio-economic result or consequence other than avoiding and/or negating the societal consequences of road crashes.

Mechanisms

• COIDA

The employer is legally obliged to contribute to a statutory fund and absolved from liability. The employee is on the other hand, obliged by s 35 of the COIDA to claim compensation from the statutory fund represented by the Compensation Commissioner (see *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) at para 14). A feature of COIDA is the s 36(1) retention of an employee's common law rights against all persons except the employer. The employee may at common law recover damages not paid in terms of COIDA, including non-patrimonial damages not caused by the negli-

gence of the employer. In terms of s 36(2) COIDA benefits recovered are deducted from the common law damages recovered by an employee. In the context of motor vehicle related occupational injuries, the shortfall not recovered in terms of COIDA is recovered from the Fund. The Constitutional Court approved of the abolition of the wrongdoer's liability by the Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act) in the *LSSA* case. This creates a clear case of discrimination between employees who are injured in a motor vehicle accident during employment and other road accident victims to claim the shortfall in compensation occasioned by the limitations introduced by the Amendment Act.

• The RAF Act

Section 21 of the RAF Act, prior to its amendment, compelled the third party to institute their claim for damages from the Fund unless the Fund was unable to pay compensation and contained an explicit reference to s 17. After its amendment by the Amendment Act there is no reference to s 17, which is the section that creates liability for the Fund and the wrongdoer is entirely absolved from liability unless the Fund is unable to pay any compensation or for a claim for emotional shock.

The new s 21 seemingly proceeds from the mistaken premise that the action against the Fund is based on the RAF Act itself and not on common law. As stated above it is quite clear that the basis of a road accident victim's claim is rooted in the common law and based on delict. To this end the wrongdoer's liability is suspended on condition that the Fund can pay, and the claimant complies with the provisions of the RAF Act (see in this regard *Rose's Car Hire* at 474 – 475 and *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A)). It also in error assumes that the RAF Act must protect the wrongdoer, where in fact and in law, the

road accident victim is the sole beneficiary of the RAF Act (see *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA)).

The common law basis of the Fund's liability is clearly established by the wording of s 19(a), which was not amended by the Amendment Act. Section 19(a) states that if the wrongdoer is not liable the Fund's liability is excluded but for s 21. As the amended s 21 after amendment by the Amendment Act contains no reference to liability of the Fund, the effect of s 19 is that the common law delictual claim, which is the premise of s 19(a) is abolished except where the Fund is unable to pay or where it is a claim for emotional shock by a secondary road accident victim. In addition to the legislative short-circuit created by the amendment of s 21 and the retention of s 19(a) it has a discriminatory consequence as it is the only Act that is based on common law where the common law liability on which the Fund is liable is all but abolished and in addition where no residual common law rights are retained as is the case with s 36(1) of COIDA. In short, the common law based RAF Act as amended fully abolishes the common law right to claim from the wrongdoer (except where the Fund is unable to pay and where it is a claim for emotional shock) and the no-fault based legislation (COIDA) retains the right to claim from a wrongdoer.

Conclusion

A presumption that COIDA is like the RAF Act is an oversimplification. COIDA has a secondary effect and ancillary purpose to protect the employer against claims of employees based on occupational injuries and diseases to conserve employment. In the case of the RAF Act, the only single object is to protect the road accident victim against the possibility of non-recovery of their common law delictual claim for damages caused

by or arising from the unlawful and negligent driving of motor vehicles. The notion that COIDA is a suitable model for the introduction into the RABS Bill is of no fault the abolition of all rights to a common law remedy for recovery of that which is not statutorily compensated, is entirely false. Employees retain their full common law rights in terms of COIDA except claims caused by the negligence of an employer where their common law claim is excluded. The secondary consequence of COIDA or ancillary object makes the argument for the transplant of the COIDA legislative structure to an Act intended for the protection of road accident victims false and COIDA can consequently not be used as a model or justification for a no fault compensation system where the common law rights of road accident victims are not recognised and retained. In fact, the current Fund dispensation brought about by the Amendment Act, which limits compensation without retention of the common law claim to recover the shortfall from the wrongdoer is in view of those provisions of COIDA (s 36(1)) that confirm employers' common law rights, discriminatory and consequently unconstitutional. Any attempt to fully substitute the road accident victim's common law rights with limited statutory compensation benefits without retention of the right to a residual common law claim to serious and justifiable constitutional challenge. This is precisely what the proposed Road Accident Benefit Scheme sets out to do.

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Access denied: Spoliation as remedy to director denied access to workplace

By
Nicholas
Mgedeza

Legal disputes are cropping up everywhere all the time. This is discernible by the many matters on our court rolls. Let me hasten to say one needs to determine whether in the circumstances where a director is prevented from entering the workplace by the employer, what the expeditious legal remedy is. To be particular, I determine whether *mandament van spolie* (spoliation) is the appropriate remedy under the circumstance.

Background

Significantly, spoliation is the possessory remedy. In the case of *Yeko v Qana* 1973 (4) SA 735 (A), it was held that an applicant for spoliation remedy must satisfy the court that –

- they were in possession or had *quasi* possession of the property; and
- that the respondent deprived them of the possession forcibly or wrongfully against their consent.

In principle, all that the spoliated person needs to prove is that they were in possession of the object; and they were deprived of possession unlawfully (see *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) at 75C). The object of the order is merely to restore the *status quo ante* the unlawful action.

Possession

The right of possession is often referred to as the *ius possessionis* and must be distinguished from the so-called *ius possidendi*, the right to the possession of a thing. The former is only available to a person actually in possession of an object and exists



STOP **ACCESS DENIED**

either in addition to, or independently from, the latter, which is a right that enables a person to demand that they be given possession of an object, that is, a right which justifies a person's claim to have an object in their possession. Thus a person may have a *ius possidendi* without actually being in possession of an object and, conversely, they may have a *ius possessionis* without having a *ius possidendi*, which is, a right to the possession of a particular object (see DG Kleyn, A Boraine and W du Plessis *Silberberg and Schoeman's the Law of Property* 3 ed (Durban: LexisNexis 1992) at p 113

– 114). The possession, which must be proved, is not possession in the juridical (physical) sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for themselves (see *Mbuku v Mdinwa* 1982 (1) SA 219 (TkS)).

Deprivation right of access

Section 71(1) of the Companies Act 1 of 2008 (the Act) provides that '[d]espite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).

(2) Before the shareholders of a company may consider a resolution contemplated in subsection (1) –

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.'

As mentioned above one must possess the article with the intention of securing some benefits for themselves. Pertinently, one needs to determine that if in the circumstances where the director's access to the workplace is denied without following the process, spoliation can be utilised as remedy. In the case of *Greaves and Others v Barnard* 2007 (2) SA 593 (C), the respondent said that the interference with his peaceful use and possession of his office began after lunch on 8 April 2005. He received a telephone call from third appellant's attorney, informing him that he would be removed from the building by the police or security guards. Two security guards and two policemen entered his office and told him that they had instructions to remove him from the premises. When he asked them to provide him with a court order authorising their conduct, they left. He tried to telephone one of the company's employees to discuss certain matters with him. Four security guards again entered his office unannounced and told him to leave the premises immediately. He again asked whether they had a court order and they left. Another person, ostensibly from third appellant's attorneys, also entered his office and told him to leave his office. This person appeared very intimidating. With all the activity in his office, he found it impossible to continue with his normal work.

When he left the building that afternoon, he noticed that the lock to the front gate had been replaced. When he visited the premises the next day, he found that he could not open the front gate as the lock had been replaced.

The court held that 'before a person can bring spoliation proceedings, he must show that the right of which he has been spoliated is something in which he has an interest over and above that interest which he has as a servant or as a person who is in the position of a servant or quasi-servant.' In other words they must hold the property with the intention of benefiting themselves and not another.

The intention to possess for one's own benefit suffices to prove possession. In the matter of *Greaves* the court confirmed the well-established principle that the first requirement for the spoliation remedy is proof of undisturbed possession, in the sense of exercising effective physical control over the property for one's own benefit (as opposed to merely as a representative or servant of the person who is actually in possession). Proof of possession for this purpose does not require physical control *animo domini* – the lesser intention to hold for one's own benefit (holdership) is sufficient. The decision *a quo*, where the application was granted, was confirmed on appeal on exactly this basis: The applicant (the respondent on appeal) occupied the office with the intention of securing some benefit for himself, which was sufficient for a spoliation order to be granted. Thus, this decision cements the position that denial of access to workplace can be cured through the recourse of spoliation provided one can prove physical possession of the article or physical enjoyment or exercise of right in case of incorporeal and; unlawful dispossession thereof. See also *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another* [2009] JOL 23849 (ECG) at 5 where the court explicitly remarked that 'To succeed, an applicant for a spoliation order must prove:

(a) that he or she was in *de facto* possession of the property (which includes physical possession of movable and immovable property, and, in the case of incorporeal property, the physical exercise or enjoyment of the right in question which is sometimes called quasi-possession ...); and

(b) that he or she has been despoiled of that possession without recourse to the courts.'

If the applicant is found to have been unlawfully dispossessed the court will order that possession of the site be restored *ante omnia*, that is to say, before any litigation will be entertained relating to which party has title or a right to the possession to the property (see *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and*



Picture source: Gallo Images/Getty

Culture Services, and Others 1996 (4) SA 231 (C)). In this case, a spoliation order was granted pursuant to the applicant company applying as a matter of urgency for a spoliation order against the respondents compelling them to restore to the applicant possession of the building site on which the Villiersdorp Secondary School was being constructed and the plant, equipment and materials on the site, which were being used for the building work.

In contrast, one might find the circumstance where the employee is lawfully suspended pending the disciplinary hearing and ordered not to enter the company's premises pending the possible hearing. Patently, in the matter of *Nel v Nieuwoudtville Rooibos (Pty) Ltd* (2010) 31 ILJ 1781 (WCC) the applicant, who was the managing director and a shareholder of the company, held his position in terms of a five-year contract entered into in January 2009. In November 2009, following a board meeting, he was suspended on full pay pending an investigation into possible disciplinary proceedings against him. He approached the High Court seeking a spoliation order reinstating him in his position, restoring his access to the company's premises and restoring his possession of his company laptop, cellphone and keys. The company contended that the applicant had been lawfully suspended; that he had acquiesced in the decision by the board to suspend him and that his position in the company was not of the nature that would entitle him to apply for a spoliation order. Louw J held at para 13 that the spoliation order may be granted if the applicant's position in the company was such that he performed his work and occupied his office with

the intention of securing some benefit for himself. That is, his interest in his possession of the respondent's property materially transcended those of an employee. Subsequently the courts ruled otherwise and found that the applicant had not established that he was in possession of the respondent's property with the intention of securing some benefit for himself.

Analysis

In principle, the director can acquire the recourse of spoliation in the event of being barred from entering the place of employment by establishing that they were *de facto* in possession of the property or in physical exercise or enjoyment of a right. Likewise, the applicant must establish that they were in possession of the respondent's property with the intention of securing some benefits for themselves. In *Scholtz v Faifer* 1910 TPD 243 at 246 Innes CJ set out the position as follows: 'Here the possession which must be proved is not possession in the ordinary sense of the term – that is, possession by a man who holds *pro domino*, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner' (see also *Mbuku v Mdinwa* 1982 (1) SA 219 (Tks)).

It is patently clear that with the legal definition of possession in the spoliation context, the possession is defined in scientific manner and it is distinguishable from the textual construction. The general rule is that an employee or agent having no interest in the company's property will not be rescued by the recourse of spoliation. One must perform work or have occupied the office with the intention of securing some benefit

for themselves, not for another. The employee or the shareholder derives benefit from being on the premises and by the fact that they were under the duty for being there. In *Greaves* at para 21 the court held that the respondent occupied the property in question in his capacity as an executive director and shareholder of the third appellant with the rights and interest described in the shareholders' agreement. The court held further that the respondent clearly performed his work and occupied his office with the intention of securing some benefit for himself. That led to the court confirming a spoliation order in favour of the respondent. In contrast, in the *Nel* matter, the court held that a spoliation application will fail because he was lawfully suspended as he acquiesced to the suspension. One must not overlook that one of the pertinent requirements for spoliation is the conduct of unlawful self-help. Furthermore, the court ruled that he did not hold possession for the benefit of himself.

Conclusion

Spoliation is an appropriate remedy in the circumstance where the director is unlawfully denied access to the workplace and they must prove possession of the office with the intention of securing some benefit for them; and unlawful deprivation thereof.

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Organs of state seeking a review of own decision: *A question of legality or PAJA?*

On 14 November 2017, the Constitutional Court (CC) determined for the first time whether the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies when an organ of state seeks to review its own conduct. In the matter of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC), the State Information Technology Agency (SITA) brought an application for leave to appeal the majority ruling of the Supreme Court of Appeal (SCA) who had decided that PAJA applies to review applications instituted by organs of state.

SITA argued that when an organ of state seeks to review and set aside its

own conduct, it does so on the basis that its conduct is inconsistent with the Constitution, and accordingly, the question should be one of legality under s 2 of the Constitution read with s 217, and not PAJA.

Gijima, on the other hand, argued that s 217 of the Constitution requires an organ of state to devise a system of fair procurement that allows only exceptional deviations. Gijima emphasised that there is no reason to exempt organs of state from the applicability of PAJA and devise a separate system of judicial review for them. Government should generally be required to follow the same forms and processes for review as any other party.

The road which led to the CC

On 27 September 2006, SITA and Gijima entered into an agreement in terms of which Gijima was to provide information technology services (IT services) to the South African Police Service (SAPS agreement). However, on 25 January 2012, SITA terminated the SAPS agreement with effect from 31 January 2012. This resulted in a loss of R 20 million in future revenue for Gijima. On 1 February 2012, citing unfair termination, Gijima instituted an urgent application against SITA in the Gauteng Division of the High Court in Pretoria.

Pursuant to this application, on the

6 February 2012, the parties entered into a settlement agreement in terms of which Gijima would render hardware maintenance and support services to the Department of Defence (DoD agreement). The DoD agreement intended to compensate Gijima for the loss of future revenue that it would have suffered as a result of SITA's termination of the SAPS agreement. The DoD agreement was, however, not made an order of court. In light of the DoD agreement, the urgent application was removed from the court roll.

The DoD agreement resulted in Gijima being appointed as the service provider for the KwaZulu-Natal Health Department from 1 March 2012 to 31 July 2012 and for the Department of Defence (DoD) from 1 April 2012 to 31 July 2012 on SITA's standard terms. As part and parcel of the DoD agreement, SITA was obliged to comply with all its internal procurement procedures. Gijima was concerned about SITA's competence to conclude such a contract without having gone through a competitive bidding process and raised those reservations with SITA. SITA by means of its executive committee at the time, assured Gijima that it had the authority to conclude and authorise agreements up to an amount of R 50 million. Relying on that assur-

ance, Gijima accordingly rendered the IT services to the DoD and the Health Department.

The DoD agreement was extended several times, and on 30 May 2013, SITA informed Gijima that it did not intend to renew the DoD agreement any further. A payment dispute then subsequently arose between the parties and Gijima instituted arbitration proceedings in order to force SITA to pay the outstanding amount. As at 30 May 2013, SITA allegedly owed Gijima an amount of R 9 545 942,72.

The payment dispute resulted in being only the very tip of a very large legal iceberg, which resulted in a number of judicial processes being instituted, starting at arbitration and concluding in a much anticipated judgment being handed down by the CC.

I outline these processes in more detail below:

• **Arbitration:** The dispute around the outstanding amount could not be resolved, and Gijima instituted arbitration proceedings on September 2013. SITA resisted the claim on the basis that the DoD agreement, as well as the three extending addenda that followed it, were invalid as there was non-compliance with the

provisions of s 217 of the Constitution when the parties concluded the agreement. SITA also argued that Gijima had not performed in terms of the DoD agreement and the three addenda. The arbitrator held that he did not have jurisdiction to adjudicate the question whether proper procurement processes had been followed and the payment dispute was, therefore, left unresolved. The court, therefore, had to be approached first in order to decide whether there was non-compliance with s 217 or not.

• **High Court:** SITA approached the High Court to set aside the DoD agreement on the same basis as set out above. It instituted these proceedings outside of the 180-day period within which a review of administrative action must be brought in terms of PAJA. The court held that PAJA applied, as a decision to award and renew the DoD services agreement qualified as an administrative action as defined under PAJA. This meant that unless the court, acting in terms of the provisions of PAJA, sanctioned the late application, such application could

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not be entertained. The court concluded that it would not be just and equitable to set aside the main agreement, and could not substantiate any reasoning for the extension of this period. The application was therefore dismissed with costs.

• **SCA:** Despite the above ruling, SITA argued that the conclusion of the agreement did not constitute administrative action as it did not adversely affect Gijima's rights. On the contrary, SITA claimed that the decision to award the DoD agreement had actually benefited Gijima. Nevertheless, the majority held that a decision to award a contract for services did constitute an administrative action in terms of s 1 of PAJA and held that, on that basis alone, there existed no good reason for immunising administrative decisions taken by the state under PAJA. The majority dismissed the appeal with costs and concluded that PAJA does indeed apply to review applications instituted by organs of state. Furthermore, the wording in s 6(1) of PAJA, which allows any person to institute proceedings in a court or tribunal for the judicial review of an administrative action, is wide enough to include organs of state.

• **CC:** Despite this ruling, SITA maintained that it is inconceivable that an organ of state can assert the right to lawful administrative action against itself, but then complain to itself that it had violated its own right to lawful administrative action and seek to invoke PAJA against itself. Therefore, on 9 May 2017, the matter appeared before the CC. SITA once again argued that when an organ of state seeks to review and set aside its own conduct, it does so on the basis that its conduct is inconsistent with the Constitution. It contended that the review should be decided in terms of the principle of legality, and not in terms of PAJA. Gijima, on the other hand, argued that there is no reason to exempt organs of state from the applicability of PAJA and

that government should be required to follow the same forms and processes for review as any other party.

The CC's ruling

The CC differed from the SCA and held that PAJA does not apply when an organ of state applies for the review of its own decision. It concluded that an organ of state seeking to review its own decision must do so under the principle of legality. The court held that, on an interpretation of s 33 of the Constitution and of PAJA itself, it cannot be said that an organ of state seeking to review its own decision can be a beneficiary of the rights under s 33, which create the right to just administrative action to be enjoyed by private persons only. The state is only the bearer of obligations under s 33. The court accepted that, by awarding the contract to Gijima, SITA acted contrary to the dictates of s 217 of the Constitution.

The court therefore ordered as follows:

'(a) The applicant's decision to appoint the respondent as a DSS service provider under a contract which was to be effective from 1 April 2012 to 31 July 2012 and all decisions in terms of which the contract was extended from time to time are declared constitutionally invalid.

(b) The order of constitutional invalidity in paragraph 3(a) does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity.'

In achieving this judgment, SITA succeeded in proving that when an organ of state seeks to review and set aside its own conduct, it does so on the basis that its conduct is inconsistent with the Constitution and the question should be one of legality under s 2 of the Constitution read with s 217, and not PAJA.

However, and despite its success,

SITA's delay of nearly 22 months before approaching the High Court for review was found to be inordinate by the CC, which held that there was no basis for it to exercise a discretion to overlook the delay. Despite the invalidity of the award of the DoD agreement, the court held that, in the interests of justice and equity, SITA must not benefit from having given Gijima false assurances from its own undue delay in instituting proceedings. It therefore declared the award of the contract to Gijima and the subsequent decisions to extend that contract to be invalid, but ordered that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it would have been entitled.

This highly anticipated ruling was expected to provide legal practitioners with some clarity on the application of PAJA versus legality in matters of judicial review. However, it is crucial to note that the court was at pains to emphasise that this judgment cannot be used as a precedent for cases where an organ of state is in a position akin to that of a private individual (natural or juristic) and seeks to review the decision of another organ of state. Nor does this ruling set a precedent in a situation where, in seeking a review of its own decision, an organ of the state is purporting to act in public interest in terms of s 38 of the Constitution.

• Gildenhuys Malatji Inc acted on behalf of the applicant.

• See also law reports 'Administrative law: Application of PAJA' 2017 (March) DR 28 for the SCA judgment.

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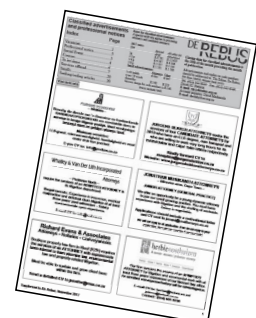
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Excessive pricing to the detriment of consumers

The definition of 'excessive price' in s 1 of the Competition Act 89 of 1998, as amended (the Act), is a price that 'bears no reasonable relation to the economic value of that good or service.' A product does not appear to assist the understanding of what is likely to be regarded as excessive pricing. Pinar and Garrod note that this definition 'leaves undefined terms such as "reasonable" and "economic value"' (Pinar Akman and Luke Garrod 'When are Excessive Prices Unfair?' CCP Working Paper 10-04. <https://papers.ssrn.com>, accessed 1-3-2018).

I submit that the adoption of this definition may well have been a deliberate position on the part of the legislature. Due to the openness of this definition it provides a good basis for adapting it to the South African economic context through case law.

There are a few considerations that can assist in guiding the decision makers – both at the firm and at regulatory authorities – in determining whether a price is excessive to the detriment of consumers. The view herein is that familiarising oneself with the market concerned, one can guide competition authorities, in determining what is likely to constitute excessive pricing, which is prescribed by the Act. As for competition authorities, in order to understand the market one can look at pricing over time, for example, the pricing to different customers and pricing by firms in

other markets whether those markets are competitive or not. This could assist in determining whether a firm is unfairly exploiting its dominant position as perceived by its customers.

In this regard, it should be noted that the provisions of s 8 of the Act state that: 'It is prohibited for a dominant firm to –

(a) charge an excessive price to the detriment of consumers'.

The operative feature of this section is that it is only excessive pricing that is detrimental to consumers that are impugned and not just any excessive price. In this regard I submit that the preoccupation of the legislature was not just with excessive pricing *per se*, but with the welfare effects of such pricing on consumers. The only consideration, which requires dedication and time of the courts to ascertain, is not whether the price is excessive but whether it is detrimental to consumers. The kind of anxiety with the first aspect of this provision can be seen in cases such as *Mittal Steel South Africa Ltd and Others v Harmony Gold Mining Company Ltd and Another* (CAC) (unreported case no 70/CAC/Apr07, 29-5-2009) (Davis JP, Malan JA and Tshigi JA) and *Sasol Chemical Industries Ltd and Another v Competition Commission* 2015 (5) SA 471 (CAC). Misplaced emphasis has created significant difficulties in the enforcing of the provisions of this section, despite the fact that there is almost an intuitive feeling of unfairness to the consumer arising

from tariffs charged by certain firms, especially when such tariffs cannot be justified by innovation, investment or superior production processes.

The provision in the Act regarding the excessiveness of the price is not in my view intended to be a bone of contention of such a nature that a case will literally turn on it despite the fact that an unjustified extraction of consumer surplus by a firm exists. If one bears in mind that in an economic textbook all prices, above average costs, that a firm might charge for are potentially exploitative, in that the firm is utilising whatever market power it possesses to extract more profit at the expense of its customers. The conclusion seems inescapable that the mention of excessive pricing is only given as an indication of the type of anti-competitive behaviour that the legislature sought to impugn provided it is not to the detriment of consumers.

In this regard, implicating oneself in all types of price-cost determination, in order to ascertain with precision the level of margin derived by the firm is, an activity tantamount to barking up the wrong tree or beating an empty husk for grain. There is difficulty in knowing upfront that a price is excessive to the detriment of consumers. By only ascertaining that it is indeed above costs irrespective of the measure of costs one is using, or the level above such costs, the price concerned is ultimately found to be. I submit that the legislature only sought to provide a guide as to the type

of pricing conduct it sought to impugn by s 8. In other words, the legislature is simply pointing out that it is not a conduct, which relates to unfairly low prices (also known as predatory pricing) and it is not a conduct which relates to unfairly discriminatory prices charged to customers (also known as price discrimination) but it is unfairly high prices. The legislature being keenly aware of the basic economic principles that all prices above costs will consequently fall foul of this section cleared its intention that the prices must be so excessive that they are to the detriment of consumers.

In this regard, it is my view that all prices, which are above the appropriate measure of costs, in most cases average costs, may be found to be excessive irrespective of how far above costs such prices are found to be. In this regard the key determinant of liability is not in the excessiveness or the percentage above costs a price is, but whether a price is unfair, in other words to the detriment of consumers. Daniel Kahneman, Jack Knetsch and Richard Thaler provide an example which illustrates this point in 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' *The American Economic Review* (1986) 76(4) 728 (www.princeton.edu, accessed: 1-3-2018) at 735 states:

'A grocery chain has stores in many communities. Most of them face competition from other groceries. In one community the chain has no competition. Although its costs and volume of sales are the same there as elsewhere, the chain sets prices that average 5 percent higher than in other communities.'

It was found in this scenario despite the fact that the affected community experienced a price that is just only 5% higher than other communities, 76% of the consumers regarded the price as being unfair. Given that there already exists a high degree of perceptions of unfairness of the price even at this low level it can be concluded that large increases will only serve to intensify the detrimental effect of the price and not whether it becomes detrimental or not.

Therefore, whether the firm's prices are excessive or not is not a simple question of cost price analysis but an involved process, which rests, primarily on fairness. A determination of fairness is predicated on many factors, which include the manner in which the firm obtained its current dominant position and the need to recoup investments made in the development of superior products or the production process.

Another factor to take into account when trying to decipher the intention of the legislature in s 8 is to note that the legislature avoided reference to a precise measure of cost that should be utilised or any such detail in the definition of

what constitutes an excessive price. Yet elsewhere the legislature chose to set out in cost terms what constitute predatory price. The legislature chose to use broad terms imported from other legal systems, in particular the European Union in the definition of excessive pricing. Excessive pricing is defined as follow in the Act:

"Excessive price" means a price for a good or service which –

(aa) bears no reasonable relation to the economic value of that good or service; and

(bb) is higher than the value referred to in subparagraph (aa).'

The courts in *Mittal* and *Sasol* have grappled with this definition, which relates to the first part of s 8 expending a lot of effort looking at what constitutes economic value. The legislature could never have purported to require this level of precision when basic economic theory itself offers no satisfactory guidance in this regard. The question that had to be answered is a simple one, namely, whether the price is above a measure of costs that is applicable for that industry. Effort should not have been expended as it was done in *Sasol* in attempts to arrive at estimates of how much the price is above costs. The determination of whether the price bears no reasonable relation to the economic value of the product applies to all prices above the applicable cost measure.

Again I emphasise that it is the detriment to consumers that should, in most cases, be telling. In order to demonstrate that higher than normal prices were not regarded by consumers as unfair irrespective of the circumstances faced by the firm, the following example from Kahneman *et al* (*op cit*) is illustrative at p 732 – 733:

'Suppose that, due to transportation mixup, there is a local shortage of lettuce and wholesale price has increased. A local grocer has bought the usual quantity of lettuce at a price that is 30 cents per head higher than normal. The grocer raises the price of lettuce to customers by 30 cents per head.'

In this scenario only 21% of the respondents regarded the price as unfair. Accordingly, it is not the fact that the price is higher than normal, which gives rise to a concern about excessive pricing, but rather the basis for such high prices. It is for this reason that once prices are found to be above a suitable measure of costs, the inquiry should – as soon as possible – turn into answering the question of whether the price is to the detriment of consumers.

In consideration of the fact that the drafters of the Act could not have envisaged a precise determination of what constitutes as excessive pricing, those who enforce these provisions should

not detain their analysis of the conduct on this point before moving on to the inquiry of whether the prices are to the detriment of customers. This is more so since the price has already been charged and, therefore, direct evidence of the effect of the price on consumers could be obtained.

A competition authority, proceeding from a position that the effects of the conduct have already been felt in the market, will be able to gather information that is telling on whether the price charged by the firm is excessive or not to the detriment of consumers.

The case for intervention by competition authorities in excessive pricing in our economy is made even stronger by the fact that abuses of dominance such as excessive pricing are unlikely to attract effective entry at least in the short to medium term. The caution with which authorities in developed countries approach the issue of excessive pricing, which is informed by the high likelihood that interventionist approaches in those jurisdiction could discourage investments, may not be an appropriate approach in the South African economic context. The foundation of this cautious approach is that the very decision to invest and take risks is informed by the prospect of being able to charge prices above breakeven as an endgame. Remove that prospect by installing a regulator to regulate monopoly pricing you also destroy the urge to enter and compete.

However, in markets that are dominated by a few firms for a long time, such as steel and petrochemicals, there is clear empirical evidence of lack of entry. The basis for the limited risks of false positives (over enforcement) in these circumstances originates from the understanding that firstly, incumbent firms did not obtain their dominance purely from their own enterprising and, secondly, the conditions for effective entry into these markets do not exist due to significant structural limitations such as lack of skills and access to capital resources.

A case for continued role of competition authorities in enforcing the provision of s 8(a) of the Act cannot be over emphasised despite the disappointingly narrow approach of the courts in a few cases that came before them.

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The views expressed in this article are strictly the author's and should not be taken as reflecting the views of the Competition Commission of South Africa.



By
Morgan
Riley

Don't tease the ostrich Considering the *actio de ferris* and the defence of provocation in modern South Africa

Van der Westhuizen v Burger 2018 (2) SA 87 (SCA)

In the recent judgment of *Van der Westhuizen v Burger* 2018 (2) SA 87 (SCA), the Supreme Court of Appeal (SCA) was seized with the question of whether provocation of a wild animal could be raised as a defence to a rather antiquated (but still existing) cause of action – the *actio de ferris*.

The *actio de ferris* arose in times of yore (in Republican Rome, to be exact), when bringing a wild or dangerous animal into a public place – or a place to which members of the public have access – was prohibited. The cause of action was based on ownership, and strict liability was imposed on the owner of the animal for the consequences of the animal's behavior. The victim was thus absolved from alleging and proving negligence on the part of the owner, which was presumed.

The appellant before the court, Van der Westhuizen, was the owner of the offending ostrich. The respondent, Burger, had sued out of the Gauteng Division of the High Court in Pretoria after the ostrich had apparently attacked and chased him. Burger alleged that in an attempt to escape from his winged assailant, he had tripped over a piece of wood and tore his Achilles tendon. He, therefore, claimed damages in the sum of R 6 750 000.

It was common cause that the incident occurred on Van der Westhuizen's farm. Burger alleged that Van der Westhuizen had 'introduced certain wild ostriches which do not naturally occur' onto the farm, alternatively, that the appellant had 'tamed and domesticated an ostrich who roamed close to the dwelling on the farm, which in attacking the plaintiff ... acted contrary to animals of its class'.

In turn, Van der Westhuizen raised the defence of provocation, contending that Burger had 'provoked and harassed the ostrich/ostriches on numerous occasions prior to the alleged incident'. He also denied that Burger had, in attempting to escape from the ostrich, run towards the dwelling on the farm and tripped over a piece of wood.

The court *a quo* dismissed the defence of provocation on the basis that the

provocation was not the immediate catalyst of the resulting injury. In the opinion of the court *a quo*, there was no immediate provocation of the ostrich and the injury would not have occurred had not been for Burger's attempt to escape the ostrich's attack in the first place. The court *a quo*, therefore, found that Van der Westhuizen was liable to pay such damages as Burger was able to prove in due course, together with the costs of the action.

On appeal, the court paid particular attention to the testimony of the appellant's witnesses in the hearing *a quo*, who described how Burger had teased a certain male ostrich on Van der Westhuizen's farm. Burger would entice the ostrich to approach him with mielie pips in his hand. While the ostrich was busy eating out of his hand, Burger would grab the animal by the neck and push its head down. The ostrich would then flap its wings and perform comical 'dance steps'. The ostrich would stagger backwards after being released, which apparently amused Burger and his audience. Burger denied all of this and maintained that he was afraid of ostriches. However, the SCA was satisfied on a balance of probabilities that that particular ostrich was the same one that had chased him.

The court took the view that the inherent improbability of Burger's version of the incident was revealed when one considered the evidence of how he teased the ostrich on numerous occasions. Obviously, said the court, that evidence could not be used to infer that the ostrich harboured a grievance against Burger, as that would 'constitute the impermissible attribution of human emotions to the ostrich'. However, the significance of the evidence lay in how it revealed Burger's attitude toward the ostrich. The reality was that Burger was not fearful of the ostrich. On Burger's own evidence, when the animal had approached him the night before the incident (in a far more aggressive manner), he confidently dealt with it, repulsing any threatened attack.

One Mr Kotze had testified that he had seen Burger walking towards the farmhouse while the ostrich was feeding at a trough. When Burger saw the ostrich,

he threw something at it and the ostrich then chased him. Kotze maintained that Burger had run towards the front door of the farmhouse and fallen. When Burger stood up he looked around, saw the ostrich looking at him and quickly ran into the house. The ostrich did not peck or kick Burger and did not appear to realise that he had been injured.

Based on the evidence before it, the court held the Van der Westhuizen had discharged the onus of proving that Burger's conduct in throwing a stone at the ostrich had provoked its behavior in chasing him.

However, the court noted that in case law, provocation was not listed as a specific defence to strict liability arising from the attack of a wild animal. Rather, it was recognised as a defence to the *actio de pauperie* (that is, an action for damages caused by a domestic animal, rather than a wild one).

In dealing with this issue, the court considered the decision of *Bristow v Lycett* 1971 (4) SA 223 (RA) in which it was held that the defences to a claim for damage caused by a wild animal included situations where 'the plaintiff's contributory negligence contributed to his injury'. Although provocation of the wild animal was not expressly included as a defence, the court found that there was 'no basis in principle or logic to recognise as a defence the case where the negligent conduct of the victim contributed to his or her injury, but not where the victim's intentional conduct provoked the attack'. The defence had been recognised in other matters (for example, *Klem v Boshoff* 1931 CPD 188 and *Hanger v Regal and Another* 2015 (3) SA 115 (FB)).

Based on this conclusion, the court considered it unnecessary to examine the issue of causation, given that Van der Westhuizen could not be liable for an injury sustained by Burger in circumstances where the latter had provoked the chase. However, for the sake of completeness, the court pointed out that after Burger had fallen and was at the mercy of the ostrich, it did not attack him. The ostrich simply stood looking at him while he was lying on the ground, as

well as when he stood up to run into the house. The ostrich did not display any aggressive behaviour towards Burger after he had fallen and his injury was therefore not caused by the pursuit. Thus, the court disagreed with the conclusion of the court *a quo* that ‘... it was one continuous event; the fall did not interrupt the flight, and the resulting injury would not have occurred had it not been for the

plaintiff escaping the ostrich’s attack in the first place’.

In the end, Van der Westhuizen’s appeal was upheld with costs.

If nothing else, the case puts an authentically South African spin on the old adage of: ‘Don’t poke the bear’. The full judgment is well worth reading, not only for its bizarre set of facts, but also for the concurring judgment of Ponnann JA,

which contains a fascinating treatise of the history of the *actio de pauperie* and *actio de ferris*.

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By
Siyabonga
Mathe

Dispassionate appointment of the NDPP

Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others 2018 (1) SACR 317 (GP)

In terms of s 179(1)(a) of the Constitution, ‘a National Director of Public Prosecutions [NDPP], who is the head of the prosecuting authority’ is appointed by the president. The High Court in *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others* 2018 (1) SACR 317 (GP), reminded the president that these powers are subject to constitutional constraints and the rule of law, and that the president’s powers are to be distinguished from those of an old time royal prerogative. The court, importantly, pointed out that where the president is conflicted it is constitutionally permissible to assign the power to appoint a NDPP to the deputy president.

This case concerned two analogous applications: One by Corruption Watch and Freedom Under Law and one by Council for the Advancement of the South African Constitution (CASAC).

In the first application, Corruption Watch and Freedom Under Law sought an order setting aside the settlement agreement reached on 14 May 2015, between former President Jacob Zuma, the Minister of Justice and Correctional Services, Michael Masutha, and the predecessor to the current NDPP, Mxolisi Nxasana. In terms of the settlement, Mr Nxasana was paid more than R 17 million for vacating his office.

Corruption Watch and Freedom Under Law further asked the court for an order reinstating Mr Nxasana as the NDPP, alternatively, that the office was vacant and direct the deputy president within 60 days to appoint a permanent NDPP on the basis that the president himself was ‘unable’ in terms of s 90(1) of the Constitution to act due to his conflict of interests.

In the second application, CASAC sought a declaration of unconstitutionality in respect of subs 12(4) and (6) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act).

The court found that the vacation of the office by Mr Nxasana and the subsequent payment of the settlement amount was invalid and contrary to the law. Section 12(8)(a)(ii) of the NPA Act states that ‘The President may allow the [NDPP] at his or her request, to vacate his or her office ... for any reason which the President deems sufficient’. In the absence of such request, therefore, the president had no legal basis to allow the NDPP to vacate his office. The notion of a request, if it is to comply with the NPA Act, must be interpreted as referring to an incentive that emanates wholly and honestly from the office bearer and not simply to an attitude of the NDPP incentivised by promise of reward. In the present case, the court found that the evidence suggested that there had not been a voluntary and *bona fide* request from Mr Nxasana. In fact, the president utilised the public purse to persuade Mr Nxasana to leave office. The upshot of this finding was that, the subsequent appointment of advocate Shaun Abrahams, the current NDPP, was declared invalid and set aside.

In light of the host of potential criminal charges, the court found that the president was disqualified from appointing a new NDPP. In terms of s 96(2)(b) of the Constitution, members of the cabinet may not ‘act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests’. This provision made it clear that a conflicted cabinet member cannot act. In the court’s view, President Zuma would be clearly conflicted in appointing a NDPP given his long-standing criminal charges that have not gone away and the finding by the SCA in *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA), that the decision to withdraw them was irrational. In addition, the president told the SCA that he ‘had every intention in the future to continue to use such pro-

cesses as are available to him to resist prosecution’. This, according to the court would place the incumbent NDPP firmly on the spot.

Having found that President Zuma was conflicted and, was therefore, unable to appoint a NDPP, the court directed that the deputy president, within 60 days, had to appoint a new NDPP. In terms of s 90(1)(a) ‘When the President is absent from the Republic or otherwise unable to fulfil the duties of President’, the deputy president acts as president.

Conclusion

This judgment is important as it highlights the long-established principle that where there is a conflict of interest, either actual or perceived, the decision-maker must recuse themselves. I submit, however, that the judgment and the legal principles set out therein must not be taken too far. Section 96 of the Constitution, on which the court relied, envisages circumstances in which the president exercises authority as head of the national executive (see s 85 of the Constitution for president’s powers as head of the national executive). However, in relation to president’s powers as head of state (see s 84 of the Constitution for president’s powers as head of state), the court may not utilise the provisions of s 96 to prevent the president from acting merely because there is a conflict of interest. This is mainly because, when the president exercises authority as head of state, he is not acting as a member of cabinet as provided for in s 96. However, in light of the recent trend by courts to develop the principle of legality beyond what it ought to be, anything is possible.

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THE LAW REPORTS

February 2018 (1) South African Law Reports (pp 335 – 657);
August [2017] 3 All South African Law Reports (pp 365 – 737);
October [2017] 4 All South African Law Reports (pp 1 – 294);
January [2018] 1 All South African Law Reports (pp 1 – 316);
February [2018] 1 All South African Law Reports (pp 317 – 619); 2017 (7)
Butterworths Constitutional Law Reports – July (pp 815 – 948); 2017 (12)
Butterworths Constitutional Law Reports – December (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
ECB: Eastern Cape Local Division, Bisho
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Company law

A member of a company is someone whose name has been entered in the company's register of members and not a beneficial owner: Section 252(1) of the Companies Act 61 of 1973 (the Act) provides that: 'Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or some part of the members of the company, may ... make an application to the Court for an order under the section.'

In *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA); [2018] 1 All SA 1 (SCA), the appellants, Smyth and others, approached the GP in terms of the section for an order declaring two agreements, one concluded on 20 January 2010 and styled 'Revised Settlement Agreement' and the other concluded on

22 January 2010 and styled 'Litigation Settlement Agreement', as constituting an act or omission, which was unfairly prejudicial, unjust or inequitable as contemplated in the section. The appellants further sought an order directing the first respondent, Investec Bank, to purchase their shares in the second respondent, Randgold, at a specified amount per share or such other amount as the court would determine. As the appellants were not registered members of the second respondent but beneficial owners, the shares having been registered in the name of nominees, the main issue was whether they could invoke the application of s 252. A related question was if the section was not applicable to them, could they nevertheless be joined as co-applicants, together with their relevant nominees in proceedings, in terms of the section by virtue of a direct and substantial interest in such proceedings?

Rabie J upheld the lack of jurisdiction preliminary point raised by the first respondent, holding that the section did not apply to the appellants nor could they be joined as co-applicants. Their claim was dismissed with costs of three counsel. An appeal against that order was dismissed by the SCA with costs of two, and not three, counsel.

Petse JA (Lewis, Mathopo, Navsa JJA and Schippers AJA concurring) held that subss

(1) and (2) of s 103 of the Act were applicable. They provided that in addition to the subscribers of a company's memorandum of association, every other person who agreed to become a member of the company, and whose name was entered in its register of members was a member of the company. It was implicit from this that for a person to become a member, it was necessary that the name of such person should be entered in the register of members of the company concerned. It was a policy of the law that a company should concern itself only with the registered owners of the shares. Accordingly, the emphasis was that when a nominee had been appointed, it was that nominee and not the beneficial owner who was eligible to have their name entered in the register of members. Only once their name was entered in the register of members do they become a member. To allow the appellants to be joined as co-applicants with their nominees would fly in the face of clear provisions of s 252, which unambiguously confined the remedy only to members, which the appellants were not.

It was a simple matter for the appellants, if they wished to avail themselves of the remedy provided for in s 252 in their own names, to terminate the nomination of their respective nominees so as to procure the entry of their names in the register of

members. For as long as the nominees' names remained in the register of members, the beneficial owners lacked a legal interest in the subject-matter of the litigation. This was all the more so when regard was had to the fact that in any event the nominees were in truth advancing the interest of beneficial owners. In particular, they also acted subject to the latter's instructions.

Oppression of minority and unfairly prejudicial conduct principles need oppression in order to apply: Section 163(a) of the Companies Act 71 of 2008 (the Act) provides that a shareholder or director of a company may apply to court for relief if '(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of, the applicant'. Under the repealed Companies Act 61 of 1973 similar provisions were found in s 252. Regarding Close Corporations Act 69 of 1984 (the CC Act) similar provisions are found in s 49.

In *Geffen and Others v Martin and Others* [2018] 1 All SA 21 (WCC) the applicants, Geffen and others, were minority members in companies and close corporations holding some 20% of the shares and membership interest in the entities concerned, where the respondents held the remaining 80%, approached the High Court for an order against the

respondents, Martin and others, in terms of ss 49 of the CC Act and 163 of the Act. The relief sought included the appointment of a chartered accountant who would be requested to compile a report, which included the financial statements of the affected companies and close corporations for the financial years 2011 to 2017; a determination of whether any amounts were due by the affected entities to the applicants and, if so, the actual amounts involved and finally a determination of the fair and reasonable values of the third applicant's membership interest in two close corporations together with two of the applicants' shareholding in specified respondent companies.

The application was dismissed with costs. Davis J held that the use of the words oppressive or unfairly prejudicial or unfair disregard of the interest of the applicants was significant. Not only had the conduct to be prejudicial, but it had to be unfairly so or at the very least unreasonable or unethical. The inquiry was thus about whether objectively speaking, the applicants had suffered prejudice, which was sourced in the conduct of the majority shareholders and which was, at least, unreasonable or unethical. Apart from analysis of s 163, and its implications to the case, the fact that an offer had been made by the first respondent to purchase the first applicant's interest in the entities, which offer was rejected, required further legal analysis.

The conduct of the majority shareholders had to be evaluated in the light of a fundamental principle of company law, namely that by becoming a shareholder, the latter undertook to be bound by the decisions of the majority of shareholders. Not all acts which prejudicially affected a minority shareholder or which disregarded their interests would entitle a minority group to the relief set out in the section. The consequence of the act or omission had to be either oppressive or unfairly prejudicial which, at the very least, connoted a significant element of unfairness.

In the present case and

on the papers as presented, the applicants had failed to show on objective grounds that prejudice, as defined in case law, had been sourced in unfair conduct of the majority shareholders. It had not been shown that the alleged conduct adversely affected or was detrimental to the financial interests of the applicants.

Note: Far from doing or omitting to do anything, the real problem in the above case was that the new business venture, which the parties attempted simply failed.

Costs

In constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs: In *Hotz and Others v University of Cape Town* 2018 (1) SA 396 (CC); 2017 (7) BCLR 815 (CC), the applicants, Hotz and others, were students at the respondent University of Cape Town who engaged in protest action in 2016 seeking, among others, free education. The protest turned violent as property was destroyed and threats were made to cause further damage and destruction, including threats to members of the university community. As a result, the respondent successfully sought an interdict against the applicants, which was granted with costs. On appeal to the SCA the interdict was confirmed, subject to modification as the generality of the interdict was narrowed down. The SCA confirmed the High Court costs order but held that concerning SCA costs each party had to pay own costs. On further appeal to the CC leave to appeal against the costs order was granted and the decision of the SCA on the merits confirmed. However, the court altered the costs order by setting aside the order of the High Court as confirmed by the SCA. Each party was ordered to pay own costs in the High Court, the SCA and the CC.

In a unanimous judgment the court held that s 172 of the Constitution vested in the courts wide remedial powers when dealing with constitu-

tional matters. In terms of the section a court could make an order, including a costs award that was just and equitable. Since an award of costs was a discretionary matter, the discretion had to be exercised judicially having regard to all the relevant circumstances.

It was an established principle that the general rule in constitutional litigation was that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. The rationale for the rule was that an award of costs would have a chilling effect on litigants who might wish to vindicate their constitutional rights. However, that rule was not inflexible and could be deviated from. A court of first instance had discretion to determine the costs to be awarded in the light of the particular circumstances of the case. Where the discretion of the court was one in the true sense of the court having to make a choice from a member of permissible options, a court of appeal would require a good reason to interfere with the exercise of that discretion as in some instances it would be inappropriate to interfere with the exercise of the discretion of the court of first instance.

The primary consideration in constitutional litigation should be the way in which a costs order would hinder or promote the advancement of constitutional justice. The

nature of the issues, rather than the characterisation of the parties, was the starting point. Costs should not be determined on whether the parties were financially well endowed or indigent. In the present case justice and fairness would best be served if each of the parties were ordered to pay its own costs not only in the High Court but also in the SCA and the CC.

• See law reports 'Constitutional law' 2017 (March) DR 28 for the SCA judgment.

Damages

Payment of future medical expenses by way of periodic payments and payment in kind: In *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC) the minor WZ suffered cerebral palsy due to asphyxia during her mother's prolonged labour at Chris Hani Baragwanath Hospital. The appellant MEC for Health and Social Development, Gauteng, under whose jurisdiction the hospital in question fell, was sued for future medical expenses that would be incurred in the treatment of the minor. The merits of the case were settled when the appellant conceded liability, this leaving only the issue of quantum for determination. That was also settled when an amount of some R 20 million was agreed on. However, be-

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fore the High Court the appellant amended her plea contending that she did not have to pay future medical expenses in a lump sum. It was contended that the common law made provision for periodic payment and that if it did not, it had to be developed accordingly. Moreover, there was a possibility that the minor would not incur those expenses as treatment could be received free of charge at a public health facility.

The GJ dismissed the amended plea as did the SCA. The CC granted leave to appeal, but dismissed the appeal with costs. Reading the main judgment Froneman J (Jafta J filing a separate concurring judgment) held that the common law did not make provision for payment of future medical expenses by way of periodic payments. Factual evidence to substantiate a carefully pleaded argument for the development of the common law had to be properly adduced for assessment. That had not been done in the present case as the appellant led no evidence at all.

There was only a single instance in South African law where the assessed loss was ordered to be paid in instalments, namely the case of *Wade v Santam Insurance Co Ltd* 1985 1 PH J3 (C). That case had apparently not been followed while doubt had been expressed as to whether the court had inherent jurisdiction to make the order there made. Apart from the *Wade* case the only instances of periodic payments as part of the damages award had been where the parties agreed to it or where execution of judgment followed on an award already made. If an order for periodic payments were to be made under s 173 of the Constitution or even under s 172(1)(b), that would constitute incremental development of the common law insofar as the court would need to determine whether a new set of facts fell within or beyond the scope of an existing rule.

Eviction

Constitutional and statutory obligation of the court to sat-

isfy itself that eviction would be just and equitable after considering all the relevant circumstances: The facts in *Lusithi and Others v Cape Lifestyle Investments and Another* [2018] 1 All SA 166 (WCC) were that the appellants, Lusithi and others, were a group of persons who occupied the property belonging to the first respondent company, Cape Lifestyle Investments. The first respondent applied for eviction of the appellants from its property and on the date of the hearing before proceedings could start, Yekiso J invited counsel for both sides to his chambers. It was there that the judge informed counsel that after reading the papers he had taken a definitive view in respect of which no amount of argument would make him change his mind. As a result he gave counsel the opportunity to consult with their clients after which they came back to him in chambers where an eviction order was granted, specifying the date by which the appellants were to have vacated the property, failing which the sheriff was authorised to remove them and any structures erected. The second respondent, the Swartland Municipality, was directed to provide alternative site for relocation of occupants of 51 identified structures, but nothing was said about the occupants of many other structures that had since mushroomed in that place. The court denied the appellants leave to appeal but such was granted by the SCA, hence the present appeal before the Full Court.

Upholding the appeal, with no order as to costs, Erasmus J (Boqwana J concurring and Gamble J dissenting) held that courts dealing with eviction matters had a specific duty to ensure that the order made was fair and just. All relevant circumstances had to be considered. An eviction order could only be granted if the court was of the opinion that it was just and equitable to do so, after considering all relevant circumstances.

An agreement by the parties as to the unlawfulness of the occupation did not absolve a court of its constitutional and

statutory duties to approach proceedings in a manner that ensured that the protection granted in s 26 (the requirement of a court order before eviction) of the Constitution was fully complied with. Since the appellants alleged that the first respondent gave them permission to occupy the property, the issue of consent ought to have been sufficiently interrogated in a proper hearing prior to the eviction order was granted.

One of the benefits of having a matter ventilated in open court was that in proceedings such as the present, litigants would have the opportunity of listening to the argument made by their legal representatives. If the legal representative presented argument, which was contrary to instructions or made concessions on their behalf on matters they did not discuss, they had an opportunity to correct what was being conveyed to court. Therefore, if a legal representative had no authority to agree to a particular issue, litigants could correct it or at least have an opportunity to do so at that stage. Accordingly, even though the appellants were represented by counsel in the court *a quo*, that did not dispense with their right to a public hearing to persuade the court in oral argument and to hear if their case was properly conveyed to the court. Doing so was in line with the decision of the CC in *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another (Poor Flat Dwellers Association as Amicus Curiae)* 2017 (8) BCLR 1015 (CC), which required the courts to interrogate whether consent was informed. Therefore, when faced with a settlement agreement the court had, as a first step, to be satisfied that the parties freely, voluntarily and in full knowledge of their rights, agreed to eviction. That duty arose even in circumstances where parties on both sides were legally represented and a comprehensive agreement was placed before the court. The interaction with counsel in chambers would not be sufficient in matters such as the present one where, not only did the attorney fail in his duty but

ultimately it was the duty of the court to ensure that the information was fully placed before it before an eviction order was issued. As a result, the appellants did not have a fair hearing and the matter had to be heard afresh before a different judge.

In a dissenting judgment Gamble J held that the occupiers of the property, the appellants, were represented by counsel and attorneys of their choice before the judge in chambers. They accordingly had access to legal advice and representation. The important fact was that the appellants were legally represented and their counsel did not thereafter assert the right to be heard in open court.

Remittal of the case for a hearing *de novo* was not warranted in the circumstances. All of the considerations required for a court to determine whether eviction order could be granted, and if so on which terms, were before the court, which was therefore in as good a position as any other to make an order that was just and equitable. No purpose would be served by remitting the matter for a new hearing.

Fundamental rights

Impermissible limitation on freedom of expression: Section 41(6)(c) of the National Prosecuting Authority Act 32 of 1998 (the Act) provides that 'no person shall without the permission of the National Director [of Public Prosecutions (the NDPP)] disclose to any other person -

...
(c) the record of any evidence given at an investigation contemplated in section 28(1)'.

In *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA); [2018] 1 All SA 369 (SCA), the respondents Mandag Centre, Mail and Guardian and managing partner of Mandag Centre, wanted to publish the contents of interviews, which had been held in terms of s 28(1) of the Act involving the first applicant Maharaj, at one time the Minister of Transport and later a presi-

dential spokesman. The essence of the intended publication was to show that the first applicant lied under oath by withholding certain information and also gave false information. The NDPP declined permission as a result of which the respondents approached the GP for an order reviewing and setting aside the decision of the NDPP. The order was granted by Pretorius J. An appeal against the order was made but dismissed with costs by the SCA.

Ponnan JA (Petse JA, Tsoka, Mbatha and Schippers AJJA concurring) held that s 41(6) (c) of the Act did not contain an absolute ban on publication. Instead, publication depended on permission first having been sought and obtained from the NDPP. The purpose of the limitation was obviously to protect the integrity of the criminal justice system. However, there was no denying that s 41(6) constituted a limitation on the right to freedom of expression contained in s 16 of the Constitution.

On the facts of the present case there was no countervailing concern regarding the integrity of the administration of the criminal justice system. On the contrary, the administration and integrity of the very criminal justice system would require that the respondents be permitted to publish the contents of the interview. The Act did not spell out the factors, which the NDPP had to consider in exercising her discretion in terms of s 41(6). Nevertheless, a consideration of the s 28 interview record would be the first and most obvious factor. That was, however, not done in the instant case. As a result the NDPP was only aware of the s 28 interview in 'general terms'. The NDPP's relegation of a factor of such obvious and paramount importance to one of insignificance amounted to a failure to apply her mind properly to the matter. Accordingly, the NDPP ought not to have refused permission without a proper consideration of the record at the time of making her decision. Given the obvious relevance of s 28 record,

failure to consider it rendered the decision irrational, for which reason alone the decision was susceptible to being set aside.

The matter raised serious allegations of corruption and mismanagement of public funds. Given the scourge of corruption, the role of the media in reporting on each activity was in the public interest. What was more, the appellants were public figures.

Right to receive education in an official language of choice: Historically the medium of instruction at Stellenbosch University (SU) has always been Afrikaans. However, attempts to revise the language policy were made in 2001 and 2003 but the major one took place in 2014 (the 2014 Policy) in terms of which, Afrikaans remained the primary medium of instruction while room was made for usage of English as well, this being among others by way of parallel teaching, meaning that a class would be divided into two groups, one group being taught in Afrikaans while the other was taught in English. Sometimes a lecturer would conduct the same lecture in both English and Afrikaans or only in Afrikaans with an interpreter assisting in English. The policy was not particularly successful as students who could not communicate in Afrikaans (mostly black students) were greatly disadvantaged. To solve the problem SU came up with a new policy in 2016 (the 2016 Policy) in terms of which English became the dominant, but not exclusive, medium of instruction. Provision was made for usage of Afrikaans, the policy providing in particular that usage of Afrikaans would be preserved and increased where reasonably practicable.

In *Gelyke Kanse and Others v Chairman of the Senate of Stellenbosch University and Others* [2018] 1 All SA 46 (WCC) the main issue was that the applicants, Gelyke Kanse (literally Equal Opportunities) and others, sought an order reviewing and setting aside SU's 2016 Policy, as well as another directing SU

to implement its 2014 Policy until it was validly amended or replaced. Their contention was that the 2016 Policy effectively dispensed with Afrikaans as a primary language of instruction.

The application was dismissed with costs. Dlodlo J (Savage J concurring) held that in terms of s 29(2) of the Constitution everyone had the right to receive education in the official language or languages of their choice, subject to the requirement that such would be the case where it was reasonably practicable. What was reasonably practicable was an assessment of equity and historical redress. The courts had to be extremely hesitant to interfere with a university's determination of what was reasonably practicable. It was rational for a university to conclude that it was not reasonably practicable to teach in Afrikaans because it would result in an unconstitutional situation on its campus, such as segregated classrooms. An assessment of what was reasonably practicable required a consideration both of resource constraints and logistics (the factual criterion) and what was reasonable which clearly included considerations of equity, redress and non-racialism (the constitutional criterion). The 2016 Policy complied with the Higher Education Language Policy formulated in terms of the Higher Education Act 101 of 1997, which allowed each university to take reasonable decisions on their own language policy. In the present case the applicants had not shown that the 2016 Policy was in any way unconstitutional.

Land tenure

Unconstitutionality of automatic conversion of land tenure rights into ownership: Section 2(1)(a) of the Upgrading of Land Tenure Rights Act 112 of 1991 (the Act), which deals with automatic conversion of land tenure rights (occupation rights) into ownership, provides that: 'Any land tenure right mentioned in Schedule 1 [of the Act] and which was granted in respect of -

(a) any erf or any other piece of land in a formalised township for which a township register was already opened at the commencement of this Act shall be converted into ownership'.

The problem, which the Act sought to solve, was created by Proclamation R293 of 1962, issued in terms of the Black Administration Act 38 of 1927, which has since been repealed. The Proclamation was obviously an old era regulatory scheme in terms of which property was registered in the name of the head of a family, invariably a male, to the exclusion of women.

In *Rahube v Rahube and Others* 2018 (1) SA 638 (GP) an extended family of eight members was allotted property in Mabopane, an area outside Pretoria, in 1970. The household consisted of the first respondent Rahube (who was the applicant's brother), the other siblings, the applicant Rahube together with her children, as well as the grandmother of the siblings and their uncle. In 1987 a certificate of occupation in respect of the property was issued in the name of the first respondent. The other members of the household were specified by name as occupants of the property. A year later, in 1988, the certificate of occupation was upgraded to a deed of grant.

It was that deed of grant, which was converted into ownership by s 2(1)(a) of the Act. However, there was a problem in that automatic conversion meant that the first respondent became the owner to the exclusion of all other occupants who were not afforded an opportunity to lay a claim. In the instant case the applicant's brothers, including the first respondent, left the property in the 1980s and early 1990s. The uncle left in the year 2000. The applicant, together with her children and grandchildren, continued living on the property. The first respondent sought an eviction order against the applicant and her descendants. In response the applicant sought an order declaring that she was the owner of the property or alterna-

tively that she was entitled to have the property registered in her name. In the further alternative she sought an order declaring s 2(1)(a) unconstitutional and, therefore, invalid as it did not give her, and the other occupants in similar position, the opportunity to lay claim at the time of automatic conversion of the deed of grant into ownership.

Kollapen J held that the request that the applicant be declared the owner of the property or alternatively that she be declared entitled to have the property registered in her name could not be granted. That was substantially because of her failure to join other members of the household in the proceedings, given that they had a direct and substantial interest in the matter. However, the order of declaration of constitutional invalidity of the section was granted with costs against the third respondent, the Department of Local Government and Housing. That order of invalidity was suspended for a period of 18 months to afford Parliament the opportunity to remedy the defect. During that period the first respondent was interdicted from passing ownership, selling or encumbering the property in any manner whatsoever.

The court held that the Act perpetuated the exclusion of women, such as the applicant, from the right of ownership insofar as it provided for automatic conversion but failed to provide any mechanism in terms of which any competing rights could be considered and assessed after which a determination could be made. The legislative scheme introduced by the Act effectively vested all rights of ownership in the property in the first respondent and similarly divested the applicant and others who might have been similarly situated of any entitlement to the property. The Act did so without affording the applicant and potentially others an opportunity to be heard and present a claim for entitlement to the property.

The conversion process prescribed in the Act took as its starting point the land tenure rights granted in terms

of the Proclamation, which had been described as racist and sexist and did not consider the genesis of how such rights were granted, and in particular whether they were granted under circumstances that excluded women from consideration as rights-holders. The applicant and her descendants were not the only persons affected by the operation of the Act as other family members were also listed for the purposes of certificate of occupation. All affected persons, those listed in the certificate of occupation or their descendants, had the right to be heard in respect of the ownership of property. However, no provision was made in the Act for an appropriate procedure affording the opportunity to be heard. The Act's automatic conversion mechanism, the lack of notice of conversion and the absence of a procedure for raising issues with the conversion of land tenure rights into ownership, defied the *audi alteram partem* principle, which required that all parties be given the opportunity to respond to evidence.

Public roads

Traffic rules governing public roads in a gated estate are governed by public law and not contract: In *Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others* 2018 (1) SA 615 (KZP), [2018] 1 All SA 279 (KZP) the first respondent, Mount Edgecombe, was a gated security estate having rules governing the conduct of residents of the estate and their domestic servants, as well as those governing usage of public roads found within the estate. The rules provided, among others, that domestic servants of residents could not walk on public roads in the estate, but had to use busses provided or be transported by the employer in their vehicle. They also provided for fines to be imposed for infringement. The traffic rules were not made with the permission of the Minister of Transport, his delegate, a Member of the Executive Committee (MEC) or

a municipality as required by the National Road Traffic Act 93 of 1996 (the Act).

After the daughter of the first appellant Singh infringed the rules governing public roads in the estate by exceeding the specified speed limits, a fine was imposed and debited to the account of the latter. When payment was not forthcoming the first appellant's access card to the estate was de-activated with the result that he, together with his family, was denied access to the estate. The first and second appellant, another resident of the estate, approached the High Court for an order declaring the rules invalid in that, in the case of public road rules, they were made without the permission of the MEC and in the case of domestic servant rules, they were unreasonable. The KZP held, per Topping AJ, that the rules were valid as they were a contract between the first respondent and its residents. An appeal to the Full Bench was upheld with costs, the rules were declared invalid, which order of invalidity was suspended for a period of 12 months, during which the first respondent was afforded the opportunity to obtain the necessary permission from the minister or the MEC.

Seegobin J (Chetty and Bezuidenhout JJ concurring) held that while the first respondent believed that it was free to control, regulate and police all roads within the estate by virtue of its rules and the contracts it concluded with its members, including the appellants, the problem was that the public-road status within the estate carried with it certain public law legal consequences. Inherent in the concept of a public road was that the public had access to it and that the regulatory regime was a statutory one, namely, the Act, which applied throughout the country.

Private bodies, such as the first respondent, were obliged to seek the necessary permission from the MEC and/or the municipality concerned. In granting such permission the MEC and/or municipality concerned would be entitled to impose such conditions as they would consider neces-

sary in the circumstances. In the instant case it was common cause that the first respondent did not apply for such permission at any stage.

Since roads within the estate were public roads, it was only the minister or someone authorised by him by virtue of delegated authority, who had the power to regulate any road or any aspect of those roads. To the extent that the road rules sought to authorise the first respondent to impose a speed limit in respect of the roads within the estate, it simply had no authority to do so. The restrictive nature of the first respondent's rules also affected basic rights of domestic employees such as their rights to human dignity, equality, freedom of association, freedom of movement, freedom of occupation and fair labour practices. To the extent that the rules restrained the rights of domestic employees from freely being on and traversing public roads in the estate, they were unconscionable and unlawful.

Traditional leadership

Appointment of senior traditional leadership of a traditional community: The dispute in *Premier of the Eastern Cape and Others v Hebe and Others* [2018] 1 All SA 194 (ECB) was about the right person to be senior traditional leader (chief) of the abaThembu Traditional Community in Whittlesea, Eastern Cape. In the recent past the senior traditional leader of the community was Hebe who, after his death, was succeeded by his son, the first respondent, Chief Hebe, in 2007. Chief Hebe's position was contested by the second respondent, one Katsi, who claimed to have been the rightful senior traditional leader of the community, he belonging to a subgroup of the abaThembu, the amaTshatshu. Because of competition between the two the dispute was referred to a provincial committee (the Committee) of the Commission on Traditional Leadership Disputes and Claims for investigation and recommendation. After completion of its task the Committee re-

ported to the first appellant, the Premier, in which it recommended that the second respondent be recognised as the senior traditional leader. The Premier delegated the task to the Superintendent-General to advise the first appellant of the intention to recognise the second respondent as the senior traditional leader, also asking for written representation as to why that should not be done.

Apart from making written representation the first appellant also approached the High Court for an interdict restraining the Premier, the MEC and the Superintendent-General from recognising the second respondent as senior traditional leader pending determination of the application for a review and setting aside the recommendation of the Committee and the decision of the Premier to recognise the second respondent. The interim interdict was granted and later made final by Bacela AJ who also reviewed and set aside the recommendation of the Committee and the decision of the Premier.

An appeal against that decision was dismissed with costs by the Full Court. Van Zyl DJP (Stretch J and Mageza AJ concurring) held that the Committee made a recommendation and not a binding decision. The dispute resolution mechanism created by the Traditional Leadership and Governance Framework Act 41 of 2003 (the Act) commenced with an investigation and was concluded with the decision of the Premier. The Premier similarly derived the power to make a decision on the recommendation from the Act. The Premier cannot take a binding decision without a recommendation of the Committee. The recommendation was accordingly a jurisdictional fact and a prerequisite for the exercise by the Premier of his authority as contemplated in s 26 of the Act. Although the Premier was empowered to make a decision that differed from the recommendation of the Committee, he or she was obliged to act on the recommendation. If the Committee's role in the decision making pro-

cess was flawed, the entire process would be tainted.

In the instant case the Committee's role in the decision making was indeed flawed. That was so as the Committee did not take into account relevant evidence and important affidavits used in the 1982 case decided in the Supreme Court of Ciskei in which the senior traditional leadership of the first respondent's father was disputed. For that reason the recommendation of the Committee had to be reviewed and set aside. Furthermore, the Committee deviated from its mandate by investigating and reporting on a matter it was not mandated to do. The task of the Committee was to investigate a dispute in relation to the right or title of the first respondent to the chieftaincy of abaThembu Traditional Council. The investigation was directed at the right or entitlement to be appointed to the chieftaincy of an existing traditional community. On the contrary, the underlying basis of the Committee's recommendation was that the amaTshatshu should be recognised as a traditional community in the land of their ancestors and that the appointment of the second respondent to the disputed chieftaincy would achieve that result. That constituted a serious misdirection and failed to recognise that the dispute was concerned with the chieftaincy of an existing community consisting of more than one abaThembu group. In brief, the Committee's recommendation effectively dealt with the traditional leadership of the amaTshatshu community as opposed to the leadership of the abaThembu community as per the mandate.

Wills

No will is valid unless it is signed by the testator in the presence of two or more competent witnesses present at the same time: The facts of the case of *Twine and Another v Naidoo and Another* [2018] 1 All SA 297 (GJ) were that at the time of his death in 2014 the deceased, one Twine, was living in a romantic relationship with the first

defendant, Naidoo, to whom he was not married. The deceased left two wills, the 2011 will and the 2014 will. In the 2011 will the deceased bequeathed among others R 20 000 to the first defendant and the rest of the estate to his daughters, the plaintiffs. The 2014 will was the opposite of the 2011 will in that there the deceased among other things bequeathed R 10 000 each to the plaintiffs and left the rest of the estate to the first defendant.

The plaintiffs approached the High Court for an order declaring the 2014 will invalid and null and void, while the 2011 will had to be declared a valid last will and testament of the deceased. The validity of the 2014 will was challenged on the grounds that it was not co-signed by the deceased's niece as stipulated in the 2011 will that all future wills should be co-signed by her and further that the deceased signed it in the absence of the witnesses. As a matter of fact one of the witnesses who signed it testified that she and her husband signed the will and left with the result that if the deceased signed the will after all it would only have been after their departure.

Vally J granted the order as sought, making no order as to costs, which the plaintiffs did not seek in the first place. It was held that in terms of s 2(1)(a)(ii) of the Wills Act 7 of 1953 no will was valid unless the signature made by the testator was made in the presence of two or more competent witnesses present at the same time. Accordingly, the witnesses who attested to the signature of the testator had to be present when the testator actually signed. That requirement was mandatory and if not met, the will was invalid for want of compliance with a statutorily required formality. As in the present case both witnesses who were supposed to attest to the signing of the 2014 will by the deceased were not present when he signed it, it was invalid.

The parties having made use of the services of handwriting experts, the court

commented at length on the role, duties and functions of an expert witness, as well as the role and functions of the court in that respect. Very briefly, the court held that a witness claiming to be an expert had to establish and prove their credentials in order for their opinion to be admitted. Their testimony should only be introduced if it was relevant and reliable. An expert witness' overriding duty was to the court in respect of which they should provide independent assistance by way of unbiased opinion in relation to matters within their expertise. Such a witness was not an advocate for any party and their independence should never be relinquished. In the instant case the testimony of the experts for both sides was rejected. That was so as in the case of the plaintiffs' witness, she failed to distance herself from the case of the plaintiffs to the point where she became an advocate for their case. While in the case of the defendant's witness he was too uncertain to be of any probative value in determining the central questions before the court.

Non-compliance with the Wills Act and forgery of signature: The case of *Karani v Karani NO and Others* [2018] 1 All SA 156 (GJ) resembles that of the *Twine* case (*op cit*) in a number of respects, including the issues involved and how they were dealt with. Furthermore, the same expert, was called to testify for the plaintiff in both cases, only that in the *Karani* case her testimony was found credible and accordingly accepted.

The facts of the case were that the testatrix was alleged to have executed a total of six wills at various stages during her lifetime. The plaintiff, the deceased's brother, sought an order declaring the will dated 15 September 2006 (the 2006 will) to be a valid last will and testament of the deceased and that her will executed on 7 February 2013 (the 2013 will) to be declared invalid and, therefore, null and void. The 2013 will was alleged to

be non-compliant with s 2(1)(a) of the Wills Act 7 of 1953 in that it was signed by the testatrix and one witness when they were together. However, the second witness was not there at the time and only signed a day later and in the absence of both the testatrix and the first witness, which was a clear violation of the section. The question was whether the will could still be validated in terms of s 2(3) of the Act, which made provision to that end if the will was drafted by the deceased personally and was intended to be her will.

Monama J held that the 2013 will was invalid and thus null and void for non-compliance with s 2(1)(a) when it was executed. Furthermore, it could not be validated in terms of s 2(3),

as it was not drafted by the deceased personally. On the contrary, it was drafted by the third defendant, the deceased's nephew who was in Canada at the time and then sent to the second defendant by electronic mail. On receipt the second defendant printed the will and brought it to the attention of the deceased, explaining it in her language as it was written in English.

Regarding forgery of the deceased's signature on the will the expert explained how great effort had been made to present the signature of the deceased as it had always been in the past. However, that was exactly the problem since at the time of the execution of the 2013 will it was improbable that her signature would have remained the same as her age had advanced in that

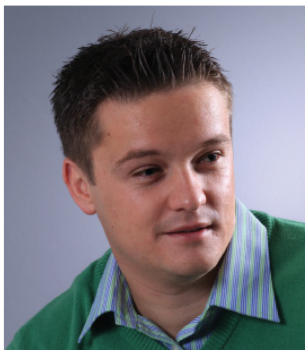
she was 76 years of age, her health had deteriorated while she had arthritis. The forger apparently forgot to take care of all those considerations. The other problem with the will was that it was witnessed on the last page only, to the exclusion of the other pages. In this regard the court held that the word 'signature' should be interpreted widely to mean that each and every page had to be signed by all signatories as failing to do so would create the risk that the unsigned pages could be tampered with.

Turning to the question of expert witness the court held that such had to be objective irrespective of the party calling her. The expert had to be properly qualified and provide the factual basis for her opinion.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Court refusing to enforce strict terms of a harsh lease contract, eviction of lessee after cancellation of lease, exclusion of adopted children from inheritance, 'interim-interim' interdict; interpretation of statutes, naturalisation of persons as South African citizens, prescription of right to claim retransfer of property to the seller, reasonable notice terminating relationship between banker and client, requirements for *condictio indebiti*, rescission of eviction order and statement made by witness to police as hearsay evidence. □

NEW LEGISLATION



New legislation

Legislation published from
2 – 28 February 2018

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Bills

Division of Revenue Amendment Bill B2 of 2018.

Appropriation Bill B3 of 2018.

Selected list of delegated legislation

Allied Health Professions Act 63 of 1982

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Unprofessional conduct: Injection therapy by chiropractors and osteopaths. BN7 GG41419/2-2-2018.

Unprofessional conduct: Bio-similar hormones. BN23 GG41456/23-2-2018.

Auditing Professions Act 26 of 2005

Amendment of the Code of Professional Conduct for registered auditors addressing long association of personnel with an audit or assurance client. BN18 GG41432/9-2-2018.

Broad-based Black Economic Empowerment Act 53 of 2003

Memorandum of understanding be-

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Extension of Security of Tenure Act 62 of 1997

Amendment of regulations. GenN72 GG41447/16-2-2018 and GenN84 GG41458/23-2-2018.

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Regulations in terms of the Act. GN R98 GG41433/9-2-2018.

Health Professions Act 56 of 1974
Repeal of the rules for the registration of orthoptists. BN19 GG41445/16-2-2018.

Justices of the Peace and Commissioners of Oaths Act 16 of 1963

Amendment of the designation of commissioners of oaths. GN68 GG41419/2-2-2018.

Labour Relations Act 66 of 1995
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National guideline on minimum information requirements for preparing environmental impact assessments for mining activities that require environmental authorisation in terms of the National Environmental Management Act 107 of 1998

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Draft municipal cost containment regulations in terms of the Local Government: Municipal Finance Management Act 56 of 2003. GN120 GG41445/16-2-2018.

Draft Alien and Invasive Species Regulations in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN112 GG41445/16-2-2018.

Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications in terms of the Health Professions Act 56 of 1974 for comment. BN24 GG41456/23-2-2018.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R143 and 144 GG41457/23-2-2018.

Amendment of regulations related to tariffs for registration of fertilizers, farm feeds, agricultural and stock remedies, sterilizing plants and pest control operators, appeals and imports in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for comment. GN146 GG41462/23-2-2018.

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Refusal to reinstate based on employee's conduct during arbitration proceedings

In *Glencore Holdings (Pty) Ltd and Another v Sibeko and Others* [2018] 1 BLLR 1 (LAC), the employee, a bulldozer driver, was dismissed for not wearing prescribed ear muffs during the performance of his duties. He referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), requesting reinstatement. The commissioner held that the employer had not proved that the employee was guilty of misconduct, but refused to reinstate the employee on the basis that his behaviour during the arbitration proceedings demonstrated a breakdown in the employment relationship to such a degree that reinstatement was an inappropriate remedy. On review, the Labour Court (LC) set aside the commissioner's ruling and substituted it with an order of reinstatement. The employer appealed against the substitution of the remedy.

The Labour Appeal Court (LAC) noted that s 193(2) of the Labour Relations Act 66 of 1995 (the LRA) provides for reinstatement as the primary remedy in the case of a substantively unfair dismissal, unless *inter alia*, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or it is not reasonably practicable for the employer to reinstate the employee.

The commissioner had felt inclined to deviate from the primary remedy of reinstatement solely because of the manner in which the employee conducted himself throughout the arbitration proceedings. The employee had been habitually disruptive, he had accused the employer's representative of bribing witnesses and for giving one another and the commissioner cues during the proceedings. The employee had said that this was just the beginning of a bigger battle between him and the employer. Having regard to this conduct, the commissioner concluded that the trust relationship be-

tween the employer and employee had broken down irretrievably and ordered six months' compensation as opposed to reinstatement.

The LAC found that the commissioner's award had failed to indicate the jurisprudential basis as contained in s 193(2) of the LRA on which the commissioner relied to deviate from the primary remedy of reinstatement. The exception that reinstatement need not be ordered where the employment relationship is 'intolerable' was inapplicable because this exception referred to the circumstances leading up to the dismissal and not after the dismissal, such as the arbitration proceedings. Moreover, a continuation of the employment relationship could not be regarded as 'impracticable' because the employee's conduct, even if deserving of reproach, could not be construed to inhibit his work as a bulldozer driver, which work did not necessarily require good manners. The court found that the commissioner had become emotional in this instance and had unreasonably deprived the employee of the remedy to which he was entitled.

In the circumstances, the LAC held that it was correct for the LC to conclude that the award was one to which a reasonable arbitrator could not have come to and the appeal was dismissed with costs.

Automatically unfair dismissal on the ground of race

In *Bakulu v Isilumko Staffing (Pty) Ltd and Others* [2018] 2 BLLR 169 (LC), a temporary employment service employee was dismissed for incapacity. The employee referred an automatically unfair dismissal dispute to the LC, claiming that he had been unfairly dismissed on the basis of his race. After the employee had led evidence and after cross-examination, the three respondents, two labour brokers and their client, claimed that the employee had failed to make out a case that he was dismissed on account of his race and applied for absolution from the instance in respect of the discrimination claim. The client also unsuccessfully applied for absolution in respect of the employee's claim that the client was also its employer.

Having considered the requirements

for a plea of absolution, the LC found that the employee had failed to make out a *prima facie* case that he had been dismissed on the basis of his race and not for incapacity. In terms of s 187(1)(f) of the LRA, a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee on the grounds of race. In this regard, s 187 of the LRA imposes an evidential burden on employees to produce evidence, which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then requires the employer to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187.

The LC noted that the employee's problems had started when he successfully applied for a job as shift supervisor and the contract he signed stipulated a smaller wage than he had expected. It was during his interactions with management personnel that he asked if he did not qualify for a better wage because he was black. Shortly after that, the employee received a warning for sleeping on duty and later other disciplinary action for different conduct ensued. The employee had also been threatened with forfeiture of pay because he had failed to attend an incapacity inquiry. The employer had offered the applicant an alternative post, which had been turned down. He was then dismissed.

Insofar as race was mentioned as a cause of his dismissal, the employee perceived it to be the reason because he had asked for a rate of pay commensurate with his qualification and he interpreted the respondents' failure to offer him a better rate to be because he was a black person. However, no evidence was advanced to show that any white person occupying a supervisory post on the same level to that of the employee had been employed at a better rate of pay.

While the LC appreciated that much of the employee's frustration and anger was directed at the fact that he had effectively worked for the same client for 17 years without ever being afforded permanent employee status because he was always engaged through labour brokers, his evidence did not suggest a link between his employment status and his dismissal, let alone a link between his race and his dismissal.

The LC held that the employee may have had an arguable case that his dismissal for incapacity was unfair, but he brought his case on the basis that the reason was because of his race and

he needed to at least provide sufficient evidence to raise a credible possibility that his dismissal fell within the scope of s 187(1)(f). The employee did not do so. Accordingly, the respondents were

granted absolution from the instance and the employee's discrimination claim was dismissed.



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Section 197 v Bargaining Council's Main Agreement

SAMWU and Another v City of Johannesburg and Others (LC) (unreported case no JR2228/2013, 2-2-2018) (Whitcher J)

When employees conclude a collective agreement, regulating terms and conditions of employment with their employer and are subsequently transferred to a new employer in terms of s 197 of the Labour Relations Act 66 of 1995 (LRA), under circumstances where the new employer falls within the scope and jurisdiction of a bargaining council, which regulates terms and conditions of employment in a main agreement; are the employees and new employer bound by the old collective agreements or the main agreement of the bargaining council?

This was the novel question before the court.

Background

The employees were previously employed by either City Power (Pty) Ltd or Johannesburg Water (Pty) Ltd, both municipal owned entities (MOEs). The applicant unions concluded plant level collective agreements with City Power and Johannesburg Water, which regulated the employees' terms and conditions of employment.

In 2010 the first respondent, the City of Johannesburg, took a decision to integrate certain of its functions, which saw the employees being transferred into the city's employ. This transfer was in accordance with s 197 of the LRA and for the two years that followed, the employees and the city acted in accordance with the old collective agreements.

However, in 2012 the city notified the

employees that because they all fell under the jurisdiction of the South African Local Government Bargaining Council (SALGBC) they were bound by the council's main collective agreement governing all employees' terms and conditions of employment. Therefore, according to the city, the old collective agreements should be replaced by the bargaining council's main collective agreement.

Negotiations over this issue deadlocked and in 2013 the city altered the employees' terms and conditions to conform to the bargaining council's main agreement. It was not in dispute that certain conditions as set out in the old collective agreements were more favourable when compared to the conditions set out in the main agreement.

A dispute was referred to SALGBC where the arbitrator held that the employees were bound by SALGBC's main collective agreement.

On review the applicant unions, on behalf of the employees, argued that s 197(5)(b)(ii) made it clear that the new employer, the city *in casu*, was bound by the old collective agreement. Section 197(5)(a) and (b) reads:

'(5)(a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by –

(i) ...

(ii) any collective agreement binding in terms of section 23'.

It was common cause that there was no agreement between the old and new employer and employees, as contemplated in terms of s 197(6), to alter any terms and conditions of the employees once transferred. Following which the union argued that s 197(5)(b)(ii) found application and that the city was, therefore, bound by the old collective agreements.

The court noted that the primary purpose of s 197 was to protect employees against job losses and not to 'immunise' old collective agreements. Thus, a new employer can change an old collective agreement, post-transfer, through negotiations with employees.

As to whether the parties were bound by the old collective agreements or the bargaining council's main agreement,

and having regard to the objectives of the LRA, the court held:

'At the time of their transfer, the employees' terms and conditions were guaranteed by, essentially, plant level collective agreements with the MOEs. Section 197 would have protected them from unilateral variation by the new employer. However, when starting work at the first respondent, the employees entered a contractual regime governed by a species of collective agreement that, interpreting the LRA purposively, trumped the old employer's collective agreement. No new bargaining had to happen with them to effect these changes as, once they became employees of the new employer, they became subject to the Main Agreement. Bargaining council agreements, such as Main Agreements, enjoy the status of subordinate legislation and ought to apply above the collective agreements concluded between the applicants and the MOEs.

In terms of the schema of the LRA, old collective agreements only guarantee the continuance of old conditions of service to the extent that a superseding Main Agreement is not in place at the new employer.'

In conclusion the court held:

'A crucial factor in this dispute is that the parties to the dispute are parties to the SALGBC Main Agreement and their members [the affected employees] fall within the registered scope of the SALGBC Main Agreement. Where employees fall within the scope of two conflicting agreements, the Main Agreement must apply to them considering its status.'

The review application was dismissed with no order as to costs.

Do you have a labour law-related question that you would like answered?

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Abbreviation	Title	Publisher	Volume/issue
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa	Institute of Foreign and Comparative Law	(2017) 50.1
<i>DJ</i>	De Jure	University of Pretoria	(2017) 50.2
<i>EL</i>	Employment law	LexisNexis	(2018) 34.1
<i>ILJ</i>	Industrial Law Journal	Juta	(2018) 39
<i>Litnet</i>	LitNet Akademies (Regte)	Trust vir Afrikaans Onderwys	(2018) 15.1 February
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) 21 January (2018) 21 February
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	LexisNexis	(2018) 81.1
<i>TSAR</i>	Tydskrif vir Suid Afrikaanse Reg	Juta	(2018) 1

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By
Chris
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Report card for immigration law and home affairs

Whether the issue surrounds Syrian or African refugees ‘pouring’ into the European Union or the United Kingdom (UK), Mexicans supposedly flooding into the United States, or the possibility of North Koreans fleeing to China, these are the challenges facing lawyers in the immigration law field. If anyone is unsure of the centrality of immigration law and policy to governance globally, only two words matter: ‘Trump’ and ‘Brexit’.

At the International Bar Association’s (IBA’s) biennial conference on immigration law held in London in November 2017, two ‘themes’, namely, ‘Trump’ and ‘Brexit’ dominated proceedings, not to mention the downstream challenges they pose.

Two South African attorneys attended and spoke at the conference. Director of Immigration and Dispute Resolution at ENS, Zahida Ebrahim and I, tried to get the positive message across that South Africa (SA) is open for business, despite issues such as questionable controls at Wonderboom Airport, as well as questionable controls in the granting of South African citizenship. But, by way of a report card on immigration in SA in 2017 and the Department of Home Affairs, several issues stand out – in no particular order.

During 2017, three Ministers of Home Affairs were appointed. An immediate consequence of this appears to have been that the proposed re-write of the Immigration Act 13 of 2002, arising from the new White Paper on International Migration – that the then-Minister Malusi Gigaba had been driving – was pushed back. There is also a suspicion that Minister Gigaba’s drive to get a better slice of the budget to enhance the enforcement-related resources of the Department of Home Affairs, may have lost some initiative.

It is difficult to speak about the Department of Home Affairs without discussing its front of house service provider for all visa and permit related applications – VFS Global. This ‘facility’ was launched in June 2014. One of the intended functions of outsourcing was to better manage corruption by setting up a firewall between the Department of Home Affairs and the public. In this regard – and while current statistics are

not available – from the perspective of ‘public perception’, matters have definitely improved although the current arrangements are not perfect. Customer service has generally improved over what it was when applications had to be submitted through the Department of Home Affairs’ regional offices. The legality of aspects of the VFS Global service, including the fees that the public must pay, as well as the enforcement by VFS Global of visa requirements on behalf of the Department of Home Affairs and refusing to accept supposedly ‘incomplete’ applications remains an open question.

Increasingly, embassies are also engaging VFS Global to provide the same service. One widely acknowledged benefit of this has been the improvement in transparency in knowing what the requirements are for any given visa or permit process – especially when some embassies formulate their own, additional requirements. For example, in countries like China, India and the UK, VFS Global has set up satellite offices in other centres to receive applications thus reducing the cost and inconvenience to the local public and businesses.

Returning to the Department of Home Affairs’ service provision, it continues to have challenges with decision-making that appear as little more than irrational to applicants. The public’s frustration with this is compounded by the delays they experience when having visa- or permit-application appeals adjudicated, which can take many months.

Quite fundamental challenges continue to exist for the importation of much-needed expat skills into the national economy.

Arising from the 2014 Immigration Regulations, the Department of Labour must ‘recommend’ the issue of a general work visa, as well as the extension of general work visa – including general work visas issued prior to 2014. Not only does the Department of Labour take six months or longer to draw up its reports (how many companies can afford to keep vacancies open that long?), officials recently claimed that the Department of Labour has an 85% rejection rate (this has not been confirmed yet). If the Department of Labour does not recommend the grant of the visa, the Department of Home Affairs treats that as binding.

The primary category of a work visa is the ‘critical skills work visa’ – where the applicant or holder is deemed to have a prescribed critical skill. Challenges persist with the definition of what many of the critical skills are and how an applicant can prove this. One can find an embassy being satisfied that a person has a critical skill and thus issue the visa, only to have the Department of Home Affairs withdraw it because it disagrees.

The other major work visa category is the ‘intra-company transfer work visa’. The introduction of the Employment Services Act 4 of 2014 (the Act) increasingly raises challenges for the transfer visa. This is because s 8 of the Act, which is administered by the Department of Labour, requires that companies must have a skills transfer plan in place in respect of any position in which a foreign national is employed. This process is supposed to be the subject of regulations. None exist yet, but many embassies are insistent on seeing the skills transfer plan before the transfer visa will be approved.

The ‘short term work visa’ option – for persons coming to work for up to 90 days – appears to be working well, albeit there continue to be disputes as to when it is needed and when it is not.

An ongoing global challenge continues to be that of refugees and refugee management. Problems range from the Department of Home Affairs’ apparent opposition in the courts to stop it from being compelled to re-open a refugee reception office in Cape Town to deal with the backlog of pending refugee application appeals and the delays, often of years, in considering applications by recognised refugees, for permission to apply for permanent residence.

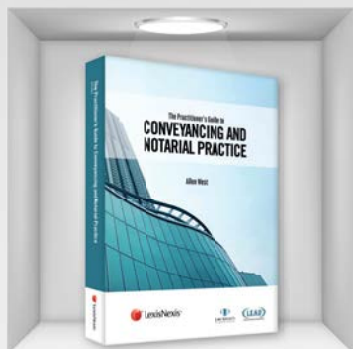
This cannot be in anyone’s best interests – unless SA is trying to send the message that it is open for business, as long as you are not a refugee.

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