

NURTURING THE LAND: IS IT NECESSARY TO AMEND S 25 OF THE CONSTITUTION FOR LAND REFORM?

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22 Nurturing the land: Is it necessary to amend s 25 of the Constitution for land reform?

The Constitutional Review Committee recently called on the public to comment on whether s 25 needs to be amended to allow for the expropriation of land without compensation. **Kevin Hopkins** and **Carl Adendorff** give their views on s 25, including constitutional requirement to compensation. They note that the Constitution requires nothing more than the owner of the land being expropriated receives whatever compensation is – in the totality of circumstances – just and equitable. The article states that carefully thought out legislation can do the job, but the legislation must be constitutionally compliant, which includes that it must be rational.

26 Road Accident Fund 'direct claims' versus public interest

The Road Accident Fund (RAF) proudly runs a campaign called 'RAF on the Road', which forms part of the RAF's marketing campaign and is aimed at encouraging the public to claim directly from the RAF. The programme has won a number of accolades, including the Department of Public Service and Administration's *Batho Pele* Excellence Award. In this article, **Gert Nel**, discusses the basis for the RAF 'direct claim' strategy and claims lodged directly with the RAF without the assistance of a legal representative.

28 The effect of the Oudekraal principle on the rule of law

Lord Denning once famously said: 'If an act is void, then it is in law a nullity' and that 'every proceeding which is founded on it is also bad and incurably bad' (*MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169). In the South African context, the same principle was expressed by Innes CJ in *Schierhout v Minister of Justice* 1926 AD at 109. Yet, in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the Supreme Court of Appeal developed the principle that an unlawful act may produce legally recognisable consequences (*Oudekraal* principle). **Ndivhuwo Ishmel Moleya** writes that the application of the *Oudekraal* principle is the bone of contention and in this article, he analyses the three cases.

32 Unscrambling the General Data Protection Regulation

At the beginning of 2012 the European Commission started with the process to reform the data protection framework in the European Union. As part of these reforms the General Data Protection Regulation (GDPR) was introduced. The GDPR took effect at the end of May. In South Africa, the GDPR is as important as it is seen as the international gold standard for protecting personal information. The ground-breaking regulations set out eight Internet user rights, writes **Daniël Eloff**. Mr Eloff states that the Protection of Personal Information Act 4 of 2013 (POPI), which by and large is yet to come into full effect, was legislated close to five years ago and already covers many if not all of the newly adopted rights under GDPR.

34 A fork in the road: Distinguishing between 'public' and 'private' roads

It is time to put up a 'stop' sign and halt the growing misconception that the roads in all private gated community estates are public roads and are, therefore, governed by traffic laws under the National Road Traffic Act 93 of 1996 (the Act). **Tim Pearce** writes that it is necessary to dispel the notion that the appealed judgment of the *KwaZulu-Natal Division of the High Court in the matter of Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others* 2018 (1) SA 615 (KZP) is authority for saying that the roads in gated estates are not 'private' but 'public' roads.

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Legal Practice Council Rules finally gazetted

As we draw closer to the full implementation date of the Legal Practice Act 28 of 2014 (LPA), the final South African Legal Practice Council Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA have been published in GN401 GG41781/20-7-2018.

The rules have been finalised and signed by the Minister of Justice and are awaiting approval by Parliament, whereafter, ch 2 of the LPA can come into operation.

The rules were finalised after the National Forum on the Legal Profession considered comments received from interested parties after publishing a draft of the rules in GN43 GG41419/2-2-2018, as required by ss 95(4) and 109(2)(b) read with ss 97(1) and 109(2) and (3) of the LPA as amended by the Legal Practice Amendment Act 16 of 2017.

The Rules will be applied by the Legal Practice Council after

its establishment in terms of ch 2 of the LPA and will apply to all legal practitioners (attorneys and advocates), as well as all candidate legal practitioners and juristic entities as defined in the LPA.

The published rules contain the following parts –

- Fees and charges;
- The Council;
- Provincial Councils;
- Professional practice;
- Education and training;
- Admission and enrolment;
- Rendering of legal services;
- Law clinics;
- Disciplinary Rules;
- Legal Practitioners Fidelity Fund;
- Procedural Rules;
- Accounting Rules; and
- Nine Schedules to the Rules.


The rules, together with the Code of Conduct for legal practitioners published in GN81 GG40610/10-2-2017 and the regulations still due to be promulgated, will play an important role in the establishment of a



Mapula Sedutla – Editor

single unified statutory Legal Practice Council to regulate the legal profession.

Visit the *De Rebus* website at www.derebus.org.za for a copy of the rules, or view the rules at www.LSSA.org.za.

Do you have an opinion on the rules published? Send your view via letter to *De Rebus* at derebus@derebus.org.za 

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BLA's Youth Forum officially launched

The Black Lawyers Association (BLA) launched its Youth Forum on 30 June at the Soweto Hotel and Conference Centre in Soweto. The BLA's Youth Forum, is said to be a platform for young legal practitioners to discuss challenges and issues they are faced with in the legal profession.

President of the BLA, Lutendo Sigogo, said the National Executive Committee (NEC) of the BLA recognised that the formation of a youth forum within the organisation was long overdue. He added that the NEC was aware that the attempts of establishing a youth forum were defeated seven years ago. 'We are thankful that this NEC saw light and ran with this noble idea. We believe that this is because we are alive to the fact that a nation or formation, which does not care about its youth, does not have future,' Mr Sigogo said.

Mr Sigogo pointed out that it was significant for the BLA to gather in Soweto to launch the BLA Youth Forum, as the BLA could not identify any place more befitting for the launch. He said Soweto was where the youth of South Africa (SA) took it on themselves to break the shackles of Bantu education. Mr Sigogo added that the youth of that time put their lives on the line in order to reject Afrikaans as the medium of instruction in schools. 'We have come here to say we acknowledge your struggle, which freed all of us today. Further, in 1955, Soweto, in particular witnessed the historic adoption of the Freedom Charter. The Charter is arguable the bedrock of our Constitution,' Mr Sigogo added.

Mr Sigogo said when the BLA launched the Youth Forum in Soweto, it was saying to the youth, to take the baton from Hector Pieterse, Tsietshi Mashinini, Solomon Mahlangu and hundreds of other youth who died in Soweto, other parts of the country and abroad for a cause. He noted that the youth of that era knew that if they did not stand up for themselves, no one would do it for them. He added that it was on that basis that the BLA wanted young people to be conscious of their current situation and of what still needs to be done.

Mr Sigogo gave examples of the youth of SA who stood up through the struggles, the youth who did what Frantz Fanon once said: 'Each generation must, out of relative obscurity, discover its mission, fulfil it, or betray it.' He mentioned people such as Alfred Mangena and Pixley ka Isaka Seme in 1912 when they participated in the formation of the African National Congress (ANC). In 1944 when Nelson Mandela, Anton Lembede, Ashby Mda, Walter Sisulu and Oliver Tambo formed the ANC Youth League, he said they were young. In the mid 1960s with the banning of the ANC and other political parties, the arrest and exiling of political leaders, a young man, namely Steve



President of the Black Lawyers Association (BLA), Lutendo Sigogo, officially launched the BLA's Youth Forum on 30 June at the Soweto Hotel and Conference Centre.

Biko, emerged as the leader of Black Consciousness Movement (BCM).

Mr Sigogo said it was through the deep influence of the BCM ideology that the youth of 1976 came up with the Soweto uprising. He added that it was immediately after the 1976 uprisings that the following year, in 1977, the black youth in the legal profession formed the BLA. He also mentioned the youth that led the 2015 #feesmustfall campaign in order to tackle the barriers to education. Mr Sigogo pointed out that it was the youth who are fighting for economic emancipation and restoration of land to their rightful owners without compensation.

Mr Sigogo said if the youth of the BLA did not stand up and occupy their space, history would judge them as having betrayed their mission. He pointed out that youth within the BLA must stand up because the legal profession was still not transformed and new minds are needed to transform it. 'The legal profession is one of the oldest professions in the world. It is also the most conservative arena where the old claim guardianship of the profession and how things must be done, the youth's ideas are not seriously entertained, if at all,' Mr Sigogo said.



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He continued: 'We need wisdom of young people to assist us navigate through the new era, which is being introduced by the Legal Practice Act 28 of 2014. It is a worrying factor that the voice of the youth is missing in the National Forum, a body, which is established to lay down the basic conditions for transformation of the legal profession,' Mr Sigogo added. He said the transformation project is about the future, but it was being managed by older people, many of whom, did not believe in young people.

Mr Sigogo added that the youth of the BLA needed to come up with mechanisms and systems to ensure that the youth are amply represented in the Legal Practice Council (LPC), the Provincial Councils and all the committees of the LPC in order to bring fresh ideas in the legal profession. He noted that it was the youth who can properly transform how the law is practiced, by finding cheaper ways of serving and filing documents within the profession. He added that the youth was capable of doing away with traditional 'messenger' means of serving pleadings. 'It is youth who will come up with rules and regulations, which will open the profession to all. The youth – given the opportunity – will come up with the means of reducing the ever sky rocketing legal fees,' Mr Sigogo said.

Mr Sigogo pointed out that the BLA in partnership with the National Democratic Lawyers Association (NADEL) championed the formation of the LSSA and helped black legal practitioners find representation in the governing structures of the legal profession. He said that when the legal profession changes its regulatory body the youth within the BLA will have to devise acceptable methods of taking the legal profession forward. He noted that the LPA was about access to the legal profession, access to legal services and access to justice and said this must be the mission of the young legal practitioners of today.


Mr Sigogo said in order to deal with access to the legal profession the BLA was championing that the subscription fees in the legal profession be reduced. He pointed out that the National Forum on the Legal Profession (NF) wanted to recommend a subscription fee of R 4 025 per year per legal practitioner, however, he noted that the BLA opposed this and have now set a subscription fee at R 2 500. 'We cannot wait another month before the newly proposed subscription fee becomes operational because the current subscription fees are a stumbling block to our youth. We have approached all the provincial law societies to reduce the subscription fees to be in line with the NF's proposed R 2 500,' Mr Sigogo said.

'I must report that the biggest law society in the country, the Law Society of the Northern Provinces, has agreed that its members will, with effect from the 1 July 2018, pay new reduced subscription of R 2 500 and newly admitted attorneys will pay *pro rata* rate of R 1 500. The Cape Law Society and the KwaZulu-Natal Law Society are still considering our proposal. We know that the main beneficiaries of this reduction will be young lawyers,' Mr Sigogo added.

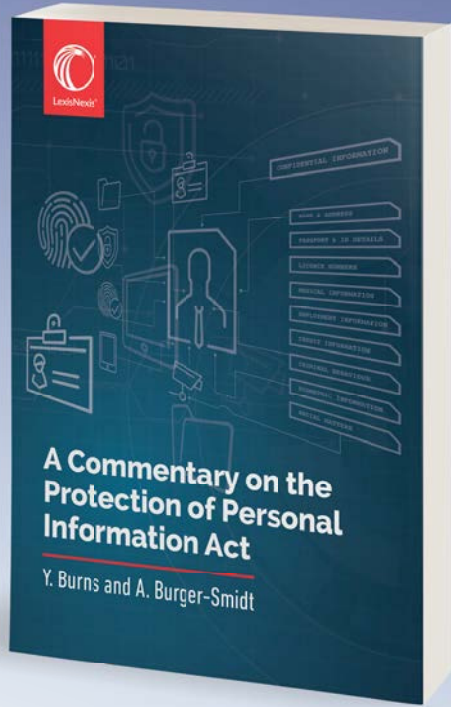
Mr Sigogo said the BLA NEC will draw up the terms of reference of the Youth Forum's Steering Committee. 'We believe that this step will necessitate amendment of our Constitution to cater for the forum's operations. There is need that the leader of the forum must sit in both the NEC and the National Working Committee,' Mr Sigogo said. However, he pointed out that it must be clear that the youth forum will not be an autonomous structure from the BLA. He added that it was a special committee of the BLA and it was to be regulated by the Constitution of the BLA.

Multiple stakeholder engagement

National Executive Member of the BLA, Mongezi Mpahlwa, spoke about how the BLA Student Chapter (BLA SC) was established in 2010, he said students decided that in line with the mother body there was a need to start a student chapter with the view to bridge the gap between leaving university and entering the legal profession. He added that through the estab-



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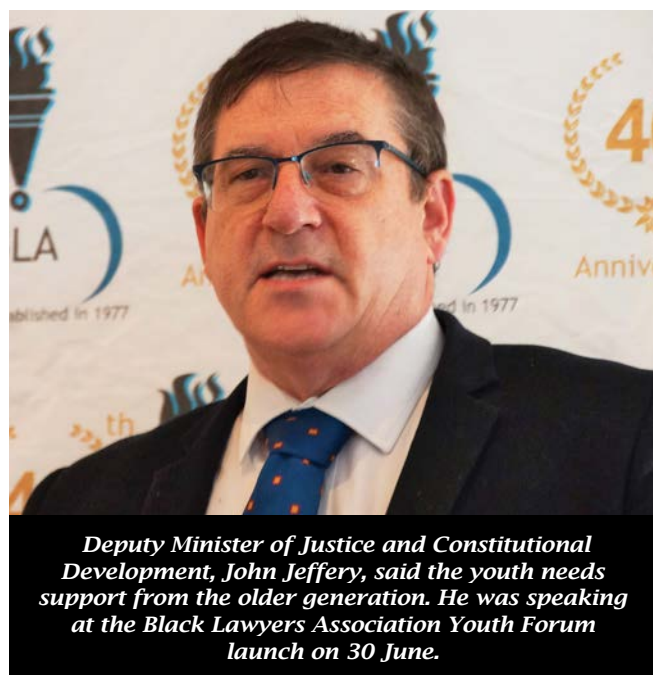
lishment of the BLA SC they were able to bring young people closer to the BLA. The BLA were able to form an initiative to open the profession up for younger people via vacation work and career guidance initiatives in collaboration with various universities. However, he noted that there was still a lot to be done to make sure the BLA SC was stronger and doing great things.

Mr Mpahlwa said if one fast forwards to 2018 there was a need to start the BLA's Youth Forum. He added that there were still young people who felt that they could not relate to the issues and discourse in the BLA and felt like they did not have a platform to address such issues and challenges that they were faced with. Mr Mpahlwa pointed out that he did not see the reason why the Department of Justice did not have an induction programme through the Office of the State Attorney, where it took a pool of high school students, particularly matriculants to universities and, assist them with funding throughout their studies. He added that programmes where SA collaborates with international bodies, such as the International Bar Association should also be included.

Mr Mpahlwa suggested that there be an apprenticeship programme where young students are trained, prepared and absorbed into the legal profession. He said with the LPC coming into effect, he did not see why there could not be a similar programme. He added that the Department of Justice through the LPC, can take existing candidate legal practitioners to different government organisations and expose them to different fields of law and in that way the challenges the youth in the legal profession are faced with would be addressed and access to work would become easier.

Mr Mpahlwa said exposure was very important and without it justice would not be done to the youth. He added that collaborations with international organisations would be very critical, taking into account the International Arbitration Act 15 of 2017. He pointed out that SA, through international partnerships, would learn a lot from foreign jurisdictions. Mr Mpahlwa said that the BLA was in talks with Cliffe Dekker Hofmeyr about establishing a skills transfer programme, with the aim to upskill members of the legal profession, particularly black lawyers. He added that a senior legal practitioner would have to collaborate with a young black legal practitioner in any particular case that they would work on.

Mr Mpahlwa pointed out that the idea was that big law firms



Deputy Minister of Justice and Constitutional Development, John Jeffery, said the youth needs support from the older generation. He was speaking at the Black Lawyers Association Youth Forum launch on 30 June.



Member of the Black Lawyers Association's National Executive Committee, Mongezi Mpahlwa, spoke about bridging the gap between law students leaving university and entering the legal profession.

would collaborate with small law firms on the instruction on matters that they are working on and in that way fees are shared and skills are transferred. However, a comment from the floor was raised on why there should be collaborating with only the 'Big Five law firms'. A member of the BLA said that there were capable black law firms who could assist with the transfer of skills to young legal practitioners and small law firms. The member further commented that the BLA needed to consult with senior legal practitioners who were willing to give training to young legal practitioners.

Mr Mpahlwa noted that candidate legal practitioners within the BLA suggested that there be young legal practitioners involved in the LPC, so they are able to have a voice within that structure. To direct and channel challenges faced by young legal practitioners in the legal profession.

Inviting youth into the conversation

The Deputy Minister of Justice and Constitutional Development, John Jeffery, said the launching of the BLA Youth Forum was a great initiative, because young voices were important. He added that young legal practitioners were faced with particular issues in the legal profession, but generally they were also faced with other issues as the youth in SA. He noted that the legal profession was conservative by nature, and meant that by conservative it was white and male dominated. He pointed out that there was a lot of pressure for young legal practitioners entering corporate law firms to bring a client base with them or establish and build their own client base.

Mr Jeffery added that young black legal practitioners had stated that networking opportunities were not available to black legal practitioners or those that were from traditionally rural areas. He said that clients, even black clients, would state that they wanted a white lawyer representing them. He pointed out that many black legal practitioners got articles of clerkships, became professional assistants and even associates, however, they did not get partnerships or become directors. He noted that of the black directors not a lot of them came up the ranks in some law firms, but instead directors were brought in from outside those law firms.

Mr Jeffery said the BLA Youth Forum should look into addressing issues, such as networking abilities. He pointed out that candidate legal practitioners and young legal practitioners who were starting their own law firms needed some form of support from the older generation. He added that going forward the BLA and NADEL should look if the legal profession



Deputy President of the Black Lawyers Association (BLA), Baiteseng Rangata, spoke at the launch of the BLA's Youth Forum launch in Soweto.

could afford two forums instead of one. He noted that there was still a lot of work to do and a lot of issues to be addressed in the legal profession. Mr Jeffery said that he supported the BLA Youth Forum and would be eager to engage and look into the forum's ideas in transforming the legal profession.

Action for the future and a better BLA

Deputy President of the BLA, Baiteseng Rangata said that the BLA NEC wanted to see the BLA Youth Forum succeed and they were ready to give their support. She added that in the struggle that the forefathers of the BLA had fought for has yielded results, because it has produced an environment where some members of the BLA are referred to as the senior members of the legal profession. She noted that some may not have realised the change, because they were not involved, witnessed or even participated in making it possible.

Ms Rangata added that as a woman in the legal profession no one would tell her to stand up and make it herself. She advised the young female practitioners that they had it in them to make it in the legal profession. She said that if women in the legal profession did not stand up on their own and search for mentors, no one was going to come to them. She pointed out that they needed to 'raise their hands'. She noted that senior legal practitioners are ready to help, however, young legal practitioners need to stand up and show interest.

Ms Rangata said the BLA wanted to create a forum where the youth were able to talk and be able to identify burning issues.

She added that senior legal practitioners are also faced with issues, such as how to better the education system and make sure that the younger generation are better equipped and be able to develop themselves further. She said that is where seniors came in as mentors of the youth. She pointed out that there were challenges where critics commented on the LLB degree, on how it needed to be changed from the four-year degree.

Ms Rangata said there was nothing wrong with the current four-year LLB degree. She pointed out that senior legal practitioners were also challenged with how they would close the gap to make sure that they create a level playing field for law graduates when entering the legal profession. She added that it was the responsibility of senior legal practitioners to deal with those challenges. She noted that as senior legal practitioners they wanted to partner with the young legal practitioners to see to it that they did not neglect young law graduates and expect them to excel in the beginning.

Ms Rangata said the type of work black legal practitioners received at government level did not allow them to open the windows of opportunity for the junior legal practitioners. She pointed out that every time black legal practitioners engage government, they get confusing statistics. She added that it could not be right that those statistics show one thing but then on the ground those numbers are not reflected. She told Deputy Minister John Jeffery that female legal practitioners were ready to join the judiciary. She noted that the judiciary has said that it was open and wanted to take female legal practitioners. Ms Rangata said for female legal practitioners to be better equipped and skilled for positions in the judiciary they have to be exposed to that kind of work.

Mr Sigogo introduced the following BLA members as the steering committee, which will oversee and manage the election of the first committee of the BLA Youth Forum. He said the steering committee would have six months to accomplish the task. The steering committee members are as follows -

- Nape Masipa;
- Nyambeni Davhana;
- Sam Mkhize;
- Nathi Dwayi;
- Tuelo Ntsoane;
- Molebogeng Phakane;
- Ndangi Thovhakale; and
- Peter Tibane.

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Family Assist and the Collaborative Network held a Parental Alienation Workshop on 16 June in Centurion.

Family and divorce mediator at Family Assist, Marici Corneli, welcomed delegates to the workshop and said that Family Assist was a corporation that was formed for the purposes of creating a multi-disciplinary membership association to develop the skills of mediators and other practitioners who work with families. 'Family Assist believes in a holistic mediation processes that involves the full scope of assistance to families in times of transition or restructuring, which includes, but is not limited to mediators, attorneys, parent coordinators, life coaches, counsellors, social workers and other mental health professionals,' she said.

Ms Corneli gave a quick summary about what parental alienation is. 'Parental alienation happens where one parent tries to stop the other parent from having a healthy relationship with their child. It is one of the most unfortunate and devastating consequences of family conflict, especially in divorce,' she said.

Giving effect to the 'voice of the child'

The opening address was given by the Senior Family Advocate from the Department of Justice and Constitutional Development, Chris Maree. Mr Maree spoke on the importance of a proper parenting plan and giving effect to the 'voice of the child', which is provisioned in the Children's Act 38 of 2005 (the Act). He said that since the Act was promulgated, the Office of the Family Advocate has seen many different ways parenting plans had been compiled. He added that he decided to write a definition for a parenting plan, which was from a uniquely South African perspective. He said he came up



Senior Family Advocate from the Department of Justice and Constitutional Development, Chris Maree, gave a presentation about the importance of a proper parenting plan and giving effect to the 'voice of the child' at the Parental Alienation Workshop on 16 June.

Parental alienation can be overcome

with the following: 'A parenting plan is a unique document, which is compiled for a specific family and represents the best possible solutions to avoid future litigation and to ensure the optimal participation of both parents and their minor child. Developed by means of a mediated process prescribed by legislation to address the ever-changing needs of the minor child involved, obviously taking into account, the inputs made by the minor children given their age, maturity and developmental stage and always complying to the best interest of the minor child standard.'

Mr Maree said that at the Office of the Family Advocate, he always detects nervousness when a parenting plan is submitted to him. There is always the anticipation of whether the plan will be endorsed or not. Mr Maree said he understood that a great deal of work and time is put into the preparation of a parenting plan and once submitted, he just sends the document back to the practitioner, which is unfair. However, he explained that he was the safety net between the child and the court. 'I have to see to it that I am upholding and protecting the best interest of the child before sending the parenting plan to the judge. It is not only my duty as a family advocate, but my duty as an officer of the court, I have to see to it that I inform the court properly'.

Mr Maree said that there were certain guidelines to consider when compiling a parenting plan. He mentioned four points, namely:

- It must comply with the prescript of the Act. Mr Maree added that many times a parenting plan was not in the prescribed format and did not fit the family or child involved.
- It must act as a roadmap to establish guiding principles that will assist the court in reaching the eventual goal of acting in the best interest of the minor child involved. Mr Maree said the parenting plan that is created and successfully submitted would hopefully guide the family over the years until the child reaches the age of majority. 'It will prevent litigation and in doing that we will assist the courts. We have to get these matters out of court and we need to get our children out of court. ... You are going to help me and the better your parenting plan the better and faster I will be able to peruse and endorse your parenting plan,' he said.
- It must give clear indication of the voice and needs of the minor child.

- It must serve the best interests of the minor children to avoid the risk of further litigation (s 7 (n)) or exposure to further chronic parental conflict based on the inability or unwillingness of the parents to co-parent peacefully. 'A parenting plan should not be a stepping stone for future or further litigation,' Mr Maree said.

Mr Maree further highlighted important sections of the Act to remember when compiling a parenting plan. He compiled a list and asked delegates to read the following sections of the Act, which consisted of –

- general principles (s 6(5));
- the best interest of the child standard (s 7);
- the best interest of the child is of paramount importance (voice of the child) (s 9);
- child participation (voice of the child) (s 10);
- parental responsibilities and rights (s 18);
- parental responsibilities and rights of mothers (s19);
- parental responsibilities and rights of married fathers (s 20);
- parental responsibilities and rights of unmarried fathers (s 21);
- contents of parenting plans and who may assist when compiling a parenting plan (s 33(5));
- formalities (s 34); and
- regulations 9 to 11 of the Act need to be complied with.

Common mistakes in parenting plans

Mr Maree highlighted common mistakes that are made by practitioners when parenting plans are handed in at the Office of the Family Advocate. He reminded delegates that each parenting plan had to have a Form 8 at the beginning of the plan and a Form 9 or 10 at the end of the plan, whichever was applicable to the case. He said: 'I get these works of art, wonderful looking parenting plans ... but the practitioners forget who is involved in the matter, they forget about the parents and most importantly the child.'

Mr Maree gave an example of a parenting plan that he received, which was approximately 35 to 40 pages long, however, at the end of the plan, there was no Form 9 or 10, he added that when he queried it with the practitioners, they said that they had compiled the parenting plan, however, they did not speak to the child, because the parents agreed to

it. 'I can never sign off on that parenting plan, even if you resubmit it, I will always have it at the back of my mind ... be very careful when you draw [up] your parenting plan,' he warned.

Mr Maree added that a common mistake also made by practitioners was to incorporate a parenting plan and a settlement agreement into one document. He pointed out that practitioners tend to cut and paste parenting plans, which does not move with the times and ignores the best interests and the voice of the minor child. Mr Maree said that technical shortcomings in the regulations were also ignored, for example, the failure to speak to the minor child to determine their needs and wishes.

Mr Maree added that in many parenting plans there was non-compliance with legislative requirements, for example, in s 33(5) practitioners must state who was instrumental in compiling or assisting with the mediation for the parenting plan.

Mr Maree said another mistake that he came across was the blatant siding with one parent and/or over emphasising the shortcomings of the other parent by relying only on the information received from the parent, again, with no input from the minor child. 'This is often found when there are allegations of alcohol abuse or [when] medical conditions or health problems are diagnosed' he said. Mr Maree referred to the judgment of *TC v SC* [2018] JOL 39810 (WCC), where in high-conflict matters, fathers cannot see their children or *vice versa*, because of certain allegations made.

Mr Maree said that the last common mistake was that practitioners very often fail to read their own parenting plans after it has been finalised. 'This leads to contradictory paragraphs in the parenting plan or to the regurgitation of paragraphs and issues addressed within the parenting plan,' he said.

Mr Maree concluded that parenting plans had to be user friendly, easy to ap-

ply and it had to address the ever-changing needs of the minor child. He added that parenting plans are not a 'one size fits all' concept, as every family is different.

The dynamics of parental alienation

Clinical psychologist, Dr Marilé Viljoen, said that statistics released by Statistics South Africa on 30 May showed that the number of divorces increased from 25 260 in 2015 to 25 326 in 2016. She added that 51,1% of divorces in 2016 were filed by women and that 44,4% of 2016 divorces were marriages that lasted for less than ten years. Dr Viljoen added that 55% of the divorces cases, included children under the age of 18.

Dr Viljoen then discussed the difference between 'estrangement' and 'alienation' and said that estrangement spoke to the breakdown of the relationship between a parent and a child due to -

- poor treatment of the child;
- abuse or neglect by the parent;
- poor parenting behaviour;
- low insight into parenting behaviour;
- lacking the ability to understand the child's world or the ability to place themselves in the child's shoes; and
- the struggle to take responsibility for their own emotions and behaviour.

Dr Viljoen said: 'Parental alienation is a set of processes and behaviours conducted and enacted by a parent to deliberately and knowingly damage or sever the relationship between a child and another parent with whom the child enjoyed a prior loving relationship.' She added that a child will express 'disapproval and even hatred toward a parent they loved and respected before the separation or divorce'.

Dr Viljoen added that it was important to understand the symptoms of parental alienation syndrome, as 'the voice of the child can influence the parenting plan ... and if we do not understand the dynamics of parental alienation, it is very easy to buy in or to even become part of that "alienation process".'

She discussed the symptoms of parental alienation, which include:

- 'A campaign of denigration': The child is consumed with hatred of the targeted parent and denies any positive past experiences. The child rejects all contact and communication. Dr Viljoen said 'the parent who was once loved and valued seemingly becomes hated or feared overnight.'
- 'Weak, frivolous and absurd rationalisations': When a child is questioned about the reason for their intense hostility, the explanation offered is not of the magnitude that would lead to a child rejecting a parent.
- 'Lack of ambivalence about the alienating parent': Dr Viljoen stated that an



Head of the University of the Witwatersrand School of Law, Professor Wesahl Domingo spoke on family dispute resolution in the context of current legislation.

alienated child exhibits a lack of ambivalence about the alienating parent, the one parent is perceived as perfect, while the other parent is perceived as flawed.

• 'The "independent thinker" phenomenon': Dr Viljoen said: 'Even though alienated children appear to be unduly influenced ... they will adamantly insist that the decision to reject the target parent is theirs alone.'

• 'Absence of guilt about the treatment of the targeted person': Alienated children will appear to be rude, ungrateful, spiteful and cold toward the alienated parent. 'A child will try to get whatever they can from that parent, declaring it is owed to them,' Dr Viljoen said.

• 'Reflexive support for the alienation parent in parental conflict': Dr Viljoen pointed out that intact families, as well as recently separated or long-divorced couples will on occasion have a disagreement and conflict within the household. 'Children with parental alienation syndrome will have no interest in hearing the targeted parent's point of view. Nothing the parent could do or say would make any difference to the child,' Dr Viljoen said.

• 'The presences of borrowed scenarios': alienated children often make accusations toward the targeted parent. According to Dr Viljoen, the child does not appear to understand the situation and speaks in a scripted fashion and makes accusations that cannot be supported in detail.

• 'Rejection of extended family': the hatred of the targeted parent spreads to their extended family. Dr Viljoen said former family members are completely avoided and rejected.

Family dispute resolution

Head of the University of the Witwatersrand School of Law, Professor Wesahl Domingo spoke on family dispute resolution in the context of current leg-



Clinical psychologist, Dr Marilé Viljoen, told delegates at the Parental Alienation Workshop that 55% of the divorces cases included children under the age of 18.



Family Assist and the Collaborative Network held a Parental Alienation Workshop on 16 June. From left: Department of Private Law at the University of South Africa, Professor Madeleine de Jong; family and divorce mediator at the Collaborative Network, Marissa Galloway-Bailey; clinical psychologist and National Accreditation Board for Family Mediators Chairperson, Dr Lynette Roux; family and divorce mediator at Family Assist, Marici Corneli; South African Association of Mediators Chairperson, Beverley Loubser; Head of the University of the Witwatersrand School of Law, Professor Wesahl Domingo; and clinical psychologist, Dr Marilé Viljoen.

islation. She said due to the workshop falling on Youth Day the focus of the legislation was about the rights of the child, in the context of their relationships with their parents.

Prof Domingo said that s 39 of the Constitution states one must have due regard to international law, common law and customary law. She added that South Africa is a signatory to many conventions that deal with children and their rights and it was important for delegates to keep that in the back of their mind.

Prof Domingo stated that all legislation in South Africa falls under the Constitution. She referred to s 28(1)(b) of the Constitution and noted that it was important, because there was nothing in the Constitution that said that every person has the right to family, except in s 28(1)(b) where it does say that a child has a right to parental care or family care.

Prof Domingo also referred to s 28(2) of the Constitution, which is the section that most legal practitioners and social workers use, as it was of paramount importance. Section 28(2) states: 'A child's best interests are of paramount importance in every matter concerning the child.' She noted that this was the section that most practitioners manipulated. Prof Domingo then asked what the best interest of the child meant?

Prof Domingo said that practitioners do not refer to s 7 in the Act (the best interest of the child standard). Many practitioners rely on the Constitution and case law, namely *McCall v McCall* [1994] 2 All SA 212 (C). 'Section 7 is almost like a guide to what the best interest principle means. ... There has been litigation around s 7. ... Before there was the best interest principle and the best interest

standard, but now the best interest principle has become the right of the child,' she said.

Prof Domingo highlighted s 6(4) of the Children's Act, which states:

'In any matter concerning a child –

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.'

Prof Domingo said that this section touched on family dispute resolution. 'In my mind, when I make the argument for family dispute resolution to be taken out of that litigious court concept ... section 6(4) then becomes compulsory, mandatory. I know that there are a lot of arguments around it, but it says "conductive" to "problem-solving", you should go to conciliation, and that you should not place the child in a confrontational approach, which is what courts do. When we speak about family dispute resolution, I always refer to this section, as it is fundamental,' she added.

Prof Domingo pointed out that the dynamics of family life in South Africa is changing, there are no longer only traditional 'mom and dad' families, but there are 'moms and moms', 'dads and dads', grandparents and extended families who assist with looking after children.

Prof Domingo said there are additional Acts in the form of, not only the Marriage Act 25 of 1961, but the Recognition of Customary Marriages Act 120 of 1998, and soon the Muslim Marriages Bill, 2011, and so when you look at family, the whole dynamic has changed.

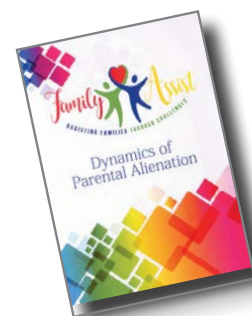
Prof Domingo said that in the Recognition of Customary Marriages Act, s 8(5) allows for mediation before the dissolution of a customary marriage, however, that is voluntary and not mandatory. In

the Muslim Marriages Bill, there is a provision for compulsory mediation before the dissolution of a marriage.

Prof Domingo also referred to other sections in the Children's Act, namely, ss 6(5), 10, 18, 19, 20, 21, 31, and 33. She also referred to reg 11(2) where a minor child has to be informed about the contents of the parenting plan and are allowed to have a say in the parenting plan.

In concluding the first part of her presentation, Prof Domingo said that training was the most important thing between legislation and working with children. 'I think that the ability to speak to children, as an attorney or an advocate, you need to be trained. I do not think that we can just think that we can speak to children. Children are bright, clever and can manipulate you as well, so I think more training needs to be done, especially on how to speak to children and how we illicit information from children,' she said.

The second part of Prof Domingo's presentation focussed on the South African Law Reform Commission and the work the commission was doing in the context of family dispute resolution and, in particular, Issue Paper 31 'Family Dispute Resolution: Care of and Contact with Children'. Prof Domingo said: 'As an academic, we see it ... from another side. ... I do see a disconnect between drafting legislation. ... [W]e have a wonderful Children's Act, but ... is it just pure paper? Is it implemented properly and how does one do that? Workshops like these are very important, because there is a disconnect in making the law, drafting policy and implementing that cause. Family law is unique in the sense that it is not like a labour law contract, where you can go into arbitration and walk away, here there are relationships that last forever when you have children, and you cannot walk away from that.'



- Family Assist is giving away a 'Dynamics of Parental Alienation' DVD to the value of R 250 to one lucky *De Rebus* reader. To enter complete the form on the website: <https://familyassist.co.za/index.php/competition> before 25 September. The winner will be announced in the November issue of *De Rebus*.

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Can blockchain technology help prevent fraud?

Werksmans Attorneys hosted a seminar on blockchain technology. The seminar was held in Johannesburg on 7 June. Consultant at the Blockchain Academy, Carel de Jager, said blockchain is a ledger that is broken into hundreds and thousands of blocks. He added that each block contained transactions and a new block is updated every ten minutes. He pointed out that it is important to note that each block is mathematically connected to the block behind it and in front of it and if a person tried to change a transaction, the entire structure of the blockchain would change.

Mr de Jager added that when a certain blockchain is tampered with, it will not look similar to the correct structure of the blockchain. He said it is easy to spot a blockchain that had been tampered with, because they are mathematically connected to one another. He pointed out that a person needed to be able to prove that they are the owner of a blockchain through cryptography, which meant that an owner had to have a private key to that blockchain. He noted that most private keys were 32 bytes in number and what that meant was the owner could derive a private key from any input they wanted to.

Mr de Jager said, for example, the owner could take their fingerprint and send it through a mathematical algorithm and then receive a private key, or the owner could provide DNA or, even provide 12 unique words that they would use as their private key blockchain. He noted that blockchain can be a piece of digital data, such as a titled deed to a property, medical records, share certificates or even electricity units, he said it could be anything that can be described in a digital manner. He added that for business use, businesses could build all functionalities of smart contracts on blockchain. However, he pointed out that businesses or investors should rather opt for a private blockchain, rather than a public blockchain, because with a public blockchain, anyone with an Internet connection will be able to see what is happening unlike on a private blockchain, where it works like a database.

Managing Director at AJR Corporate Financial Services, Alain Jacques Renard, said that blockchain is very impressive technology, however, he added that there are challenges attached to it. He pointed out that some of the risks linked to blockchain included: Infrastructure;



Consultant at the Blockchain Academy, Carel de Jager, spoke at the blockchain seminar hosted by Werksmans Attorneys, in Johannesburg on 7 June.

hardware; software malfunction, either, accidental or malicious; and the possibility to create a fake copy of the blockchain website to scam investors. He noted that automation with blockchain is not always fast, and when financial services have to contract on behalf of multiple clients, they cannot use the platform, instead making phone calls is faster than an automated system. He added that another challenge with blockchain was that the administrator of blockchain was unknown and that if investors were to experience a problem with blockchain, where would they go?

Mr Renard said blockchain can be introduced in financial transactions. He added that payments between parties can be made through blockchain, however, he pointed out that he was worried that blockchain administrators would then have to be the banker and a custodian of the fund. He added that on financial markets, blockchain could be classified as an over the counter transaction. Mr Renard said blockchain could be used in financial transactions, provided there was transparency and the administrator was known to the user. He added that communication between parties must always be possible.

Director at Werksmans Attorneys, Natalie Scott, said there are three types of blockchains, namely -

- public blockchains;
- private/enterprise blockchains; and
- consortium blockchains.

She added that a public blockchain is an Internet protocol that manages the distribution of unique data that -

- acted as a unit of account for transactions on that ledger;
- transactions are immutable;
- it was an open source protocol;
- it enabled innovation such as side-chains or scripting;
- it was easy to audit; and
- there are incentives for early adopters and developers to use, support and verify the ledger without the need for a trusted third party/intermediary.

Ms Scott pointed out that a public blockchain contained authentication and verification technology. She said it is claimed to be less open to corruption and borderless. She added that it is frictionless, and that there is anonymity and most widely understood application for money transfers and payment in Bitcoin. She noted that public blockchains prevented a 'double-spend' by a proof-of-work validation system, which disallowed the electronic units of value to be copied. Ms Scott gave examples of public blockchains, which include -

- Bitcoin;
- Ethereum;
- Google; and
- Amazon.

Ms Scott spoke about the enterprise blockchain, she said it was a private blockchain and was consensus driven via trusted intermediaries who are identified. She pointed out that the network was permissioned, and that digital currency was not necessarily required. She added that enterprise blockchain offered solutions to persons who wanted to use a cryptographic database, which was managed and stored by trusted third parties and their intermediaries. However, she noted that the data subject identity de-



Managing Director at AJR Corporate Financial Services, Alain Renard, spoke about the challenges of blockchain in the financial sector.

tails are disclosed, so there are reduced privacies. She said examples of enterprise blockchain, included –

- Ripple;
- Chain;
- Hyperledger;
- Oracle; and
- IBM.

Ms Scott said consortium blockchain was built on the public blockchain architecture and was partially decentralised. She added that a consortium blockchain provides technology for permissioned networks (pre-selected nodes), for example, ten financial institutions jointly operate a blockchain and each controls a node, but at least eight financial institutions are required to sign a block, for the block to be valid. She added that the right to read transaction data may be private or public and can be permissioned, on a case-by-case basis. Ms Scott identified the regulatory role players of blockchain, which include the –

- South African Reserve Bank (SARB);
- Prudential Authority;
- National Treasury;
- Financial Intelligence Centre;
- National Credit Regulator;
- South African Revenue Service;
- Strate;
- Johannesburg Stock Exchange;
- Commissioner at the Companies and Intellectual Property Commission; and
- Financial Sector Conduct Authority.

Ms Scott added that one of the big issues in terms of blockchain technology and contracting via blockchain is determining jurisdiction. She said regulation looks at the governing laws that speak to blockchain. She pointed out that in terms of issues of offer and acceptance, there is a law and contracts that speak to where the offer is made and when acceptance can be received, which varies from jurisdiction to jurisdiction. She



Director at Werkmans Attorneys, Natalie Scott spoke on regulations in regard to blockchain on 7 June.

said with regards to the ostensible authority some countries do not recognise ostensible authorities of the contracting parties, she then asked how do you know you have a valid contract?

Ms Scott pointed out that there are decentralised autonomous organisations (DAOs) that automatically execute smart contracts, however, she added that DAOs have no legal persona and run on predetermined scripts as there is a protocol for them to act as they automate the process. She said the enforcement of rights is one of the contractual issues that an investor should bear in mind. If something goes wrong, where do you go, who do you sue and under what laws and what happens if you have conflicts of laws? She added that confidentiality was another thing an investor should look at. Ms Scott pointed out that confidentiality does not work in an open blockchain where a banker and client's confidentiality can be compromised as it is available for determination by all nodes on the network.

Ms Scott touched on some of the regulations in regard to blockchain such as:

- The SARB has said that cryptocurrency is a 'cyber-token', and not a legal tender. Merchants are not obliged to accept 'cyber-tokens' but are legally obliged to accept legal tender. Payments made via cryptocurrency may not be considered to discharge monetary obligations, because it is not recognised as 'money' in law.
- Income Tax Act 58 of 1962: Cryptocurrency is not considered to be a currency, but as an intangible asset, which is to be included in the income tax return.
- Currency and Exchanges Act 9 of 1933: Capital outflows are regulated and allowance is made for an annual single discretionary allowance or an annual foreign investment allowance. The SARB may require approval and tax clearance certificates. Investors should be careful of offshore/international exchanges.
- Protection of Personal Information Act 4 of 2013: The effective date is still pending. The intention is to safeguard the 'personal' information of a 'data subject' when information is 'processed' by a 'responsible person'. Lawful 'processing' of 'personal information' requires eight conditions of the European General Data Protection Regulation (GDPR) to be fulfilled (see feature article 'Unscrambling data Protection Regulation' at p 32).
- Consumer Protection Act 68 of 2008: Describes any scheme that offers return of 20% above the repo rate as a 'multiplication scheme', for example, a Ponzi scheme.

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Women's Task Team uplifting female legal practitioners in the profession

The Law Society of South Africa's (LSSA's) Women's Task Team was interviewed by lawyer and law firm strategist, Pamela DeNeuve, in June for her blog 'Lawyer of the week'. Attorney and Chairperson of the LSSA's Women's Task Team and Vice Chairperson of the Attorneys Development Fund (ADF), Mimie Memka; Founder and Director of Calibrics Innovative Legal Strategies, Jeanne-Mari Retief; Legal Aid South Africa Attorney, National Association of Democratic Lawyers (NADEL) General Secretary and LSSA Council member, Nolitha Jali; Director at Mafelo Attorneys, Reshotketsoe Mafelo; LSSA Council member, Black Lawyers Association's (BLA) Head of Events and campaign and Director at Mabaeng Lenyai Attorneys, Mabaeng Denise Lenyai; and State Attorney and President of the South African Women in Law (SAWLA), Nolukhanyiso Gcilitshana were guests on the blog where the LSSA's Women's Task Team discussed its mission on transforming the legal profession for women in the profession.

Pamela DeNeuve (PD): How and when was the LSSA's Women Task Team formed?

Ms Memka: The LSSA Women's Task Team was established late in 2016, after a conversation that was held at the LSSA's annual general meeting on the challenges that female legal practitioners face in the legal profession. The legal profession in South Africa (SA) is predominantly male dominated and gender transformation is moving at a snail's pace. As women we took it on ourselves to try and change the landscape and deal with transformation and not leave it up to other people.

PD: Describe the obstacles that women need to overcome to practice law in SA.

Ms Lenyai: The challenges female legal practitioners face are vast. For some female legal practitioners – after completing their degree, – it is to enter the legal profession and find articles. There are perceptions that female legal practitioners are weak and sensitive. You do not get taken very seriously, especially when issues of promotion come, which also includes issues of remuneration for the fact that sometimes you are out of practice because you have to go and tend to your children.

When serious matters or cases are handed out, female legal practitioners are overlooked because of the perception that they are only needed for 'soft types

of duties in the office', as female legal practitioners are not seen to be strong enough to handle serious court cases. There are also issues of sexual harassment, and some female legal practitioners have left the profession because of the challenges of sexual harassment. It is not easy to speak about sexual harassment and female legal practitioners opt to rather leave the profession than speak about it.

Based on a scale, black female legal practitioners are at the bottom of the list, with top of the list being white male legal practitioners, followed by black male legal practitioners and then white female legal practitioners. Black female legal practitioners have to battle through many levels before they are taken seriously. The fact that black female legal practitioners are accomplished attorneys have become the last thing that people consider. In order for black female legal practitioners to be taken seriously, they need to work twice as hard as their male counterparts. It is not fair that female legal practitioners have to 'break their backs' before they can be taken seriously.

PD: What is the mission of the LSSA Women's Task Team?

Ms Mafelo: The mission is to see that transformation and female legal practitioners are uplifted in all key areas. The task team wants to see female legal practitioners uplifted to key positions, which is necessary to make sure they progress. The LSSA Women's Task Team would know that it had accomplished its mission, when female legal practitioners get recognition and are given the opportunities they deserve, because they work harder than their male counterparts.

Statistics revealed that there were more female law graduates than male. However, female legal practitioners who got into the system and remained in the profession are much fewer than male legal graduates from university. There are different levels that one goes through after university. You have to become a candidate attorney and be admitted as an attorney. But after you have been through all this, that is where you recognise that a lot less women have become attorneys.

PD: How different is the LSSA Women's Task Team from other committees?

Ms Retief: The LSSA Women's Task Team is different from other committees and teams that are championing women's gender advancement. The LSSA Women's Task Team did not want to be another

committee that came together to discuss challenges and then go their separate ways. We wanted something practical to come out of the LSSA Women's Task Team. We wanted to be able to get together and identify achievable objectives and then at the end of the year, sit down and discuss what we had achieved and to what degree and whether they had succeeded.

PD: How do you support each other?

Ms Retief: We support each other's goals and objectives even though members of the LSSA Women's Task Team serve on other committees and in other fields of law, members still try to get together to put objectives together to reach a common goal.

Ms Jali: Members knew their schedules when we started and also knew the commitment and wanted to make a difference. In order for the LSSA Women's Task Team to achieve what we wanted, we had to take it one step at a time and focus on one programme at a time and to see it to fruition, then take on the next programme.

Ms Memka: The LSSA Women's Task Team are not talking about 'pie in the sky' ideas. Members have started a mentorship programme where we have sought the services of mature female legal practitioners to mentor the younger practitioners who have entered the legal profession in terms of content of the law, but also in terms of running their own practices. Most of us are practitioners running our own firms, be it a small or medium sized, so we want to ensure that the younger generation of female practitioners coming into the legal profession have a support system and that they are not left by themselves and feel isolated, as we did when we entered the profession.

Ms Gcilitshana: It was important to have something tangible that contributed to the development and upliftment of women. We needed to identify the issues affecting women and see what can be done to assist. The LSSA Women's Task Team need other parties to be involved in addressing such issues, for example, the relationship the task team have established with Ms DeNeuve. The LSSA Women's Task Team were given a platform to speak about issues affecting female legal practitioners in SA. Perhaps you can assist us to do what we would like to do in the legal profession for women in South Africa.

Ms Lenyai: The LSSA's Women's Task Team is in collaboration with the ADF. There was a challenge for attorneys who

wanted to start their own law firms, because they had to go for a Practice Management Training course first. However, the course was costly and most legal practitioners came from disadvantaged backgrounds and could not afford Practice Management Training. Through Ms Retief, the LSSA Women's Task Team and the ADF, had a memorandum of understanding that the ADF would pay for female legal practitioners to attend Practice Management Training.

The arrangement with the ADF was to offer an interest free loan. The ADF pays for the course and later when the female legal practitioners are working, they pay the interest free loan back to the ADF over a period of a year.

PD: What legacy does the LSSA's Women's Task Team want to leave behind?

Ms Gcilitshana: It would be the transformation of the thinking in the legal profession, generally a transformation of the thinking among legal practitioners. A society of a profession that is able to think broadly, especially on issues of gender equality.

Ms Memka: The LSSA Women's Task Team wants to open a way for the younger generation and for that generation to find it easier to get access into the legal profession. The LSSA Women's Task Team wants the younger generation to be encouraged to remain within the profession because the environment, which they would have entered the profession

in at that particular point would have changed. The younger generation would not face the same challenges the older generation did.

Our children must find it a level playing field for everyone irrespective of their gender, irrespective of their colour and that colour should not determine whether you succeed as a lawyer or not.

The full interview can be found at www.pameladeneuve.com

• See also LSSA news 'Women attorneys' panel takes AGM discussion to the next level' 2016 (July) DR 19.

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Lady Liberty SA needs help from legal practitioners

A social enterprise named Lady Liberty SA is seeking help from legal practitioners in South Africa (SA), to help in its mission to assist underprivileged women to get access to justice. Human Rights Attorney, Samantha Ngcolomba founded Lady Liberty SA in 2014. She describes Lady Liberty SA as a social justice and advocacy platform that seeks to extend access to justice to women living in marginalised communities. Ms Ngcolomba said Lady Liberty SA focused on issues, such as, domestic violence, marriage, divorce, maintenance and wills and estates.

Ms Ngcolomba pointed out that she established Lady Liberty SA, simply because she hated the injustice being done to women and decided that she would use her qualifications to help women in townships and rural areas. However, she said that Lady Liberty

SA has had challenges with regard to funding.

Ms Ngcolomba noted that while the enterprise did need seed funding, she said the enterprise was not funding dependent and have ways of generating their own revenue. However, she pointed out that funding was needed to increase resources in order to enable Lady Liberty SA to pursue all avenues. She added that lawyers are also needed for *pro bono* work. She said some legal practitioners did not respond to their requests, or when they did they did not attend on the day that they were needed.

Ms Ngcolomba pointed out that Lady Liberty SA was able to reach over 2 000 women, with some cases solved and some cases pending. She said the enterprise holds community road shows where they engage with women and educate them about human rights. She added that Lady Liberty SA also com-

municated with their clients through Facebook, e-mail, telephone etcetera, and was working on an USSD platform, which is an SMS based solution with a short code that women can dial on their mobile phones. 'For instance we will say: To get free legal information dial *123#. When they dial, and the user will get a list of options, for example, 1. English 2. Xhosa 3. Zulu, once they select their option the next screen would say: 1. Domestic Violence 2. Marriage 3. Divorce, and so on. It is not only cheaper and easier to use, but does not require users to have a smart phone,' Ms Ngcolomba added.

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People and practices

Compiled by Shireen Mahomed

Hogan Lovells in Johannesburg has three promotions and one new appointment.



Mokhutwane Phooko has been promoted as an associate in the business rescue and insolvency department.



Larissa Scholtz has been promoted as an associate in the competition department.



Ziyanda Sibeko has been promoted as an associate in the mining department.



Fezile Nkosi has been appointed as an associate in the banking and finance department.

Livingston Leandy Inc in Durban has four new appointments.



Nike Pillay has been appointed as a director in the corporate and commercial department.



Anisa Govender has been appointed as a senior associate in the maritime department.



Hlengiwe Skosana has been appointed as an associate in the labour department.



Kirsty Steytler has been appointed as an associate in the conveyancing and property department.

Stegmanns Inc in Pretoria has two promotions.



Jana Doussy-Coetzee has been promoted to head of the intellectual property law department.



Jacqueline Retief has been promoted as an associate and head of the correspondent section in the general litigation, family and labour law department.

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

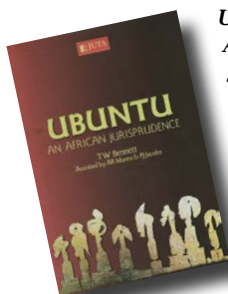


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By
John
Ndlovu

Compensation orders in criminal proceedings

The Criminal Procedure Act 51 of 1977 (the CPA), as amended, makes provision for the award of compensation to victims of crime, who have suffered damages because of the criminal conduct of an accused. The purpose of such a compensation order is to reimburse the complainant for the loss or damage they suffered without the need to institute separate civil proceedings against the accused for the recovery of such damages. In view of the foregoing, the court will – where it finds it desirable to make a compensation order against an accused – avoid imposing an effective period of imprisonment. This approach is intended to afford the accused an opportunity to raise the money in order to pay the compensation. Furthermore, since a compensation order is intended to reimburse the complainant for the loss or damage suffered, the court will not make such an order if the accused does not have the wherewithal to satisfy it. Compensation orders are regulated by ss 297 and 300 of the Act, and this article will discuss and compare the provisions of these sections and will also show how the courts have, in practice, interpreted the provisions.

Legislation and case law

Section 300 of the CPA makes provision for an award of compensation by the court during criminal proceedings. The said section provides that where a person is convicted of an offence, which has caused damage to or loss of property (including money, belonging to some other person) the court in question may, on the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss. It is clear from this section that the court can only make an award of compensation after the accused has been convicted of the offence in question. The use of the word ‘may’ means that the court has a discretion whether to make the award or not. However, the use of the word ‘forthwith’ does not imply that the court should not properly apply its mind in exercising its discretion in terms of this section.

Furthermore, the court cannot *mero motu* decide to make a compensation order in terms of this section as it is the complainant’s prerogative to apply for compensation after the accused has been convicted. Where the prosecu-

tor applies for compensation in terms of this section, it should be clear that they are acting on the instructions of the complainant. In *S v King* (ECG) (unreported case no CA8R: 393/2014, 11-12-2014) (Brooks AJ) the court set aside the sentence imposed by the magistrate on the accused, on the ground that it was evident from the record of proceedings that the compensation award made by the magistrate in terms of this section was made on the application of the prosecutor during his address on sentence. The prosecutor did not make it clear that in making the application he was acting on the instructions of the complainant. The court also decided that the accused must be afforded the opportunity to lead evidence or address the court on the application. In this case the accused was not given such an opportunity.

Section 300(3)(a) provides that an award made in terms of s 300 shall have the effect of a civil judgment of the magistrate’s court. This means that the award is for all intents and purposes a judgment debt and is subject to all the principles and procedures applicable to judgment debts. Where, for instance, the accused fails to pay the compensation as ordered by the court, the complainant will be entitled to enforce compliance with the compensation order by means of a warrant of execution issued by the magistrate’s court having jurisdiction in the matter. It is, therefore, not possible to commit the accused to prison in the event of his failure to pay the compensation in terms of s 300. Furthermore, it is also permissible to pay the compensation in terms of s 300 in monthly instalments since in civil judgments payment by instalments is normal and happens very often (*S v Williams* (FB) (unreported case no 241/2015, 4-2-2016) (Moloi J)).

Where a compensation order in terms of s 300 becomes an option for sentencing, the court must satisfy itself as to the accused’s ability to pay the compensation. In *Vaveki v S* (WCC) (unreported case no A414/10, 3-12-2010) (Matthee J) the court held that where a court has decided that it wishes to give a person the opportunity to avoid effective imprisonment by ordering a fine and/or a compensation order as an alternative or as a condition, it must endeavor to establish whether such a person is in fact in a position to pay such an amount at all and/or within the time frames stipulated. In this case the court found that the magistrate had failed to apply his mind as to

whether the accused would be in a position to pay the compensation timeously or not so as to comply with the conditions of the sentence. The sentence imposed by the magistrate was accordingly set aside on appeal and replaced with a sentence which had no reference to time limits within which the accused was to pay the compensation. The judge also remarked in this case that an award for compensation under s 300 can form part of a plea and sentence agreement as provided for in terms of s 105A of the CPA (see also *S v Williams* (*op cit*)).

The complainant in whose favour the award has been made in terms of s 300 may, within 60 days after the date on which the award was made, renounce the award in writing. Where the complainant does not renounce the award as aforesaid, they will be precluded from instituting any further civil proceedings against the accused concerned in respect of the injury for which the award was made (see s 300(5)(a) and (b)). A complainant who is not satisfied with the amount of compensation awarded by the court in terms of s 300 will be entitled to renounce the award within the time period referred to so that they may be able to institute separate civil proceedings against the accused for a claim greater than the compensation awarded by the court.

A comparison of ss 297 and 300

Section 297(1)(a)(i)(aa) provides that where the court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may – in its discretion – postpone the passing of sentence for a period not exceeding five years and release the person concerned on one or more conditions, which may include an award of compensation. An important distinction between the two sections is that a compensation order in terms of s 300 is made as part of the conditions of sentence, whereas a compensation order in terms of s 297 is a condition of suspension of sentence. Failure by the accused to pay the compensation in terms of s 300 will not result in his incarceration. However, where the accused fails to pay compensation in terms of s 297 they may be committed to prison. One of the differences is that s 297 does not give the complainant the right to apply for compensation. The court has a discretion whether to invoke the provi-



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sions of this section or not. Any award of compensation under s 297 does not have the effect of a civil judgment as is the case of an award made in terms of s 300. Where the amount of compensation awarded in terms of s 297 is less than the actual amount of damages suffered by the complainant, the complainant concerned will be entitled to institute separate civil proceedings against the accused for the recovery of the balance of such damages.

An award of compensation in terms of s 300 appears to be the better option than compensation under s 297. It is clear that the legislator enacted s 300 with the intention of ensuring that victims of crime are restored to the position in which they were prior to the commission of the crime. Section 300 is designed to advance the principles of restorative justice and focuses on repairing the harm occasioned by crime. The purpose of a compensation order should be restitution and not retribution. In the case of *Vaveki* the court stated at para 52 of the judgment: 'The section 300 route also is better suited to addressing the main mischief a sentence-

ing officer is seeking to address with a compensation order, namely that the victim be compensated. If a compensation order is made in terms of section 297 and made a condition of suspension of a prison sentence, as in the present matter, and the accused cannot meet the condition timeously, by going to prison the chances of the accused ever compensating the victim become less than if the accused was kept out of prison and remained free to try and raise the money to pay the compensation awarded. The facts of the present matter clearly illustrate this.'

Conclusion

It is clear from the discussion that compensation orders in criminal proceedings are desirable as a means of repairing the harm caused by the accused's criminal conduct. The award of a compensation order as a condition of the sentence will ensure that the accused is kept out of prison and this will in turn maximise the chances of the accused paying the compensation. Victims in criminal proceedings are often not conversant with the provisions of the CPA governing

compensation orders. It is proposed that prosecutors and police officers charged with the investigation of crime should, where appropriate, draw the attention of the complainants to these provisions.

The award of compensation orders can serve as a deterrent to crime. The possibility of the accused being ordered to compensate the victim for the loss or damage suffered will ensure that the accused does not see any benefit from the commission of crime. Furthermore, the threat of being imprisoned in the event of non-compliance with a compensation order is an added factor that will encourage the accused to comply with the conditions of the sentence.

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By
Michelle
Mudzviti

Termination of contracts with an indefinite term: South African courts' approach

The duration of a contract is often specified by an express provision, or it may be determined from the nature and purpose of the contract. However, there are cases when the duration is neither determined nor determinable. An indefinite term contract is a contract that does not set a time period for the life of the contract, nor a procedure for termination of the contract. It usually covers agreements that involve the regular, cyclical sale or transfer of goods and services. Indefinite term contracts are typically used when the life of the contract cannot be readily estimated, but each party is willing to work with the other over a long period of time. The clause determining the duration or termination of a contract is one that can be easily forgotten in the rush of concluding a deal; or parties may omit it in anticipation of a permanently harmonious business relationship. Should one of the contracting parties wish to terminate the agreement this can cause numerous problems such as what is considered a reasonable notice period for termination

or whether a contract has existed for a 'reasonable period' to warrant termination. Due care should always be taken to remove any ambiguity surrounding the term of a contract and the termination procedure required to terminate the contract, to avoid the possibility of a dispute as to whether and how the contract can be terminated.

Where the duration or termination of an agreement is regulated by legislation, those provisions regarding duration and termination must be applied to the contract. For example, the Consumer Protection Act 68 of 2008 (CPA) allows certain fixed term consumer contracts to be terminated on 20 days' notice, thus removing the uncertainty regarding termination periods. The CPA also specifies a maximum period of two years for such fixed term consumer contracts. Any agreement, which purports to be longer than this would need the supplier to prove a demonstrable benefit in favour of the consumer.

Under common law, the duration and termination procedure will have to be determined contractually by establish-

ing whether there are any specific termination grounds, including voluntary termination on which the parties can rely. If no such specific termination grounds are included in the contract, the courts have provided direction in this respect. In 2014, the Supreme Court of Appeal (SCA) dealt in detail with the position where a contract is silent as to its duration and termination procedure. In *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) the issue was whether the written contract could be construed as containing a tacit or implied term to the effect that the contract was terminable by either party on reasonable written notice.

The dispute between the parties had its origin in a contract concluded in 2005, which Plaaskem sought to terminate by way of written notice in 2010. Plaaskem's purported termination of the contract by written notice was rejected by Nippon Africa as being of no force and effect, because according to Nippon Africa, the contract did not contain a tacit term that it could be terminated on reasonable notice. Plaaskem pleaded

that the contract contained a tacit, alternatively implied, term to the effect that the contract was terminable on reasonable notice.

The court *a quo* held that the contract did not contain such a term and as a result, the notice of cancellation of the contract by Plaaskem was invalid and of no effect. In overturning the court *a quo*'s decision, the SCA held that certain factors had to be taken into account to determine the existence of such a tacit term. Firstly, the SCA analysed the language used by the parties in the contract and held that from such language, there was no indication that they intended to be bound in perpetuity. Secondly, the court considered the intention of the parties, having regard to the nature of the relationship between the parties, as well as the surrounding circumstances. The SCA noted that the contract was of such a nature that it required the parties to form and maintain a close working relationship and have regular contact and interaction with each other. Other aspects such as the contract covering a wide spectrum of products and that the nature of the relationship would change over time were strong suggestions that the parties did not intend to remain bound in perpetuity.

Regarding the third consideration, being the nature of the relationship between the parties, the SCA held that the court *a quo* erred in finding that the working relationship between the parties was open to serious doubt. The relationship appeared to be one of good faith and trust from the contract. Fourthly, the surrounding circumstances of the agreement were considered. The unpredictable and variable nature of factors such as production costs, transportation costs, landing costs and the applicable

exchange rates would lead one to conclude that the parties had no intention to be bound in perpetuity.

The SCA upheld Plaaskem's appeal and held that it was necessary and commercially efficacious for a tacit term to be imputed, which in this case meant the contract could be terminated by either party on reasonable written notice.

This was also the approach of the courts in *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA); *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W); and *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A). In these cases it was held that where the circumstances of an agreement show that all that the parties intended was a temporary arrangement, but the contract was silent as to duration, it is reasonable to infer that they contemplated termination on reasonable notice.

Perpetual contracts

In some jurisdictions, like most American states, parties may not enter into perpetual contracts, because they violate public policy and thus will not be enforced. In South Africa, however, parties may enter into a perpetual contract as long as they make it clear that they intend to be bound in perpetuity. Where the contract does not specify the duration or expiry date of the contract, or the termination process, but the parties intended the contract to run indefinitely, the court will generally not impute a tacit term that the contract is terminable on reasonable notice. In *Golden Lions Rugby Union and Another v First National Bank of SA Ltd* 1999 (3) SA 576 (SCA) the court held that the appellant was bound to a written agreement in perpetuity as the agreement contained a clause, which ex-

pressly stated that the obligation would endure in perpetuity, or until terminated by the respondent.

In *Kelvinator Group Services of SA (Pty) Ltd v McCulloch* 1999 (4) SA 840 the court held that a term, to be imputed, must not merely be reasonable or desirable, but necessary, and that such a tacit term will not be imputed into an agreement if it is in conflict with its express provisions.

Conclusion

Termination of a contract should be contemplated by the parties at the time of drafting. In order to avoid lengthy and costly court procedures, the drafter should ensure that the intention of the parties regarding the duration and termination of the contract is clear and unambiguous from the wording of the contract. The contract should contain clear and unambiguous language with regard to how it can be terminated, whether that is a certain date, specific notice provisions, a specified event, or some other occurrence that makes it clear to both parties that their business relationship has ended. If the parties intend to be bound in perpetuity the wording of the contract should also make this clear. Where an agreement is silent as to its duration or termination procedure, it is terminable on reasonable notice in the absence of an intention that it was intended to continue indefinitely.

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By
Riaan
de Jager

Diplomatic law: Legal proceedings against a foreign diplomat in a South African court

In a previous article, I examined the purpose of immunity, the difference between state immunity and diplomatic immunity, identified the different types of immunity, as well as the implications of each (see Riaan de Jager 'Diplomatic immunity: Its nature, effects and implications' 2018 (July) *DR* 26). In this article, I will explore the circumstances under which a plaintiff could institute legal proceedings against a defendant who enjoys immunity in terms of customary international law and the Diplomatic Immunities and Privileges Act 37 of 2001 (the Act). In addition, I will highlight the issues that need to be taken into consideration when a plaintiff is considering the possibility of launching proceedings against a defendant who enjoys immunity. Lastly, I will propose a process that could be followed in this respect.

The most important fact to be determined is what the defendant's status is and whether they enjoy jurisdictional immunity. This information is essential to prevent anyone from falling foul of s 15(1) of the Act. Clarity could be obtained from the Directorate: Diplomatic Immunities and Privileges of the Department of International Relations and Cooperation (DIRCO) by way of a certificate issued by the Chief of State Protocol in terms of s 9(2) of the Act (De Jager (*op cit*)).

Residual immunity

When considering the question of immunity, a distinction should be made between acts performed as part of official duties and private actions. As indicated before, diplomatic agents and consular officers enjoy jurisdictional immunity in respect of acts or omissions performed in the course of their official functions for an unlimited period (De Jager (*op cit*)). In respect of acts or omissions performed outside their official functions, they enjoy immunity for the duration of their mission only, so-called 'residual immunity'. Diplomats with residual immunity can thus be sued in our courts after they have completed their term at the mission.

One of the potential impediments a

plaintiff will, however, encounter is that the respondent would most likely have left South Africa (SA) at the end of their tour of duty. Under these circumstances, they will have to be located abroad to enable service of process to be effected on them by way of edictal citation. Another issue that could potentially hamper a plaintiff's claim is extinctive prescription, especially if the debt arose quite early in the respondent's official term in SA, as such tours are usually for a three- or four-year period. In this article, I will further refer to the waiver of immunity by the sending State, a matter, which could also frustrate a plaintiff seeking redress.

Exceptions in terms of art 31(1) of the Vienna Convention on Diplomatic Relations

The Vienna Convention on Diplomatic Relations of 1961 has the force of law in SA pursuant to s 2(1) of the Act. Article 31(1) of the Vienna Convention on Diplomatic Relations confers jurisdictional immunity on currently serving diplomatic agents in respect of both private and official acts, except for three designated categories of private acts, namely –

'(a) [a] real action relating to private immovable property situated in the territory of the receiving State, unless [the diplomat] holds it on behalf of the sending State for the purposes of the mission;

(b) [a]n action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; [and]

(c) [a]n action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.'

Although art 31(1)(c) is of particular importance for purposes of this article, I should mention that the High Court had an opportunity to consider the exception referred to in art 31(1)(a) in *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues* 2001 (1) SA 1285 (W) (at 1296 C – E). In that particular case it was held that the Angolan Ambassador did not enjoy jurisdic-

tional immunity while in his post. He had been sued for damages for having failed to pay the purchase price for a residence he had bought in his personal capacity.

The exception contained in art 31(1)(c) will apply if two conditions are satisfied that –

- the action relates to a 'professional or commercial activity exercised by the diplomatic agent'; and
- the exercise of that activity was 'outside his official functions'.

If the relevant acts were within the scope of the diplomat's official functions, the inquiry ends there. The diplomat is immune from the court's jurisdiction and will also retain immunity in respect of these acts even after their posting comes to an end. But, if they are still in the post and the relevant activity is outside their official functions, the operation of the exception will depend on whether it amounts to a professional or commercial activity that they have exercised (*Reyes v Al-Malki and Another* [2017] UKSC 61 at para 19).

To determine what are a diplomat's official functions, one should start by looking at the functions of the mission to which they are attached. These are defined in art 3 of the Vienna Convention on Diplomatic Relations, but also extends to a wide variety of incidental functions that are necessary for the performance of the general functions of the mission – in sum, these are all his official functions that are performed for or on behalf of the sending State (*Wokuri v Kassam* [2012] ICR 1283, at paras 23 – 26; *Abusabib v Taddese* [2013] ICR 603 at paras 29 – 34; *Baoanan v Baja* 627 F Supp 2d 155 (2009) at paras 3 – 5; *Swarna v Al-Awadi* 622 F 3d 123 (2010) at paras 4 – 10).

If the relevant activity was outside the diplomatic agent's official functions, the next question is whether he has exercised a 'professional or commercial activity'. The Supreme Court of the United Kingdom in the *Reyes* case at para 21, *inter alia*, highlighted the following in this regard –

- an activity is not the same as an act. Article 31(1)(c) is concerned with the carrying on of a professional or commercial

activity having some continuity and duration;

- the word 'exercise' of a 'professional or commercial activity' means practising the profession or carrying on the business – the defendant must, so to speak, set up shop;

- this is confirmed by art 42 of the Vienna Convention on Diplomatic Relations, which provides that a diplomatic agent 'shall not in the receiving state practise for personal profit any professional or commercial activity'; and

- it is not inherent in that concept that the immunity 'will enable him to exercise a distinct business activity in competition with others while sheltering him from the modes of enforcing the corresponding liabilities which are an ordinary incident of such an activity'.

Foreign courts and tribunals

Superior courts of the United States and the United Kingdom have held that the expression 'commercial activity' relates only to trade or business activity engaged in for personal profit. Day-to-day living services incidental to daily life were also held to fall within a diplomatic agent's official functions – these acts are thus excluded from the exception (*Tabion v Mufti* (1996) 107 ILR 452 at 454 – 456; *Gonzales Paredes v Vila and Nielsen* 479 F Supp 2d 187 (2007), *Sabbithi v Al Saleh* 605 F Supp 2d 122 (2009); *Montuya v Chedid* 779 F Supp 2d 60 (2011); *Fun v Pulgar* 993 F Supp 2d 470 (2014); *Reyes* at para 23).

This principle is also endorsed by Eileen Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4ed (Oxford University Press, 2016) at 251 – 253.

It is noted as well that the Republic of SA successfully argued before the New Zealand Employment Relations Authority in *Komla v South African High Commissioner to New Zealand* [2016] NZERA Wellington 152 (at paras 30 and 33) that the exception under art 31.1(c) does not apply to the Head of Mission who has dismissed her housekeeper. Since a contract of employment does not amount to a commercial activity for purposes of art 31.1(c), the High Commissioner was found to have enjoyed jurisdictional immunity. The tribunal struck the matter out for lack of jurisdiction. The same conclusion was reached by the Irish Employment Appeals Tribunal in *Senelisiwe Buthelezi v Coy Dlamini and Thobeka Dlamini and Republic of South Africa* (case no MN20/2014, 9-11-2017).

Based on the above, the purchase of goods by diplomats, obtaining medical, legal or educational services, or concluding lease agreements to hire residential accommodation will not constitute 'commercial activities' for purposes of art 31(1)(c). Defendants will accordingly enjoy civil and administrative jurisdictional immunity for such acts.

In the absence of any case law regarding this issue in SA, I am of the view that our courts will reach a similar conclusion. Plaintiffs will thus be unable to hold individual diplomats liable for breach of contract, where the transaction is regarded as incidental to daily life here (ie, employment disputes involving domestic servants, contracts for goods and services, lease agreements, etcetera).

Waiver of immunity

Section 8 of the Act, read with art 32(1) and 32(2) of Vienna Convention on Diplomatic Relations or art 45 of the Vienna Convention on Consular Relations of 1963 provides that a sending State or intergovernmental organisation may waive a diplomat's immunity. Such a waiver will be provided by the head of a mission, consular post or organisation and must be express and in writing (ss 8(2) and (3) of the Act). In practice, the diplomatic or consular mission will usually communicate the decision to waive or not to waive immunity to DIRCO by way of a diplomatic note. Such a waiver is irrevocable – as the proceedings in whatever court or courts are regarded as an indivisible whole, immunity cannot be invoked on appeal if an express waiver was given in the court *a quo* (*Denza (op cit)* at 278).

It is essential to note that, even if the sending State or intergovernmental organisation decides to waive a defendant's jurisdictional immunity, a separate waiver will be required to give effect to the subsequent judgment (art 32(4) of Vienna Convention on Diplomatic Relations and art 45(4) of Vienna Convention on Consular Relations). This means that the defendant's inviolability (ie, of his person, property, residence, etcetera) would also have to be expressly waived to allow for the execution of the judgment. This could cause considerable frustration for a plaintiff who obtained a judgment in their favour but who is unable to execute it due to the defendant's inviolability.

Possible process

The following process is proposed if a plaintiff intends to institute a claim (eg, contractual or delictual) against a defendant who might enjoy immunity:

• Step 1

Obtain a s 9(2) certificate from DIRCO to establish the nature of the defendant's immunity (ie, full immunity, functional immunity, residual immunity, etcetera).

• Step 2

If the defendant enjoys jurisdictional immunity, establish whether one of the exceptions under art 31(1) of the Vienna Convention on Diplomatic Relations applies.

• Step 3

If an art 31(1) exception does not apply, DIRCO could be approached to request the sending state through the diplomatic channel to expressly waive the defendant's immunity.

• Step 4

In the event that an art 31(1) exception does not apply and/or if the sending State refuses to waive the defendant's immunity, the matter cannot proceed as the court will lack jurisdiction. If the defendant enjoys residual immunity, the matter could proceed after their tour of duty has come to an end.

• Step 5

If the defendant does not enjoy immunity, if an exception under art 31.1 applies or if immunity is expressly waived, the matter can proceed and service of process can be effected on the defendant through DIRCO – a separate waiver for the execution of judgment will, however, be required.

It is always advisable, when instituting legal proceedings against a defendant who enjoys immunity, to consider citing the sending State as a co-defendant. In doing so, proper regard must then be had to the applicable provisions of the Foreign States Immunities Act 87 of 1981.

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Nurturing the land: Is it necessary to amend s 25 of the Constitution for land reform?

By Kevin Hopkins and Carl Adendorff

The Constitutional Review Committee recently called on the public to comment on whether s 25 needs to be amended to allow for the expropriation of land without compensation. This article encapsulates our views.

The structure of s 25

For the purposes of the discussion, we have focused on s 25(2) to (5):

‘(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.’

The first point to be noted from the quote above is that whatever policy the

government ultimately adopts in pursuit of its land reform programme will have to be implemented by legislation (see s 25(5)). The second point to be noted is that all legislation – including land reform legislation – must comply with all of the provisions in the Bill of Rights, including s 25.

We have to look at the constitutional requirement to compensate. Section 25(2)(b) expressly provides that an expropriation must be done ‘subject to compensation’. For many, this is the stumbling block to any land reform legislation designed to allow the state to expropriate without compensating. However, it is important to read the obligation to compensate with s 25(3), which deals with how the amount of compensation must be calculated. According to s 25(3), the amount of compensation payable must be ‘just and equitable’ and compensation will be just and equitable if it reflects the –

- current use of the property;
- history of the acquisition and use of the property;
- market value;
- extent of state investment; and
- purpose of expropriation.

Thus, the Constitution requires nothing more than that the owner of the land being expropriated receives whatever compensation is – in the totality of circumstances – just and equitable. It need not be market value and it need not be based on the willing buyer, willing seller principle.

If one imagines the amount to be represented as a continuum, then ‘zero’ compensation will be on the one side whereas ‘market value’ will be on the other end. The Constitution gives the

Picture source: Gallo Images/Getty

state the right to compensate a private property owner any amount along the continuum provided that, whatever the amount may be, it is just and equitable in the circumstances regard being had to the five considerations in s 25(3)(a) to (e). It, therefore, seems that there will be times when the Constitution requires that only a nominal amount of compensation needs to be paid in very special circumstances.

Finally, s 25(8) provides that:

'No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).'

The effect of s 25(8) is that even if the state violates s 25(2)(b), perhaps by paying no compensation where a nominal amount is just and equitable, the state nevertheless has an opportunity to justify its violation. That is so because s 25(8) expressly provides that any departure from the requirements of s 25(2)(b) must be done in accordance with the provisions of s 36(1) of the Bill of Rights.

Section 36(1) provides that the state can limit a person's rights in the Bill of Rights – s 25 included – if the 'limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'

So, the state has an opportunity to expropriate land without compensation if it can justify doing so in the manner contemplated by s 36(1).

Thus, looking at the structure of s 25, the following is apparent –

- the state may only expropriate private property if it compensates the owner;
- the amount of compensation may vary from anywhere between zero and market value depending on what is just and equitable in the circumstances;

- a nominal amount of compensation may be regarded as just and equitable in some circumstances; and

- even where a nominal amount of compensation is required, the state may nonetheless elect not to pay anything at all in which case the owner's right will be limited, but the limitation could still be lawful if it is a reasonable and justifiable limitation in the circumstances.

No need to amend s 25

For these reasons, the state will be able to expropriate certain types of land under certain conditions without paying compensation. The factors set out in s 25(3) make it clear that, conceptually, there will be times when nominal compensation will be just and equitable.

Section 25(3)(a) makes the 'current use of the property' a relevant consideration when determining what amount of compensation is just and equitable. Clearly a large scale commercial farming operation must be treated completely differently to a portion of land that has never been worked, never been used, and has no planned use in the foreseeable future.

Section 25(3)(b) makes the 'history of the acquisition and use of the property' relevant as well. Land that may have been acquired in an unlawful manner or in a manner which, even if lawful once-upon-a-time, occurred under an immoral law must be treated differently to a piece of land recently acquired by a purchaser who paid market value for the land in a post-Apartheid free market society.

Section 25(3)(c) makes the 'market value of the property' relevant to the extent that a successful commercial operation worth many millions of rands must be treated differently from a vacant piece of unworked land where the value is considerably lower.

Section 25(3)(d) makes the 'extent of direct state investment and subsidy in the acquisition' and 'the beneficial capital improvement of the property' relevant meaning that land acquired by a particular family during the Apartheid years, which was financed by the soft loans of the state-owned Land Bank must be treated differently to a piece of land recently purchased where the acquisition was financed through a commercial bank at a competitive market-related interest rate. Land on which the owner has spent considerable amounts of money doing capital improvements to the land like working it, fertilizing it, planting crops, installing irrigation systems, erecting fences, building roads, constructing homes and out buildings, such as dairy farming equipment or grain silos must be treated differently to land that has never been used by anybody and where the owner has spent no money at all doing anything to it.

Section 25(3)(e) makes the 'purpose of the expropriation' relevant meaning

that an expropriation being done in furtherance of a carefully thought out land reform programme designed to give access to land to landless people must be treated very differently to an expropriation where the state wants the land to build a harbour that will be used as a commercial port or for some other important infrastructure that the state will use to upgrade the economy.

Thus, having regard to the s 25(3) factors, the state will clearly not be able to implement a policy of expropriation without compensation by targeting viable commercial agricultural operations or farms that were recently acquired by the owner where those farms are heavily bonded with commercial banks or land that has been worked and where the owner has spent large sums of money doing capital improvements to the land, and the like. However, a policy of expropriation without compensation may work if the state carefully identifies land that, for example, was historically acquired in an unjust manner or where the state has heavily subsidised the owner's acquisition of that land or where the land is currently not being used and there are no immediate plans to use it or where the owner has not invested in the land nor done any capital improvements on the land.

In our view, the factors enumerated in s 25(3) can usefully serve the state when it develops its land reform policy. They will discipline the state into thinking carefully about land reform, and ensure that Zimbabwe-style takings do not occur (where large commercial farming operations were hand-picked for the taking in a manner that severely compromised that nation's food security and completely undermined investor confidence). But, if the South African government is guided by the s 25(3) factors then, in our opinion, there are greater prospects of food security being enhanced (because unproductive land will now become productive) and investor confidence will not be undermined (because those who invest in property will not feel insecure in their investments) and the agricultural sector will be enhanced rather than threatened (because more people will be working more land and there may be greater agricultural output than there was before).

We stress, however, that absent an amendment to s 25, the state will not acquire blanket power to take whatever land it wants, wherever it wants, without compensating. Its right to take without compensating will be limited to special cases.

Unintended consequences of an ill-thought amendment

An amendment to s 25 will be cata-

strophic. Section 25 protects property. Section 25(4)(b) of the Constitution makes it clear that 'property is not limited to land'. Thus, if s 25 is amended to allow the state to expropriate property without compensation then the state will effectively be empowered to take more than just land without incurring a concomitant obligation to pay compensation.

In order to appreciate the catastrophic consequences of such an amendment, one must first appreciate the meaning of the term 'property' as it appears in s 25 of the Constitution. Thus in –

- *First National Bank of SA Ltd t/a Wesbank v Commissioner, of South African Revenue Service and Another* 2002 (4) SA 768 (CC) it was held that movable property, such as motor vehicles, would constitute property for the purposes of the protection offered by s 25;
- *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) it was accepted that intellectual property like trade marks and copyright are property for the purposes of the protection offered by s 25;
- *Phumela Gaming and Leisure v Gründlingh and Others* 2007 (6) SA 350 (CC) it was held that goodwill is property and protected by s 25;
- *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) it was accepted that medical costs, loss of earning capacity and loss of support are a bundle of rights, which fall within the meaning of property as used in s 25; and
- *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) it was held that a person's right to the restitution of money paid on the basis of an unjustified enrichment claim, constituted property within the meaning of s 25 and was protected by s 25 of the Constitution.

Therefore, s 25 of the Constitution protects property, which includes just about anything of economic value, including both movables and immovables, corporeals and incorporeals, real rights and personal rights, intellectual property rights, claims with a monetary value, and the like. People and companies would understandably be unwilling to invest in a country where their investments are at risk of being taken by the state. Foreigners would be too scared to start businesses here or to build factories or even invest on our stock exchange. South Africa (SA), like most states in the world, is dependent on foreign investment. But if s 25 is amended to allow the state to take any property, at will, without having to compensate the owner, we can expect to lose a great deal of foreign investment.

Legislation can do the work needed

As stated above, no amendment to s 25 is needed. Carefully thought out legislation can do the job, but the legislation must be constitutionally compliant. It must be rational. The rationality of legislation can be tested by a rational review inquiry, which entails a two-part analysis. In the first part, one asks what the legitimate purpose behind the legislation is and then, in the second part, one asks whether such legislation is reasonably capable of achieving its stated purpose. If it is capable of achieving its purpose then the legislation is rational, but if not, the legislation will be irrational and consequently unconstitutional.

It is important that in a rational review inquiry, one correctly identifies government's purpose. An incorrect categorisation of the purpose will affect the outcome of the inquiry. What then is government's legitimate purpose behind seeking to enact land reform legislation that will enable it to expropriate without having to pay compensation? Government has, itself, told us in a number of media statements, beginning with the State of the Nation Address given by President Cyril Ramaphosa and repeated frequently thereafter, that the purpose of expropriating land without compensation is to achieve equitable access to land for all of SA's people in a manner that will not compromise food security, threaten the agricultural sector, or harm the country's economy. If that is government's purpose then any legislation, in order to be rational, must not allow expropriations that could compromise food security, threaten the agricultural sector, or harm the country's economy. This will effectively remove from the expropriation-radar commercially viable farming operations that produce food and employ large numbers of people.

We mention the issue of rationality only because it is clear to us that government can implement a policy of expropriation without compensation via legislation but that such legislation will have to be very carefully thought out so as not to unconstitutionally infringe on s 25, nor fail a rational review test. All of this can, we submit, be achieved through carefully thought out legislation.

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Road Accident Fund 'direct claims' versus public interest

By
Gert
Nel

The Road Accident Fund (RAF) proudly runs a campaign called 'RAF on the Road', which forms part of the RAF's marketing campaign and is aimed at encouraging the public to claim directly from the RAF.

The programme has won a number of accolades, including the Department of Public Service and Administration's *Batho Pele* Excellence Award.

In a media statement issued by the RAF on 22 April 2015, the RAF stated: 'The RAF has never precluded claimants or motor vehicle accident victims from approaching the courts or seeking legal representation as is their constitutional right to do so. However, we encourage claimants to come directly to the RAF through our regional or hospital-based offices as it is the most quickest and cost effective way to register and settle claims.'

Basis for the RAF 'direct claim' strategy

A 'direct claim' refers to a claim that is

lodged directly with the RAF without the assistance of a legal representative.

With a direct claim, the RAF effectively steps into the shoes of the legal representative taking over the role of due professional care.

In the 'Responses from the Department on written submissions and input at public hearings' document handed to the Portfolio Committee on Transport (PCOT) in June 2018, the Department of Transport (DOT) offered the following explanation to justify the RAF's direct claim strategy.

'The RAF's core mandate to compensate accident victims is contained in the RAF Act [56 of 1996].

The modalities of how the RAF must go about delivering on the core mandate is contained in the Constitution, which provides that:

- a) The RAF is an organ of state, as defined in section 239.
- b) Section 195 provides for principles that govern public administration by organs of state, such as the RAF.
- c) These principles include, amongst others, that organs of state must: Pro-

mote efficient, economic and effective use of resources; must be development-oriented; and, must respond to people's needs.

The RAF's assistance to direct claimants achieves these principles.

A claimant may lawfully elect not to utilise the services of an attorney. In exercising this election a need for assistance from elsewhere may arise. The RAF responds to this need by providing such assistance, at no cost to the claimant. This assistance will also be provided under the Bill.'

The RAF is an 'organ of state'

In the judgment of *Road Accident Fund v Duma and Three Similar Cases* 2013 (6) SA 9 (SCA), Brand JA (Mhlantla, Leach JJA, Plasket and Saldulker AJJA) states: '[T]he Fund is an organ of state as defined in s 239 of the Constitution,' created by s 2(1) of the RAF Act. In *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E) at para 14, Plasket J states:

'That being so, it is bound by the Bill of Rights and is under an express constitu-

tional duty to “respect, protect, promote and fulfil the rights in the Bill of Rights.” This means not only that it must refrain from interfering with the fundamental rights of people but also that it is under a positive duty to act in such a way that their fundamental rights are realised.’ In para 16 the court states: “The Constitution has subordinated them to what Cameron J in *Van Niekerk v Pretoria City Council* 1997

(3) SA 839 (T) at 850B – C called “a new regimen of openness and fair dealing with the public”. The very purpose of their existence is to further the public interest, and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust.

It is expected of organs of state that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly.

This is particularly so in the case of the defendant: It is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity, as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind are able to. That places the defendant in a position of great responsibility: Its control of the purse strings places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well known, are poor and “lacking in protective assertive armour.”

Prescription and direct claims

The prescription of an RAF claim is subject to s 23(3) of the Act (as amended):

‘23(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.’

The RAF’s approach of ‘stepping into the shoes of the legal representative taking over the role of due professional care’ left the RAF with the predicament of having to sue themselves in order to interrupt prescription (s 23(3)).

The RAF had no process of dealing with direct claims about to prescribe and made the decision to summons themselves, in the absence of any other legal option.

A practice of self-summonsing ensued on a large scale, at tremendous expense to the taxpayer, in an effort to prevent direct claims from prescribing in the hands of the RAF.

The CEO of the RAF tasked an internal audit in June of 2015 to review the ‘summons experience in direct claims’.

The following observations were made:

- Direct claimants were not informed of the summonses.
- On some matters claims handlers only became aware of the fact that the claimant was deceased after the summons was served.
- Some summonses were issued on claims that were later repudiated indicating that no work was done on the claim before prescription resulting in fruitless and wasteful expenditure.
- Most files showed no progress after the summons was issued to interrupt prescription resulting in poor service delivery.
- Some claim files had already prescribed when summons was issued resulting in fruitless and wasteful expenditure.
- It was indicated that the legal team of the RAF, advised the Fund that they could not issue summons against themselves.

However, this practice was exposed after formal charges were laid against the RAF when evidence of the *modus operandi* of the RAF on direct claims about to prescribe, came to light.

To add insult to injury, the RAF then decided to stop the self-summons campaign and deal with prescribed direct claims by referring these matters to the CEO to waive prescription on these matters.

A RAF Executive Summary published in December 2015 stated: ‘In the last two years, over 9 000 direct claims were referred to the CEO in order for him to waiver prescription’.

As a result of the public wising up to the fact that the RAF cannot own up to the promises made under the ‘RAF on the Road’ banner, many direct claims are converted to represented claims and there are thousands of documented cases of attorneys successfully suing the RAF for the under-settlement and/or prescription of these matters.

Discussion

The RAF cannot, by its very nature, reasonably act as ‘judge and jury’ – procedural fairness demands a fair hearing by an impartial decision-maker, perceivable that in view of the fact that the employees of the Fund are not trained in the evaluation or procedural aspects of preparing and obtaining the necessary documentation in order to properly evaluate and quantify a potential claim.

In the RAF Commission Report 2002: Findings and recommendations of the Interdepartmental Committee of the DOT, the following remark was made on p 1328 thereof:

‘The theme has emerged throughout this report that the claimant and the dis-

burser of benefits are in grossly unequal bargaining positions.’

Having regard the thousands of direct claims prescribing in the hands of the RAF and many more being adjudicated in court due to under-settlement there can be no doubt that the RAF is failing dismally in their obligation to ensure that the fundamental rights of the direct claimants are realised.

Section 237 of the Constitution requires that all of its constitutional obligations must be performed diligently and without delay.

In the 2015/2016 RAF Direct Claim strategy the following comment is made on p 4: ‘We only settle specific direct claims quicker *and leave the rest unattended* that also means that eventually *we will have more direct claims sitting waiting to be processed*’ (my italics).

By frustrating the legitimate claims of direct claimants and by failing to protect, promote and allow the direct claimant to fulfil their right to human dignity, falls short of what is expected of public administrators like the RAF as directed in s 195 of the Constitution.

Conclusion

Contrary to the submissions by the DOT, direct claims can in no way be associated with the constitutional requirements to treat members of the public with dignity, honesty, openness and fairness nor is the RAF capable of delivering the service required.

The drastic measures being taken by the RAF to manoeuvre themselves out of harm’s way when it comes to direct claims should be an indication to the DOT that the process is fatally flawed, does not enjoy the protection of the Constitution and should, in the interests of the poor, who are most lacking in protective and assertive armour, be stopped immediately (see *Ngxuza* case at para 12).

The Road Accident Benefit Scheme (RABS) Administrator is said to absorb the current RAF Administration, which should sound a clear alarm bell to the PCOT that victims under the proposed RABS Bill will suffer the same fate – if not worse – at the hands of an administrator that is not liable in respect of anything done or omitted in the exercise of any power or performance of any duty under the RABS Bill.

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Give your view on the Road Accident Benefits Scheme.

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The effect of the *Oudekraal* principle on the rule of law

By
Ndivhuwo
Ishmel
Moleya

Lord Denning once famously said: 'If an act is void, then it is in law a nullity' and that 'every proceeding which is founded on it is also bad and incurably bad' (*MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169). In the South African context, the same principle was expressed by Innes CJ in *Schierhout v Minister of Justice* 1926 AD at 109, where he stated that '[it] is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.' Yet, in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the Supreme Court of Appeal (SCA) developed the principle that an unlawful act may produce legally recognisable consequences (*Oudekraal* principle). The application of the *Oudekraal* principle was the bone of contention in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); and *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC). In these cases, the minority strongly asserted that the majority's interpretation of the principle offends the rule of law. Against this backdrop, this article analyses these three cases.



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Origins of the *Oudekraal* principle

In the *Oudekraal* case, the then provincial administrator had granted Oudekraal's predecessor conditional permission to establish a township. The first condition was to lodge a general plan of the proposed township with the Surveyor-General for approval. The second was to lodge a general plan, as approved by the Surveyor-General, with the Registrar of Deeds. There was a prescribed period for complying with each condition.

The applicable ordinance provided that should the applicant fail to comply with the conditions within the prescribed or extended period, the administrator's permission would be deemed to have lapsed. Oudekraal failed to comply timeously and was granted extensions to comply with each condition, but only after the expiry of the prescribed period. Relying on this, the Municipal Council contended that the administrator's purported extensions were *ultra vires* and, therefore, unlawful.

The High Court found that the administrator's extensions of time were invalid and that finding otherwise would mean that an illegal decision had somehow evolved into a legal decision. On appeal, the SCA found that the administrator's permission was 'unlawful and invalid at the outset.' It, however, questioned whether the permission should 'simply ... be disregarded as if it had never existed?' The court took the view that: 'Until the Administrator's approval ... is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked' (at para 26). In developing what is now known as the *Oudekraal* principle in administrative law parlance, the court reasoned at para 31 that: 'If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect *for so long* as the initial act is not set aside by a competent court' (my italics).

Application of the *Oudekraal* principle in the *Kirland*, *Merafong* and *Tasima* cases

The *Oudekraal* principle was first afforded judicial imprimatur by the Constitutional Court (CC) in *Kirland*. In that case, the question was whether a decision of a state official may be set aside by a court even when the government has not applied for the court to do so. The majority held (at para 64) that: 'Even where the decision is defective ... government should generally not be exempt from the forms and processes of review. It must apply formally for a court to set aside the defective decision.' It explained that the essential basis of the *Oudekraal* principle is that an 'invalid administra-

tive action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process' (at para 101). On the other hand, the minority took the view that 'courts do not have the power to make valid administrative conduct that is unconstitutional' (at para 60).

The principle was once again contested in *Merafong*. There, the minister had overturned Merafong Municipality's decision to levy a surcharge on water for industrial purposes used by AngloGold. In the High Court, AngloGold compelled the municipality to comply with the minister's decision. In reaction, the municipality argued that the minister was not legally empowered to take the decision on a matter within its exclusive jurisdiction. Relying on the *Oudekraal* principle, the High Court held that the minister's decision was binding on the municipality until it was set aside. The decision was endorsed by the SCA. At the CC, the majority found that as 'a good constitutional citizen,' the municipality was supposed to either accept the minister's ruling as valid or to challenge it in court, but not ignore it. The court explained (at para 41) that the import of *Oudekraal* and *Kirland* is that 'government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid' and that the decision 'remains legally effective until properly set aside' by a court of law. For the minority, the suggestion that 'an unlawful administrative act that exists in fact, and not in law, has legal force and is binding for as long as it is not set aside' is incorrect and 'pays no regard to the supremacy of the Constitution' (at para 114).

The debate about the proper application of the *Oudekraal* principle continued in *Tasima*. There, the Department of Transport (DOT) sought, by means of a collateral challenge, to impugn a decision of its official to extend an agreement with Tasima on the ground that the extension was in contravention of s 217 of the Constitution, s 38 of the Public Finance Management Act 1 of 1999 and the Treasury Regulations. The High Court concluded that the extension was illegal and declared it void *ab initio*. On appeal to the SCA, that court found that the DOT could not bring a collateral challenge as it was an organ of state. It treated the application as a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and concluded that since it was brought out of time, the unlawful extension of the contract was 'validated by the delay.' In the CC, the minority stressed that no 'amount of delay can turn an unlawful act into a valid administrative action' (at para 81). It reiterated that *Oudekraal* is not authority for the proposition that 'an administrative

action performed in violation of the Constitution should be treated as valid until set aside' (at para 87). It further pointed out that the 'notion of an invalid action remaining valid until set aside is flawed' (at para 124). The majority agreed that the SCA was wrong in concluding that a reactive challenge is not available to organs of state. It, however, stressed that although no invalid administrative decision may 'morph into a valid act' it may have a binding effect because of its mere factual existence until it is set aside by a court of law (at para 147). It further pointed that the principle does not offend the doctrine of objective invalidity as it 'merely preserves the fascia of legal authority until the decision is set aside by a court' and until that happens the decision 'remains legally effective, despite the fact that it may be objectively invalid.'

Exploring the seemingly discordant relationship between the *Oudekraal* principle and the rule of law

The divergence between the minority and the majority in *Kirland*, *Merafong* and *Tasima* lies on the effect of the *Oudekraal* principle on the rule of law. In *Kirland*, the minority stressed that '[u]nder our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional' (at para 60). This was a broad response to the majority's proposition that an 'invalid administrative action ... may be valid and effectual ... until set aside by proper process' (at para 101).

To that extent, I think the criticism is jurisprudentially sound as it is conceptually incorrect to suggest that an invalid act that is not set aside by a competent court 'may become valid'. Theoretically, the invalid act remains invalid. The fact that it is functionally effectual until it is set aside by a competent court does not make it legally valid. Had that been the case, the need for a court to set it aside would not arise. However, whatever ambiguity that *Kirland* may have spurred through that statement was cleared in *Merafong*. There, the majority at para 43 made it clear that *Kirland* did not 'fossilise possibly unlawful - and constitutionally invalid - administrative action as indefinitely effective' (at para 43). It only placed 'a provisional brake' on determining the invalidity of the act. In my view, once it is accepted that *Kirland* does not validate invalid acts, the critical assertions by the minority in *Merafong* and *Tasima* should crumble.

So, the proposition that 'an invalid administrative act that exists in fact is binding and enforceable until set aside

by a competent court' does not, in my view, '[collide] head-on with the principle of legality' as asserted by the minority in *Merafong* (at para 89). If anything, it complements the rule of law. There is no doubt that whimsical disregard of administrative acts (valid or invalid) may be disruptive to the administration of justice. It is in recognising this that the CC (citing *Kirland*) in *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) stated (at para 74) that administrative decisions may not simply be ignored 'without recourse to a court of law' as that would 'amount to a licence to self-help' and indeed a recipe for anarchy.

The minority's assertion in *Tasima* (at para 79) that '[a] decision that is invalid because of its inconsistency with the Constitution can never have legal force and effect' departs from an incorrect premise. It is indeed theoretically correct that '[n]o amount of delay can turn an unlawful act into a valid administrative action' (at para 81). But, as *Merafong* painstakingly explained, the *Oudekraal* principle does not validate invalid acts. This much is also clear from the context in which it originated. It was formulated as an answer to the question 'whether, or in what circumstances, an unlawful administrative act might simply be ig-

nored, and on what basis the law might give recognition to such acts' (*Oudekraal* at para 1). The answer was that unless the invalid act is set aside by a competent court 'it exists in fact and it has legal consequences that cannot simply be overlooked' (*Oudekraal* at para 26). It is in this context that the principle should be understood.

As I understand it, Christopher Forsyth's theory of the second actor was invoked in the *Oudekraal* case (at para 34) to provide the basis on which 'the law might give recognition to [invalid] acts' (at para 1). In my view, when the SCA referred to the theory of the second actor, it did so to locate a jurisprudential basis for sustaining the proposition. So was reference to the other related authorities and the maxim *omnia praesumuntur rite et solemniter esse acta*. It would then be imprudent to unduly focus (as the minority appears to have done) on the analysis of the theory of the second actor when determining the question whether 'an unlawful administrative act might simply be ignored'. It is indeed for this reason that the majority in *Tasima* was able to eloquently dispose of the question without reference to that theory.

Conclusion

In my view, the *Oudekraal* principle is

'constitutionally sustainable, and indeed necessary' (*Merafong* at para 36). The majority in *Merafong* rightly points out that the principle applies for 'rule of law reasons and for good administration.' Rule of law reasons because a bad decision (administrative or judicial) is nonetheless law unless it is properly substituted by an impeccable one. As pointed out in *Merafong*, the 'validity of the decision has to be tested in appropriate proceedings' and 'the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts.' Before and unless that happens, the decision must be complied with notwithstanding its defectiveness. Differences aside, both the minority and majority should be credited for unanimously jettisoning the SCA proposition that collateral challenges are not available to organs of state.

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Unscrambling the General Data Protection Regulation

By
Daniël
Eloff

At the beginning of 2012 the European Commission started with the process to reform the data protection framework in the European Union (EU). As part of these reforms the General Data Protection Regulation (GDPR) was introduced. The GDPR took effect at the end of May.

The GDPR enables Internet users to control their own personal data more effectively through various legislated rights. The framework also increases potential fines that organisations could face should they not comply with best practice regarding data privacy. At its core, the new regulations aim to bring transparency to people about what data various data controllers collect about them. How those data collectors use the collected data, as well as equipping In-

ternet users with the ability to prevent unwanted, as well as unnecessary data collection.

The GDPR introduces two principles with regard to its applicability. Firstly, that the regulation applies to establishments within the EU regardless of where the actual processing is conducted. In terms of art 3(1) of GDPR:

‘This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.’ Secondly, the GDPR applies to the personal data of any person within the EU borders. In terms of art 3(2) of GDPR:

‘This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or

processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.’

In short, if an Internet user is in Europe, regardless of whether an EU citizen or not, and that user visits a website or service outside Europe, the website that is visited has to comply with the provisions of GDPR as if it is operating from Europe. The GDPR is, in many aspects, the most far-reaching privacy regulation in history.

In South Africa, the GDPR is as important. Even if companies do not have any

website visitors from within the EU, the GDPR will likely become best practice throughout the world, as it is seen as the international gold standard for protecting personal information.

The ground-breaking regulations set out eight Internet user rights, many of which are by default included in older privacy policies. The Protection of Personal Information Act 4 of 2013 (POPI), which by and large is yet to come into full effect, was legislated close to five years ago and already covers many if not all of the newly adopted rights under GDPR. The eight rights are discussed below and compared to current South African provisions and protection under POPI.

Right to be informed

Condition 6 of the GDPR requires data controllers to be completely transparent on how they make use of the personal data that they collect. This must be provided in a concise, easily accessible and intelligible manner. This prescribed right does fit neatly into the ambit of s 18 of POPI, which stipulates that when information is being collected, data subjects as defined in POPI, must be made aware of what information is being collected, what the source of the personal data is and how it will be used.

Right to access

Section 23 of POPI specifically empowers users to have access to their own personal data records. Condition 8 of the GDPR now provides for the same right. Both POPI and GDPR allows for a request, by the user, to be informed on whether or not any personal data of theirs is being held by the data collector and if so, to receive a summary of what personal data is held.

Right to rectification and right to erasure

The GDPR in ch 3 s 3 states that individuals are entitled to have their personal data rectified and or erased if inaccurate or incomplete and data controllers must respond to a rectification request within one month subject to certain exceptions that the request is complex in nature. This right gives Internet users more control over their own personal data and how accurately it may be used. This right relates to the relatively new concept of the so called 'right to be forgotten', which in the case of the GDPR provides that in certain circumstances, an individual may request to have personal data held by data collectors erased or to prevent further processing of their data. POPI already directly provides for both these rights through s 24, but the GDPR deals with it more extensively and gives more explicit power to the users.

Right to restrict data processing

Under the GDPR regime individuals have the right to 'block' or restrict processing of personal data, in circumstances where a user contests the accuracy of the personal data or where a user objects to the processing of their own personal data. Once again this right has been provided for through POPI. In terms of s 14(6) of the act the processing of personal information is restricted when the user objects thereto or when the user questions the accuracy of records in terms of the right to rectification and erasure.

Right to data portability

The right to data portability allows individuals to obtain and reuse their personal data across different services for their own purposes. In terms of this right users may request personal data that was provided for by the individual, through consent or the performance of a contract and when the processing is automated. Internet users should, for example, be easily able to download their account transactions or data that is collected. The data has to be provided for in a computer readable format that is commonly used. This right gives ownership of personal information to each user. This is a new addition to the series of data privacy rights. As it stands POPI does not expressly give this right as the GDPR does.

Right to object

In terms of the GDPR users may object to specific use of their personal data, which includes but is not limited to it being used for –

- direct marketing;
- research; or
- for the performance of a task, which is in the public interest.

POPI does touch on this subject and to a certain extent protect users in this regard. In terms of s 68 of POPI, users are protected against the processing of personal information for the purpose of direct marketing if the user has not given consent. This means that direct marketing is prohibited unless the subject's consent is obtained, or if the subject is already a customer. POPI is, therefore, limited to direct marketing and it may become necessary to cover the other areas of use, as the GDPR does.

Rights related to automated decision making and profiling

Under the GDPR certain safeguards have been put into place to protect individuals against the risk involved with decisions being made without any human intervention. POPI provides the same protection in s 71 of the Act.

Applicability of the GDPR and POPI

One major difference and area where POPI is seen to be ahead of the GDPR is the applicability of the regulation to juristic persons. The scope of the GDPR is limited to natural persons who are EU citizens or who are in the EU at the time of visiting a website. POPI expressly protects the information of juristic persons, as well.

Privacy impact assessments

The final major difference between POPI and the GDPR is that the last mentioned regulation provides for privacy impact assessments. These assessments are required where the processing of data is considered to be of high risk to the users' rights and data freedoms. In order to comply with the GDPR these assessments should involve identifying threats to the protection of personal data and taking the necessary mitigating measures to prevent personal data loss. Although POPI does minimally touch on these measures, more direct provisions and guidance are needed to align our domestic policy with that of the leading international framework.

Conclusion

It remains clear that POPI, which is roughly based on similar United Kingdom legislation does – to a very large extent – embrace the new GDPR provisions, especially when it comes to the rights of data subjects. The biggest difference might only be limited to different naming conventions. As a matter of fact, the GDPR could look at POPI when it comes to the legislation also protecting the information of juristic persons. The only rights that need direct attention are the rights of data portability and the right to object to specific uses of personal data.

POPI remains a great stepping-stone for our country to ensure that they keep up to date with international best practice. POPI as an embodiment of our s 14 constitutional right to privacy is by most accounts successful in the principle of upholding data sovereignty.

- For more information on Regulation (EU) 2016/679 of the European Parliament and of the Council – of 27 April 2016 – on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation). Visit <http://eur-lex.europa.eu>.

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A fork in the road: Distinguishing between 'public' and 'private' roads

By
Tim
Pearce

It is time to put up a 'stop' sign and halt the growing misconception that the roads in all private gated community estates are public roads and are, therefore, governed by traffic laws under the National Road Traffic Act 93 of 1996 (the Act). Secondly, it is necessary to dispel the notion that the appealed judgment of the KwaZulu-Natal Division of the High Court in the matter of *Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others* 2018 (1) SA 615 (KZP) is authority for saying that the roads in gated estates are not 'private' but 'public' roads.

Applicability of the Act

The distinction between 'private' and 'public' roads is the critical issue because the Act applies only to public roads. The owner of a private road may manage the private road without any reference to the Act. The Act defines a 'public road' as follows: 'Any road ... which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access.'

The *Singh* case

In this judgment the court did not make a finding that the roads in the Mount Edgecombe Country Club Estate are public roads. Paragraph 23 of the judgment reveals that the Mount Edgecombe Coun-

try Club Estate Management Association (Mount Edgecombe Association) did not dispute that its roads in the estate were public roads. Rule 7.1.1 of the Mount Edgecombe Association's Conduct Rules expressly declares that its roads are public roads and, therefore, under the jurisdiction of the Act (see para 15 of the judgment).

The Mount Edgecombe Association argued that owners in the estate contracted with each other to manage the roads according to their own rules and, therefore, the Mount Edgecombe Association's Rules should operate as a parallel system to the statutory laws provided by the Act.

In short, the Mount Edgecombe Association's argument was that they were free to apply a private regulatory regime to the roads within the estate. It was this argument that was unsuccessful. In para 25 the judge stated: 'Inherent in the concept of a public road is that the public has access to it and that the regulatory regime is a statutory one [namely] the [National Road Traffic Act].'

The point is that the court was not called on to consider and decide whether the Mount Edgecombe Association's Estate roads were private or public roads. The Mount Edgecombe Association declared their roads to be public roads in their rules and it would seem that the Mount Edgecombe Association

shot themselves in the foot, because the definition of a public road as per the Act – properly interpreted – does not mean their roads are 'public' roads.

When do roads on private land become 'public' roads in terms of the Act?

For an owner of a road on private land to decide whether the road is a public road, the owner has to ask: 'Is my road or a section thereof commonly used by the public?'

In the case of *R v Papenfus* 1970 (1) SA 371 (R), the court had to deal with the question of whether a road within a privately owned Colliery was a public or a private road. At p 376E the judge stated as follows:

'It seems to me that in this context the word "public" cannot include persons who as individuals are there with the express or implied permission of the Colliery. Employees and their dependents, visitors and guests of the Colliery or of the Colliery's employees and persons coming to the Colliery to do business with the Colliery cannot be regarded *qua* the Colliery as members of the public. They are all persons who as individuals are there with the special consent (either express or implied) of the Colliery.' It is a mistake to assume that a member of the public is always a member of the public.

It is the 'context', which is of importance.

A person walking down the main street in town to a doctor's appointment is a member of the public, but ceases to be a member of the public when by permission, that person enters the doctor's rooms. Such person then becomes the doctor's patient. So too, the plumber called out to do work at the home of an owner in a gated estate is a member of the public while on the road to the estate, but once the plumber is permitted to enter the gate, the plumber is no longer a member of the public. The plumber has entered the estate as a plumber and uses the road in the estate as a plumber invited by the resident and permitted by the Estate Management.

In deciding whether a place is 'used by the public', the test is, whether the user requires consent from the owner in the Estate. This is not always an easy test to apply because, consent may be express or implied. For example:

- Express permission is required to enter a gated estate.
- A hotel makes an implied invitation to members of the public to enter the hotel. Once a member of the public crosses the threshold into the hotel that person ceases to be a member of the public and instantly becomes a guest of the hotel.
- The Mount Edgecombe Estate Two has two gates. The west gate and an east gate, which would bring the user of the road to the doorstep of the Gateway Shopping Mall. Any person living in the Mount Edgecombe area (but outside of the gated estate) who wishes to visit the shopping mall would have to travel along the main highway and take the off-ramp to the shopping mall. This trip would be so much easier if a member of the public could use the estate's roads by entering the west gate and exiting at the east gate. However, no one except a resident has consent (express or implied) to use the Mount Edgecombe Estate's roads as a thoroughfare.

The Community Schemes Ombud Service adjudicator in the matter between *Gregory and Midstream Estate Home Owners Association* (case no CSOS1050/GP/17, 27-2-2018) made a finding that the roads in this estate are public roads. The adjudicator's reasons for making such a finding are not altogether clear. The adjudicator was strongly influenced by the Act and the Administrative Adjudication of Road Traffic Offences Act 46 of 1998. However, this begs the question in deciding whether the road is a public or private road by reference to public usage or public right of access as the provisions of these Acts only apply to public roads.

Legal authority

Fortunately, there is further legal authority to support the interpretation

that gated estate roads are private roads.

In the case of *S v Christodoulou* 1967 (3) SA 269 (N) Harcourt J had to consider whether a parking area, which was on privately owned property and used by the customers of two businesses, was a public road within the meaning of the Road Traffic Ordinance 21 of 1966. The court assumed that these customers were members of the public. The court observed that because this particular parking area was on private land, it could be closed at any time. The court was, therefore, reluctant to hold that it was a public road. The reluctance stemmed from the fact that the court felt that this would give rise to some serious anomalies. These anomalies are described by Harcourt J at pp 280 – 281 of his judgment. At that time gated estates were unheard of, but he did describe two anomalies with the same features as our present day gated estates, namely:

- Farm roads along which commercial travellers and service personnel (eg, persons supervising electrical supply installations, receiving bulk milk supplies or making bulk petrol deliveries to tanks established on the farm) are required to travel to get to the farm yard.
- A private residence with a driveway, which guests, tradesmen, salesmen, hawkers and delivery personnel travel to reach the house when visiting it for the householder's purposes.

The court held that it would be wrong for the roads on these properties to be considered as included in the definition of a public road. The conclusion of the court, therefore, was that the legislator must have meant that a road is a public road when it is commonly used by the public 'and' a road to which the public has a right of access.

In the case *S v Rabe* 1973 (2) SA 305 (CPO) at 307G – H Corbett J disagreed with Harcourt J in the *Christodoulou* case. He ruled that the 'or' should remain in the definition of a public road (ie, a road which is commonly used by the public 'or' a road to which the public has a right of access). In his judgment he found that properly interpreted the definition does not give rise to the anomalies.

'[I]t seems to me that the requirement that the place should be commonly used by the public, properly interpreted, does impose limitations which would tend to obviate most of the anomalies referred to in the judgment of Harcourt, J, in *S v Christodoulou*, ... at pp 280-1.'

Likewise, in the case of *S v Dillon* 1983 (4) SA 877 (N) at p 881E – G Milne JP came to the same conclusion:

'These anomalies, in my view, do not exist; either because, in the instances given by him [ie, Harcourt J], the definition would be held not to apply because the context would indicate otherwise (in

which case, in terms of the definition, it does not apply), or because, on the particular facts, it could not be said that the use of the area in question was one which was properly described as a common use, or because it could not properly be said that it was an area commonly used by the public or section thereof.'

In other words, the mistake made by Harcourt J was not to properly consider the meaning of 'use by the public'. There were no anomalies, because the people he identified as using the farm road or the private residence driveway, were not in that context 'the public or a sector thereof'. Harcourt J decided that the parking area for customers was not a public road, because the people using it did not have a right of access. However, the correct reason for it not being a public road is that the parking area is used by the customers of the business.

The *Christodoulou* decision then becomes a classic example of correct result for the wrong reasons.

Road safety

In cases like Mount Edgecombe or, where a gated estate permits the public to use its roads, how does the management association police its roads? There are two possibilities, namely –

- to persuade the local traffic enforcement authorities to send traffic officers into the estate in order to police the estate roads; or
- the estate management association has to apply to the Minister of Transport or the local Member for the executive Council for a delegation of powers in terms of s 91 of the Act, with the particular objective of being empowered to appoint its own traffic officers.

In either case, the most appropriate comment seems to be: 'good luck'.

The majority of owners are content with their homeowner association managing their roads and enforcing the rules. After all, self-regulation is one of the important reasons for buying a home in a gated estate in the first place.

Conclusion

Roads in gated estates are private roads and, therefore, do not fall under the regulatory framework of the Act. Where a homeowner association has allowed the public to use its roads, the solution is simple and instant. All that need be done is for the homeowner association to stop the public from using the roads then, under the Act, the roads are instantly no longer public roads.

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THE LAW REPORTS

June 2018 (3) South African Law Reports (pp 335 – 661);
[2017] 1 All South African Law Reports January (pp 1 – 312);
[2018] 2 All South African Law Reports April (pp 1 – 309);
[2018] 2 All South African Law Reports May (pp 347 – 595);
2018 (6) Butterworths Constitutional Law Reports – June (pp 659 – 756)

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
ECG: Eastern Cape Division, Grahamstown
ECP: Eastern Cape Local Division, Port Elizabeth
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Review of Public Protector's decision on basis of legality principle: In the case of *Minister of Home Affairs and Another v Public Protector* 2018 (3) SA 380 (SCA), [2018] 2 All SA 311 (SCA) the facts were as follows: Marimi, the second respondent in the court *a quo*, was employed by the Department of Home Affairs (the Department) where he served the South African Embassy in Cuba. The Cuban government complained of his unruly behaviour, as a result of which, the Department recalled him. He lodged a complaint with the respondent Public Protector alleging maladministration on the part of the Department relating to his transfer from Cuba. As a result of his transfer, the cost-of-living allowance (COLA) was stopped. He was also threatened with disciplinary action, which never materialised.

After investigating the

claim, the Public Protector concluded that his recall from Cuba was procedurally flawed and constituted maladministration; the delay in taking disciplinary action was unreasonable and improper; the decision to stop COLA was improper and constituted maladministration. The Public Protector directed, among others, that Marimi be paid COLA. The Director-General of the Department was directed to ensure that a letter of apology was written to him.

The appellants, the Minister of Home Affairs and her Director-General approached the High Court for an order reviewing and setting aside the decision of the Public Protector. The GP per Prinsloo J dismissed the application. An appeal to the SCA was dismissed with costs.

Plasket AJA (Lewis, Majiedt, Willis JJA and Mothle AJA concurring) held that the applicant for judicial review did not have a choice as to the 'pathway' to review. If the impugned action was an administrative action, as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the application had to be made in terms of s 6 of PAJA. If, on the other hand, the impugned action was some other species of public power, the principle of legality would be the basis of the application for review.

The constitutional and statutory powers and functions vested in the Public Protector to investigate, report on

and remedy maladministration were not administrative in nature and so were not reviewable in terms of s 6 of PAJA. That being the case, the Public Protector's exercise of her core powers and functions was reviewable on the basis of the principle of legality and stemmed from the founding constitutional value of the rule of law. On the facts of the present case, the appellant had failed to establish any ground of review, since what the Public Protector did was allowed by law.

Appeal – suspension of judgment

Exceptional circumstances required to justify execution of judgment pending appeal:

Section 18(1) of the Superior Courts Act 10 of 2013 (the Act) provides among others that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision, which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of application or appeal. In subs (3) it is provided that a court may only order otherwise if the party who applied to it, in addition, proves on a balance of probabilities, that they will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders. Subsection

(4)(ii) gives the other party affected by execution of judgment an automatic right of appeal to the next highest court against that execution order, meaning that no leave to appeal against the execution is necessary.

The application of the above provisions arose in the *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA); [2017] 1 All SA 79 (SCA) where in 2003 the appellant University of the Free State (the University) adopted a language policy, which provided for parallel-medium instruction in Afrikaans and English. The policy was changed in March 2016 when the University adopted a new language policy in terms of which English became the primary medium (with tutorials in Afrikaans and Sesotho), excluding the faculties of theology and teacher education where Afrikaans remained the medium of instruction. Aggrieved by the new language policy of the University, the respondent, Afriforum, a non-governmental organisation involved in the protection and development of civil rights, launched an application to review and set aside the new language policy. The order was granted by the Full Court of FB per Hendricks J (Mokgohloa and Motimele AJ concurring). Thereafter, the Full Court granted judgment in favour of the respondent to the effect that an appeal by the University to the SCA or the CC would not suspend

the operation of the review and setting aside order, that is, the University would not in the meantime implement its March 2016 language policy, which was to come into effect at the commencement of the 2017 academic year. Pending determination of its appeal against the Full Court order reviewing and setting aside its March 2016 language policy, the University exercised the automatic right of appeal against the execution order granted to the respondent, but filing the present appeal. The appeal was upheld with costs.

Fourie AJA (Cachalia, Swain, Mathopo JJA and Schippers AJA concurring) held that the well-established common-law rule of practice was that generally the execution of a judgment was automatically suspended on the noting of an appeal, with the result that, pending the appeal, the judgment could not be carried out and no effect could be given thereto, except with the leave of the court which granted the judgment. What was immediately discernible on perusing s 18(1) and (3) was that the legislature proceeded from the well-established premise of the common law that the granting of relief of that nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders were suspended.

It was further apparent that the requirements introduced by s 18(1) and (3) were more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) required the applicant, 'in addition', to prove on a balance of probabilities that they 'will' suffer irreparable harm if the order was not made, and that the other party 'will not' suffer irreparable harm if the order was made. Section 18(3) has introduced a higher threshold, namely proof on a balance of probabilities that the applicant would suffer irreparable harm if the order was not granted, and conversely that the respondent would not if the order was granted. On a proper construction of s 18, it was clear that it did

not merely purport to codify the common-law practice, but rather to introduce more onerous requirements.

In evaluating the circumstances relied on by the applicant, a court had to bear in mind that what was sought was an extraordinary deviation from the norm, which in turn required the existence of truly exceptional circumstances to justify deviation. In the present case, the University had demonstrated such exceptional circumstances as there had been substantial planning and preparation to implement the new language policy in 2017. To that end the University expended extensive human and financial resources in the process. Were it to be precluded from continuing with the implementation and introduction of the new language policy, it would have wasted substantial public resources.

Attorneys - under settlement - professional negligence

Damages: Liability for under-settlement or prescription of client's claim: In *Drake Flemmer & Orsmond Inc and Another v Gajjar* 2018 (3) SA 353 (SCA) Sutherland (S) was injured in a motor vehicle collision and as a result instructed the first appellant, Drake Flemmer & Orsmond Inc (DFO) to represent him in a claim for compensation against the Road Accident Fund (RAF). DFO caused him to be examined by an orthopaedic surgeon, lodged a claim with the RAF and, thereafter, settled the claim in an amount of some R 98 000 for orthopaedic injuries suffered. The settlement offer was accepted in December 1999. Thereafter, as the medical condition of S deteriorated, he asked if the settlement agreement could be reviewed so that he could get a better settlement offer but that was not possible. As it turned out the claim was under-settled as the settlement offer did not, among others, include compensation for brain injury, as well as past and future loss of earnings. For that

reason S instructed a new law firm Le Roux Inc (LRI) in July 2001 to sue DFO for under-settlement of his claim. However, LRI allowed the claim against DFO to prescribe in their hands, after which the matter dragged on for some ten years until LRI withdrew as attorneys of record in November 2011. Thereafter, a new law firm took over and joined LRI as the second defendant in the claim against DFO. The trial started on 23 November 2015, by which time the respondent Gajjar had been appointed as *curator ad litem* to act for S due to his medical condition. By that stage both DFO and LRI had conceded negligence on their part, the only remaining issue for determination being the amount of compensation to be awarded. Judgment was delivered almost a year later in October 2016. As the claim against DFO had prescribed, judgment was against LRI only.

The claim having been quantified by among others the actuary, as well as other experts, the ECP, per Bloem J arrived at a certain amount (some R 8,8 million) which was reduced by 43,69%, being the inflation rate from the date when the claim against LRI could have been finalised had it been prosecuted promptly. The High Court held that the appellant did not have to be saddled with undue hardship because of

delay on the part of the plaintiff finalising the matter.

LRI's appeal to the SCA was dismissed with costs while the cross-appeal against the 43,69% reduction of the claim was upheld. LRI was ordered to pay the respondent, in his representative capacity, the amount of some R 9,2 million.

Rogers AJA (Cachalia, Tshiqi JJA, Makgoka and Ploos van Amstel AJJA concurring) held that where an attorney had all the relevant information for assessing a proper settlement but negligently under-settled the matter, the date of settlement would be the appropriate date for assessing damages. Where, however, the complaint was that the attorney settled the case at a time when they had not properly investigated the claim, the date of settlement was inappropriate because it did not meet the essential function of an award of contractual damages, namely to place the aggrieved party in the position he would have enjoyed had the mandate been properly performed.

Where an attorney's negligence resulted in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney had to assess the amount that the client would probably have recovered at the time of the notional trial against the original debtor. Where the original claim was one for personal injuries, the

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evidence available and the law applicable at the notional trial date would determine the amount. The nominal amount in rand terms which the client would have recovered against the original debtor represented the client's capital damages against the negligent attorney. A similar approach applied where, as in the present case, a second attorney had allowed a claim against the first attorney to prescribe. Generally, in such a case the client's claim for damages against the second attorney was determined by the amount the client would have obtained against the first attorney.

In the present case, but for the supposed delay by the plaintiff the court *a quo* would have granted him the full amount as proven. However, and supposedly to avoid penalising the defendants for the plaintiff's delay, the High Court reduced the award to accommodate inflation. The deduction was unsound in law and unjustified by the facts. There was no legal principle which entitled a court to reduce a claimant's damages because of a delay in bringing a case to trial. If the defendant wanted to bring the matter to trial, there were procedural remedies at his disposal.

Credit agreements

Granting money judgment against the debtor without declaring the subject property executable: The case of *Absa Bank Ltd v Njolomba and Another and Related Matters* [2018] 2 All SA 328 (GJ) dealt with unopposed application for default judgment against the respondent, Njolomba, and was heard together with those of seven other respondents who were in a similar position. The applicant, Absa Bank, and the other applicants in the rest of the applications, did not cancel the agreement but only sought judgment against the respondent in an amount of money without declaration that the property was executable. That was after the respondent fell into arrear with payment of instalments under a home loan agreement. The loan was secured by a mort-

gage bond over the subject property and had an acceleration clause in terms of which failure to pay one instalment rendered the whole contract balance due and payable immediately. The respondents in all eight matters not opposing default judgment, the question was whether judgment should be granted as sought.

Fisher J held that the applicants, in all the matters, were entitled to orders sought in relation only to the money judgment without declaration of the subject property executable. It was further held that there was no reason to dictate that there be judicial oversight in all eight matters as there was no danger of foreclosure at that stage. The costs, on attorney and client basis, were awarded in those instances where they were provided for in the agreement and pressed for on behalf of the applicant. In all the matters the respondents were advised that if they paid the arrear amounts owing under the agreement, namely the total of all instalments that were overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of the default was remedied, which amounts could be obtained from the applicant, they could resume paying the usual instalments under the agreement in the normal course thereof.

There was, in the absence of cogent circumstances that could translate into the rendering of a debtor homeless, no reason to delay giving judgment in relation to an indebtedness to which a judgment creditor was entitled in terms of substantive law. It could not simply be assumed, as a general proposition, that the fact that money judgment was taken against a debtor would inevitably lead to the debtor becoming homeless or even that such event would be more likely. The court would not, in any event, seek to avoid that result in its ultimate inquiry as contemplated by r 46 and 46A of the Uniform Rules of Court. Indeed, the execution process was such that it could yield valuable information for the court

as to the true circumstances of the respondent for the purposes in due course of the r 46A process. That was implicitly recognised by r 46(1) (a), which provided for the issue of a return process against the movable property of the judgment debtor from whom there was insufficient property to serve the writ. While that measure ensued that the immovable property was not executed on without a resort to the movables, it also had the effect of eliciting a return from the Sheriff and, furthermore, presented the opportunity to seek some form of engagement or co-operation if it had not been forthcoming from the debtor.

Unconstitutionality of a regulation unfairly discriminating against self-employed and informally employed consumers not having bank accounts:

Regulation 23A(4) (c) of the regulations made in terms of the National Credit Act 34 of 2005 (the NCA) provides, among others, that a credit provider must take practical steps to validate gross income, in relation to consumers that are self-employed or informally employed, by requiring production of the latest three months bank statements or latest financial statements. Although there were a few peripheral issues in *Truworths and Others v Minister of Trade and Industry and Another* 2018 (3) SA 558 (WCC) the main one was the constitutional validity of the regulation. The applicant Truworths and two other clothing retailing companies sought a court order reviewing and setting aside reg 23A(4) although it was particularly subreg (4) (c) that they were challenging. It was the applicants' contention that the regulation was unfairly discriminatory, unreasonable and contrary to the provisions of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act) and that subreg (4)(c) dealt largely with poorer and less privileged members of the society. Since persons in that category did not ordinarily have banking accounts or financial statements, that form of validation of their

gross income was inappropriate and, in most cases, impossible for them to comply with. As a result they were effectively excluded from the credit market.

The regulation was reviewed and set aside and the minister was ordered to pay costs. Engers AJ held that the regulation frustrated the aim of the NCA of promoting the development of a credit market that was accessible to all South Africans and, in particular, those who had historically been unable to access credit under sustainable market conditions. The evidence showed that reg 23A(4) had the potential to eliminate any credit being granted to many in that category, instead of merely preventing reckless credit. As such, the regulation was neither reasonable nor rationally connected to the purpose, which it was intended to serve. In discriminating against a section of the population that represented the less privileged, and probably many previously disadvantaged persons, in a manner that was not fair, the regulation fell foul of s 14(2) and (3) of the Act. The fact that it was taken virtually *verbatim* from one of the very many comments received from the public suggested that it was arbitrarily inserted into the regulations.

Local government

Presence of statutory disqualifying factors against approval of building plans:

Section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) has two parts. In the first part s 7(1)(a) provides that if a local authority, having considered a recommendation by the local building control officer, is satisfied that an application for the approval of building plans complies with the requirements of the Act and any other applicable law, it shall grant its approval in respect thereof. In the second part s 7(1)(b) provides that if the local authority is not satisfied or if it is satisfied that the building to which the application relates is to be erected in such a manner or will be of such a nature or appearance that

it will probably or in fact be 'unsightly or objectionable' or will derogate from the value of adjoining or neighbouring properties, it shall refuse to grant its approval.

The application of the section arose in *Cape Town City and Another v Da Cruz and Another* 2018 (3) SA 462 (WCC); [2018] 2 All SA 36 (WCC) where the appellant City of Cape Town (the City) approved of building plans submitted by Simcha Trust (the Trust) for renovations to a building owned by the Trust and which was situated in the central part of the City. The building consisted of four storeys. The renovations were intended to increase the building by four more storeys to eight. If implemented, the renovations would result in the top three storeys of the building eventually abutting, as a blank and solid wall, against apartments on the eight to tenth storeys of the adjoining building along the common boundary of the two buildings thus obliterating whatever view, space and light which the apartments in the adjoining buildings had. It was the position of the respondents Da Cruz, an owner of a residential unit in the adjoining erf, and the body corporate of that building, that the construction of the renovations would trigger the disqualifying factors set out in s 7(1)(b) of the Act in that they would be 'unsightly or objectionable', would 'disfigure' the surrounding areas and 'derogate from the value of adjoining or neighbouring properties'. Notwithstanding the respondents' objections to the building plans the City, acting on the recommendation of the building control officer, approved of them. As a result the respondents approached the High Court for an order reviewing and setting aside the City's approval of the building plans. The order was granted, hence the present appeal to the Full Court.

The WCC dismissed the appeal with costs. Sher J (Hlophe JP and Fortuin J concurring) held that the basic premise from which the building control officer proceeded to consider the objections by the

affected owners of adjoining properties and the body corporate was flawed. His understanding was that as long as the owner of the subject property sought, in its plans, to put forward a construction that was permitted by the zoning scheme, which was otherwise legally compliant in a formal sense, the owners of adjoining properties had to accept any intrusiveness that would result, even if it were gross and unreasonable, because that was the inevitable consequence of progressive development within the City. That amounted not only to a basic misunderstanding of the legal position, but to an abdication of the duty which the building control officer had to weigh up in regard to the envisaged development against the probable negative effect it would have on neighbouring properties.

The fact that plans for a proposed building were legally compliant with zoning, planning and building requirements did not mean that the building, which was to be erected in terms thereof should, on that account alone, be permitted to be erected by a local authority, particularly if the negative attributes of the proposed building were considered not to have been within the legitimate expectations of the notionally informed parties to a hypothetical sale. In giving effect to their duties in terms of s 7(1)(b), local authorities were required to strike a balance between the rights of the owner of the subject property for which the building plan approval was sought, and the rights of the owners of adjoining properties. That could not be done by the simple expedient of having regard only to the building plans under consideration in isolation and without regard to what existed, as well as what could reasonably be anticipated was likely to be put up in the future, on neighbouring properties. Whether or not a proposed building would disfigure an area, be unsightly or objectionable or derogate from the value of adjoining properties, required a judgment call that could only properly be made if it had

regard to the area concerned and the neighbouring buildings in it.

Whether a vote of no-confidence in the mayor of local government should be taken by secret ballot:

In the case of *De Lille v Democratic Alliance and Others* [2018] 2 All 464 (WCC) the applicant, Patricia de Lille was the Mayor of the City of Cape Town (the City) and a member of the first respondent, the Democratic Alliance (the Party), a governing political party in the City. After instituting an investigation into the conduct of the applicant, the majority party (the African National Congress) placed a motion of no-confidence on the agenda of the council against the mayor. The Party caucus resolved at its meeting that it would support a motion of no-confidence in her. At a further caucus meeting and, thereafter, the chairperson of the federal executive of the Party told caucus members that they were bound by the majority decision of the caucus that it had no confidence in the Mayor, whether they agreed with it or not. The position of the Party emanated from clause 6.7 of its caucus regulations, which provided that all decisions made by the caucus were binding on all members of the caucus except on issues where the Party allowed a free vote. A vote on no-confidence in the Mayor, which in the instant case was scheduled for 15 February 2018, was not such an exception.

The present case was an interlocutory application, brought on an urgent basis, for an order:

- Interdicting and restraining members of the Party caucus for the City from participating in the motion of no-confidence in the Mayor other than on the basis that each member of the caucus shall be free to vote for or against the motion in accordance with the dictates of their own conscience.
- Interdicting and restraining the Speaker (second respondent) and the City from proceeding with the vote unless it was by way of secret ballot.
- Interdicting and restrain-

ing the Party's office bearers from influencing members of the caucus on the manner they should vote in respect of the motion of no-confidence.

The court granted an order, with costs against the Party, declaring that by agreement between the parties, for the purpose of the scheduled motion of no-confidence, members of the Party caucus were free to vote for or against the motion, in accordance with the dictates of their conscience and that no member would face any adverse consequences from the Party no matter how they voted on the motion. The Speaker was ordered to exercise their discretion as to whether the motion of no-confidence would be voted on by means of secret ballot.

Henney J held that the chairperson of the Party's federal executive knew, or ought to have known, that as a result of the decision of the CC in *United Democratic Movement v Speaker of the National Assembly and Others (Council for the Advancement of the South African Constitution and Others as Amici Curiae)* 2017 (5) SA 300 (CC), 2017 (8) BCLR 1061 (CC), not only members of the National Assembly but also councillors in a local government, should vote according to their conscience, rather than on the instructions of how their political party expected them to vote.

The court was not permitted by law to issue an order to the effect that the Party had to instruct its members of the caucus to support the vote by a secret ballot, as doing so would breach the principle of separation of powers, crossing into the terrain of the legislature in the sphere of local government. Doing so would be directing a political party to exercise a specific function in the legislative sphere of local government. Neither the Local Government: Municipal Structures Act 117 of 1998 nor the rules of Order Regulating the Conduct of Meetings of the Municipal Council of the City of Cape Town (Rules of Order) made provision for a vote to be held by means of a secret ballot. There was no provision that

a motion of no-confidence in the Mayor would take place by secret ballot. The person or authority that was best suited to make such a decision was the Speaker who was given the necessary discretion by r 4 of the Rules of Order.

Prescription

Arbitral award is not debt for the purpose of prescription: In *Brompton Court Body Corporate SS119/2006 v Khumalo* 2018 (3) SA 347 (SCA) the appellant, Brompton Court, was a body corporate of a sectional title scheme that claimed payment from the respondent, Khumalo, regarding levies and electricity consumption. In a counter-claim the respondent claimed payment from the appellant for cost of repairs to her property and loss of rental for which she blamed the appellant. By agreement the disputes between the parties were referred to arbitration, which was conducted in terms of the Arbitration Act 42 of 1965. The arbitrator published his award on 21 December 2012 in terms of which, the appellant was entitled to payment of a certain amount (some R 87 000), together with interest and the costs of arbitration. In March 2014 the appellant applied to the GJ for the award to be made an order of court. The respondent opposed the application on the ground that the debt in question had prescribed in terms of the Prescription Act 68 of 1969 (the Act). The High Court per Mokose AJ upheld the defence of prescription and accordingly dismissed the application with costs.

On appeal to the SCA it was contended first that when a binding arbitral award was made, a new debt arose and second that if an arbitral award was not made an order of court within three years of its granting, the right to do so prescribed. The court held that both submissions were not correct and upheld the appeal with costs.

Van der Merwe JA (Ponnan, Mocumie JJA, Pillay and Makgoka AJJA concurring) held that the statement that when an arbitral award was made

an order of court a new debt arose could not be accepted as a principle of general application. If anything, the opposite was the case. Even a judgment of a court generally did not create a new debt. It served to affirm and/or liquidate an existing debt, which was disputed. What the judgment did in relation to prescription of a debt was to give rise to a new period of prescription of 30 years in terms of s 11(a)(ii) of the Act. The same principle generally also applied to an arbitration award, save that it did not attract a new prescription period in terms of s 11 of the Act. The conclusion that an arbitration award generally did not give rise to a new debt was supported by s 13(1)(f) of the Act, which delayed completion of the period of prescription of a debt subjected to arbitration by one year. If the arbitration award constituted a new debt, it would make no sense to provide for the delay of completion of prescription on the original underlying debt after the award. The sensible and logical approach was that the delay of completion of prescription in terms of s 13(1)(f) was intended to enable a creditor to apply to make the arbitration award an order of court in terms of s 31 of the Arbitration Act before the debt on which it was based prescribed.

An arbitration award was not a debt and it did not prescribe after three years. In terms of the Act a 'debt' meant an obligation to pay money, deliver goods or render services. In the present case the appellant's claim to make an arbitration award an order of court did not require the respondent to perform any obligation at all, let alone one to pay money, deliver goods or render services. The appellant merely employed a statutory remedy available to it.

Knowledge of facts from which debt arose, not of effect of those facts, required:

The facts in *Loni v MEC for Health, Eastern Cape (Bhisho)* 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) were that the applicant Loni suffered a gunshot wound in August 1999

and was admitted to a provincial hospital falling under the jurisdiction of the respondent MEC for Health, Eastern Cape. Although X-rays were taken, the bullet was found to have lodged in his body and save for cleaning the wound and giving him painkillers, not much else was done. The following morning doctors looked at his file and did not communicate with him. Two weeks later an operation was performed in order to insert a plate and screws on his femur, but the bullet was not removed. After two to three months he was discharged from hospital and given his file to use when visiting a local clinic for treatment. At the time of his discharge his condition deteriorated. He was still in pain and the wound visibly infected and oozing pus. More than a year later he removed the bullet himself and after getting employment in 2008, which enabled him to secure medical insurance, he approached doctors in private practice to establish the reason for his limp and constant pain. He was informed by the doctor that he was disabled. In November 2011 Dr Olivier advised that his condition was attributable to medical negligence. In June 2012 he instituted an action against the respondent for damages arising out of the treatment he received at the provincial hospital. The respondent raised a special plea of prescription. The applicant's defence was that he only became aware of his claim against the respondent in November 2011 after advice given by Dr Olivier.

The ECB upheld the special plea and dismissed the claim. The court held that the applicant had acquired knowledge of information, which enabled him to institute the claim long before consulting with Dr Olivier, in that his wound was still oozing pus after discharge from hospital; he removed the bullet himself; he continued to experience pain; was limping and was given his medical file on discharge. In those circumstances a reasonable person would not have waited for seven years in order to institute proceedings. Further-

more, a reasonable person would not have endured pain for seven years before seeking help to find out the cause of the pain. An appeal against the High Court decision was dismissed by the Full Court of the ECG. His application for leave to appeal to the SCA was also dismissed.

That being the case the applicant approached the CC with an application for leave to appeal. The application was dismissed with no order as to costs. A unanimous court held that the objective assessment, which was appropriately applied by both the High Court and the Full Court, established that a reasonable person in the position of the applicant would have realised that the treatment and care he received at the provincial hospital were substandard and not in accordance with what he could have expected from medical practitioners and staff acting carefully, reasonably and professionally. On an assessment of the applicant's evidence, it was clear that by December 2000, and before meeting Dr Olivier, he had already suffered significant harm and it would have been apparent from a reasonable assessment that the pain and suffering, which he had endured, were a direct result of the substandard care, which he had received.

The applicant should have over time suspected fault on the part of hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Long before the applicant's second discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts on which his claim was based. He had knowledge of his treatment and quality (or lack thereof) from his first day in hospital and had suffered pain on an ongoing basis. The fact that he was not aware that he was disabled or had developed complications

was not a relevant consideration.

Revenue

Amount of transfer duty – whether one or two transactions involved: In the case of *Commissioner, South African Revenue Service v Short and Another* 2018 (3) SA 492 (WCC); [2018] 2 All SA 100 (WCC) the respondents, Short and his life partner, jointly bought a residential unit from the seller, Morrow Investments, for R 4,2 million. The two were jointly and severally liable for the amount. In terms of the agreement the first respondent Short acquired bare *dominium* of the property, and was registered as the sole owner, while the second respondent acquired *habitat*io. The arrangement was reflected in the title deed to protect the right of use, enjoyment and occupation of the second respondent in the event of the first respondent encountering financial difficulties. The appellant, Commissioner for the South African Revenue Service (the Commissioner) levied transfer duty on the transaction, treating it as a single transaction. The respondents paid the duty under protest, contending that they had concluded two separate transactions, one for bare *dominium* and the other for *habitat*io. If treated as a single transaction, the amount of transfer duty was higher, being some R 281 000 whereas if they were two separate transactions the respondents would each pay transfer duty separately, but would collectively make a tax saving of some R 55 000. The Cape Town Tax Court upheld the respondents' appeal against the Commissioner's assessment.

An appeal to the Full Bench of the WCC was upheld. As per agreement between the parties the court made no order as to costs. Binns-Ward J (Waglay and Nuku JJ concurring) held that in order for the respondents' contention to prevail, the reservation of a right of *habitat*io to the second respondent would have to be an acquisition, which was independent of, and not integral to, the transfer of ti-

tle of the property from the seller to the first respondent. The fact that separately registrable rights were to be acquired by the purchasers was not determinative. A multiplicity of individually registrable properties of various values could be the subject of a single transaction for transfer duty purposes. In this case it did not matter that there were two purchasers, each of whom was to acquire different rights in the property.

There were a number of salient pointers in the agreement that there was only one indivisible transaction in the contemplation of the parties namely –

- the agreement expressly referred to the purchasers as acting 'jointly';
- the undertaking by the purchasers of joint and several liability for all the obligations in terms of the agreement was irreconcilable with the respondent's contention that the intention was to enter into two divisible transactions; and
- only a single purchase price was given. There was no indication that separate prices had been agreed on by the seller and the purchasers for the right of *habitat*io and the bare *dominium*.

Road Accident Fund claims

Objection to medical examination by Road Accident Fund (RAF) doctor on basis of bias: In *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) the respondent Chin was the plaintiff in the main action between the parties, in terms of which she claimed compensation from the applicant in the interlocutory application, the RAF, for injuries suffered in a motor vehicle collision. The RAF filed a notice in terms of r 36(2) of the Uniform Rules of Court in terms whereof, Chin was advised to attend a medical examination to be conducted by Dr M. In response Chin's attorneys filed a notice in terms of r 36(3) objecting to her examination by Dr M, alleging that the doctor was –

- biased against plaintiffs;
- failed to listen to complaints by plaintiffs;

- made uncalled for comments in respect of plaintiffs' lawyers;
- lacked empathy and care when examining plaintiffs; and
- further that he had already pre-judged a plaintiff's condition even before examination.

Because of that objection the RAF instituted the present interlocutory application for an order directing Chin to submit to examination by Dr M. The application was granted with costs to be costs in the main action. It was further ordered that in addition to her own medical practitioner and legal representative being present at the examination, Chin could, if she so chose to, record the examination.

Slings J held that given the inherent invasive nature of the provisions of r 36(2) the legislature could not have intended to limit the grounds on which an objection could be raised against a doctor nominated to carry out the medical examination. While there was no closed list of objections, which could possibly be raised against submitting to an examination by a medical practitioner nominated by the RAF, the objection raised would have to be reasonable, material and substantial. In determining whether the grounds of objection raised in a matter were reasonable, material and substantial, regard had to be had to the facts or averments on which the objections were based.

Given that the prerogative to elect one's own expert was part of the right to a fair trial, a higher standard than a reasonable apprehension of bias would be applied when objecting to a medical practitioner nominated to conduct the medical examination in terms of r 36(2). At a minimum the apprehension of bias would have to have been objectively established, which had not been done in the instant case. As Chin would also be aided by the expertise and assistance of her own expert, which would enable her to fully interrogate the opinion and report of Dr M, it had not been shown what prejudice she would suffer should Dr M be allowed to

conduct the medical examination. Furthermore, bias was best tested through cross-examination. Accordingly, Chin had not demonstrated that her objection to Dr M on the basis of a reasonable apprehension of bias was material and substantial.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Additional income tax assessment, admissibility of confession, arrest of associated ship, bail application in extradition proceedings, compensation for land awarded to a labour tenant, deduction of interest expense incurred on a loan facility, division of property on divorce, exception to particulars of claim, *locus standi* to liquidate a company, mandatory suspension of accused's driving licence, maintenance of spouse *pendent lite*, Minister of Finance not empowered to intervene in private bank-client relationship, Road Accident Fund appeal tribunal deals with seriousness of injuries and not causation, setting aside arrest of vessel, standing to apply for removal of base station of cellular station from common property, targets for participation in or ownership of mining rights by historically disadvantaged persons, transfer of joint estate property to third party without consent of spouse, unlawful possession or control of abalone for commercial purposes and winding-up of a solvent company on the just ground.



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By
Marvin
Petersen

Appraisal rights of minority shareholders in a holding company, in relation to the subsidiary of the holding company

Cilliers v LA Concorde Holdings Limited and Others
(WCC) (unreported case no 23029/2016, 14-6-2018) (Papier J)

In the recent judgment of *Cilliers v LA Concorde Holdings Limited and Others* (WCC) (unreported case no 23029/2016, 14-6-2018) (Papier J), the court had to determine whether the appraisal rights of a minority shareholder in a holding company, in terms of s 164 of the Companies Act 71 of 2008 (the Act) had been established, where the holding company's subsidiary intended to dispose of all or the greater part of its assets.

The Act provides various remedies for the protection of minority shareholders. Section 164 of the Act contains one such remedy available to minority shareholders by enabling a dissenting shareholder during an offer and under certain limited circumstances to inform the company of their intention to vote against a special resolution; and within a prescribed time to require that the company pay them the fair value for all the shares they hold in the company (appraisal rights).

An instance where a minority shareholder may exercise their appraisal rights is when a company resolves to dispose of all or the greater part of the assets or undertaking of a company. In this regard, s 112(2) of the Act provides that:

'A company may not dispose of all or the greater part of its assets or undertaking unless –

(a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and

(b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company.'

Section 115(2)(b) of the Act provides that the disposal of all or the greater part of its assets or undertaking must be approved by a special resolution, by the shareholders of the company's holding company if any, if the holding company is a company or an external company; the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary, and having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.

Facts

The applicant was a minority shareholder in the first respondent, La Concorde Holdings Ltd (the holding company). The holding company owned 100% of the shares in its wholly owned subsidiary, KWV SA (Pty) Ltd (the subsidiary).

On 11 May 2016, the Stock Exchange News Service announced that the subsidiary would dispose of all its' operational assets to a third party. On 29 June 2016, the holding company gave notice to its shareholders at a general meeting, where at which, resolutions were put to the holding company's shareholders, on the basis that the disposal by the subsidiary constituted a disposal of all or the greater part of the assets or undertaking of both the subsidiary and the holding company. At the shareholders meeting, the applicant (along with the first, second, and third applicant) as a shareholder in the holding company, objected to and voted against the resolutions.

The holding company made an offer (which was subsequently retracted) to acquire the shares held by the dissenting shareholders, including the applicant, and relied on a valuation of their shares obtained from KPMG. The offer was rejected by the applicant on the basis of it being inadequate, whereafter the applicant instituted an application in terms of s 164 of the Act for two appraisers to be appointed to enable the court to determine the fair value in respect of the shares.

Issue

The issue before the Western Cape Division of the High Court (WCC) was whether s 164 of the Act affords appraisal rights to dissenting shareholders of the holding company whose subsidiary has implemented a transaction disposing of all or the greater part of its assets or undertaking in accordance with s 115(2)(b) of the Act.

Arguments

The respondents contended that a dissenting shareholder of the disposing company has appraisal rights if the company in which it holds shares, adopted a resolution contemplated in s 112 of the Act. In other words, it was contended on

behalf of the respondents that the applicant, as a minority shareholder in the holding company, is not entitled to appraisal rights in respect of the subsidiary company disposing all or the greater part of its assets or undertaking in accordance with s 115(2)(b) of the Act.

The applicant, in his argument relied on the wording of s 115(8) of the Act, that affords the dissenting shareholders, appraisal rights in terms of s 164, in the circumstances where the disposal by the subsidiary constituted a disposal of all or the greater part of the assets or undertaking of both the subsidiary and the holding company. In this regard, s 115(8) provides that:

'The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person –

(a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and

(b) was present at the meeting and voted against that special resolution.'

Judgment

Papier J held that s 115 of the Act sets out the manner in which shareholder approval must be obtained. It creates a requirement and establishes an obligation on the shareholders in the disposing company's holding company if, having regard to the consolidated financial statements of the holding company, the disposal of the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company. Therefore, the clear wording of s 115(8) affords the applicant with appraisal rights as a shareholder in the holding company when subsidiary of the holding company disposes of all or the greater part of its assets or undertaking in the circumstances where s 115(2)(b) is applicable.

Papier J further held that s 115(8) of the Act extends the category of shareholders to all other shareholders (with voting rights), who are not necessarily envisaged in s 164, affording to the holder of any voting rights in a company, the right to seek relief in terms of s 164 of the Act.

Accordingly, it was ordered, *inter alia*, that the applicant – as a minority shareholder in the holding company – is the

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This book sets out the broad framework of the private international law rules in operation in each of the sixteen Anglophone jurisdictions considered (Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe). It identifies and clarifies the law to be applied as it relates to: (i) civil jurisdiction over commercial disputes involving a foreign element; (ii) the enforcement of foreign judgments; and (iii) the availability and nature of the interim remedies, in each of the sixteen jurisdictions addressed.



Immigration Law in South Africa

F Khan (Editor)

This book outlines the existing law applicable to foreigners as reflected in the Immigration Act, the Citizenship Act, the Domicile Act and the Extradition Act as at 31 July 2017. The book also draws attention to the policy shifts by the South African government in the White Paper on International Migration, the Border Management Act, and the Discussion Paper on the repositioning of the Department of Home Affairs within the security cluster.



Fuggle & Rabie's Environmental Management in South Africa 3e

H A Strydom, N D King, F P Retief (Editors)

The third edition of *Environmental Management* delivers a thoroughly updated and insightful analysis of how the discipline of environmental management has developed in South Africa. It addresses, in 24 chapters, the normative ideas that currently define the evolution of the discipline and considers how the discipline will develop to adequately manage human and environmental interactions in the future.



Precedents for Applications in Civil Proceedings

P van Blerk; Contributions from G Marriott and Kevin Iles

Precedents for Applications in Civil Proceedings has been written to assist all, from aspirant novices to experienced practitioners. The book contains more than 100 examples covering an extensive range of more than 50 subjects, with commentary on the requirements of applications and the identification of typical defences.



Scott on Cession: A Treatise on the Law in South Africa

S Scott

Scott on Cession is a comprehensive exposition of the law of cession. The book focuses on case law with reference to the historical development of cession as a legal institution. It also provides extensive commentary on certain problematic aspects of cession, using comparable legal systems, and incorporates the dogmatic foundations of the law of cession.



Ubuntu: An African Jurisprudence

T W Bennett, assisted by A R Munro and P J Jacobs

Ubuntu: An African Jurisprudence examines how and why South African courts and law-makers have been using the concept of ubuntu over the last thirty years. Included in this work are discussions of two traditional institutions that provide model settings for the realisation of ubuntu: *imbizo*, national gatherings consulted by traditional rulers to decide matters of general concern, and *indaba*, a typically African process of making decisions based on the consensus of the group.

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holder of shareholder appraisal rights as envisaged in terms of s 164. That two appraisers be appointed to determine the fair value in respect of the shares and that s 115(8) of the Act be interpreted to mean that s 164 of the Act applies to dissenting shareholders of the holding company, who advised a company that they object to the resolution and have voted against it at a meeting called for that purpose, in compliance with the provisions of the Act.

Conclusion

This judgment is important for a number of reasons. Firstly, the applicant is the first known minority shareholder to successfully use s 164 of the Act to exercise valuation rights wherein the court exercised its discretion to appoint two appraisers to determine the fair market value of respect of shares that are subject to appraisal rights. Secondly, the judgment is unequivocal in its find-

ings that a minority shareholder in the holding company is capable of holding a shareholder appraisal right in respect of a subsidiary company in compliance with the relevant provisions of the Act.

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By
Nadia
Froneman

Racial references met with disapproval

Rustenburg Platinum Mine v SA Equity Workers Association on behalf of Bester and Others (2018) 39 ILJ 1503 (CC)

The case of *Rustenburg Platinum Mine v SA Equity Workers Association on behalf of Bester and Others* (2018) 39 ILJ 1503 (CC) dealt with the issue of when an apparently neutral race descriptor may be regarded as racially abusive or insulting.

Mr Bester was called to an internal disciplinary hearing to face the allegation of referring to a co-worker as a 'swart man', thereby breaching a workplace rule that prohibits abusive and derogatory language.

Briefly, the facts leading to the allegation are as follows:

- The co-worker was allocated a parking bay next to the one that was allocated to Mr Bester.
- Due to the size of the co-worker's car, Mr Bester was concerned that his vehicle would get damaged.
- Mr Bester made several inquiries to address this with the safety manager, without success.
- As a result, Mr Bester uttered the words 'verwyder daardie swart man se voertuig'. Translated to English as 'remove that black man's vehicle'.

At the internal disciplinary inquiry, Mr Bester was found guilty of the allegation against him and the chairperson recommended a sanction of dismissal. Mr Bester was subsequently dismissed. The case was taken to the Labour Court and the Labour Appeal Court, however, this article focusses on the outcome of the Constitutional Court (CC).

The CC crystallised the issues to determine as being –

- whether referring to a fellow employee

as a 'swart man' in this context was racist and derogatory; and

- if so, whether dismissal was the appropriate sanction.

The CC held that the words 'swart man', per se, are not racist but the context within which they were used will dictate whether they were used in a racist or derogatory manner.

The test is an objective one, being whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory, and further that the reasonable person will not only consider what the words expressly say but what they imply.

The CC highlighted that Mr Bester denied ever saying 'swart man' and further conceded that using such language could be a dismissible offence. Mr Bester never raised the defence that he used those words as a descriptor. As such, the CC held that the commissioner and the LAC had erred in relying on a defence that was never raised by him.

Furthermore, and significantly, while the CC recognised that not every reference to race is a manifestation of racism or evidence of racist intent, it had to consider South Africa's (SA's) past of institutionally entrenched racism when determining whether a statement is racist and derogatory, even if the statement appeared to be neutral. In this way, the CC rejected the LAC's starting point of viewing phrases as neutral. This, it held, carried the danger that the dominant, racist view of the past – of what was neutral, normal and acceptable – may skew an objective inquiry. Ignoring the reality of SA's of institutionally entrenched

racism and beginning the inquiry from a presumption that the context was neutral, would sanitise the context in which such phrases were used. As such, the CC held that the LAC and the commissioner failed to consider the totality of circumstances of this case and came to the unreasonable conclusion that 'swart man' was used innocently.

The CC was satisfied that, having regard to the context in which the utterances were made, Mr Bester was guilty of the allegation and that the appropriate sanction was dismissal. This was, primarily, because –

- he showed absolutely no remorse throughout the proceedings;
- he conducted himself in an unruly manner during his disciplinary inquiry; and
- he was dishonest in denying having made the utterances.

It is important to educate employees on this judgment and caution them not to resort to making racial utterances. This will assist in eliminating racist behaviour of any sort in the workplace, which it has been held, can have the effect of destroying working relationships and being disruptive of the employer's business.

- See employment law 'Use of race to describe a person may not be derogatory or offensive' 2017 (Oct) DR 39.

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By
Njabulo
Kubheka

Promotion of constitutional rights and fair labour practises

September and Others v CMI Business Enterprise CC 2018 (4) BCLR 483 (CC)

The applicants in this case were Theo September, Dean September and Roland Paulsen who were all employed by CMI Business Enterprise CC (the respondent). The applicants resigned as workers of the respondent and alleged that the respondent had made their working conditions intolerable. They alleged that they were subjected to racial discrimination in the form of physical, verbal and mental abuse.

After terminating their employment, the applicants referred their matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). The applicants based their claim on two grounds. The first was based on unfair labour practice and the other was based on unfair discrimination in terms of the Employment Equity Act 55 of 1998 (the EEA). The CCMA held that the applicants were constructively dismissed and further held that the issue of unfair dismissal remained unresolved and referred the matter to the Labour Court (LC).

In the LC the applicants filed their statement of material facts where they submitted a list of incidents that led to their resignations. The issue before the LC was whether it had jurisdiction, which in turn begged the question of whether constructive dismissal based on unfair discrimination had been conciliated before referral to it. The LC considered the evidence by the applicants as to what emerged during the CCMA proceedings. The LC on the issue of constructive dismissal held that it had jurisdiction as the dispute had been conciliated in the CCMA.

The respondent then appealed to the Labour Appeal Court (LAC). The main issue that had to be considered by the LAC was whether constructive dismissal had been conciliated before the matter was referred to the LC. In its reasoning, the LAC relied on the decision of the *National Union of Metalworkers of South Africa and Others v Driveline* 2000 (4) SA 645 (LAC) and held that 'where the real issue was conciliated, the employee's statement of case can be amended to broaden the issue's characterisation. However, where the issue was never referred to conciliation at all, the Labour Court does not have jurisdiction to determine the dispute'. The LAC noted that the dispute

of unfair dismissal was conciliated. It further held that the LC made an error as the evidence supported the conclusion that the referral was for unfair discrimination and that the applicants did not consider themselves to have been dismissed. The LAC held that the LC should have held that it had no jurisdiction as it was not entitled to venture beyond the referral form to determine what was conciliated.

The applicants appealed to the Constitutional Court (CC). The CC began by setting out the functions of the commissioner as set out by s 135(3) of the Labour Relations Act 66 of 1995 (LRA). The CC further held that the LAC failed to consider the purpose and context of the LRA and the dispute resolution mechanisms for which it provides and only relied on the referral form and the certificate of outcome. The CC further held that LAC's interpretation is inconsistent with the jurisprudence of the CC in that it was narrowly textual and was a legalistic approach. The court further held that because the LAC adopted a legalistic approach it did not achieve the objects of the Constitution, the fundamental rights provided by s 23 of the Constitution and the promotion of the effective resolution of labour disputes.

Conclusion

One of the crucial visions of our democratic era is to create a fair working environment, which recognises the rights of employees and prevents them from being subjected to unfair labour practices. In order to achieve this goal, we have adopted the Constitution, the LRA, the EEA and other laws, as our tools to achieve this objective. Among other values, included in our Constitution, is human dignity, the advancement of human rights and freedom and supremacy of the Constitution. When interpreting the Bill of Rights, the courts are required to promote the values that trigger an open and democratic society founded on human dignity, equality and freedom. The LRA requires that when interpreting its provisions there must be compliance with the Constitution. It is, therefore, clear that the LRA and the Constitution aims at rectifying the power imbalance between the employers and the employees in the workplace.

From the facts of this case it is clear

that the appellants rights were violated, particularly their rights to human dignity, equality and fair labour practices. I submit that the CC came to the right conclusion, because the lenient approach adopted by the court gives effect to the founding values of the Constitution and it promotes fair labour practice, as enshrined by the Constitution. It is trite that the provisions of any statute are to be given their ordinary meaning whenever they are being interpreted. However, where the ordinary meaning will lead to a violation of constitutional rights, the courts are required to adopt a less restrictive approach, which will give effect to the provisions of the Constitution. In this case, requiring strict compliance with s 191 of the LRA as held by the LAC would lead to conflict with some of the founding values of the Constitution and the purpose of the LRA. The CC was correct in concluding that the LC had jurisdiction to adjudicate on the issue of constructive dismissal, because the CCMA had conciliated this issue. By contrast, the approach of the LAC impedes the courts from referring to evidence outside of the certificate of outcome and referral form, and thereby limiting the commissioner's duties, particularly the duty to identify the nature of the dispute.

Njabulo Kubheka BA LLB (UKZN) is a candidate attorney at Venns Attorneys in Pietermaritzburg.



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By Robert Gad
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The tax and exchange control implications of cryptocurrency transactions

In an opinion of the European Central Bank, the Banking Authority defined virtual currency (cryptocurrency) as 'a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically' (<https://eur-europa.eu>, accessed 11-7-2018).

With cryptocurrencies such as Bitcoin becoming increasingly popular and accessible, it is becoming ever more important that South Africans carefully consider the tax and exchange control uncertainties that accompany the incorporation of these relatively new systems into their day-to-day transactions, businesses and/or their investment portfolios. Summarised below are some of the developing commentaries issued by, *inter alia*, the South African Reserve Bank (SARB) and the South African Revenue Service (Sars) regarding the tax and exchange control consequences arising from transactions involving cryptocurrencies, such as Bitcoin.

Exchange control

On 3 December 2014, the SARB issued a Position Paper on Virtual Currencies (the Position Paper) indicating at p 2 that a cryptocurrency such as Bitcoin 'is a digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account and/or a store of value, *but does not have legal tender status*' (our italics). (www.resbank.co.za, accessed 20-7-2018). It is, therefore, not of itself, subject to regulation by the SARB. South Africans nevertheless remain subject to South Africa's exchange control regulations in general and should take care that they do not un-

wittingly contravene any of these regulations in their dealings with cryptocurrencies, particularly since cryptocurrencies can so easily be transferred internationally without any involvement from South African banks or other authorised dealers.

In August 2017, the SARB established a Fintech Unit and has indicated that it intends to release a new position paper on the evolving uses of private cryptocurrencies (the New Position Paper). It is not yet clear how the New Position Paper will interact with the Position Paper and it remains to be seen how the SARB's approach to cryptocurrencies develops over time.

Tax

In its 2018 budget review, released on 21 February, the National Treasury confirmed the widely held view that South Africa's tax laws are already broad enough to address transactions involving cryptocurrencies. Sars, thereafter, on 6 April, released a media statement 'Sars' stance on the tax treatment of cryptocurrencies' (the media statement) (www.sars.gov.za, accessed 11-7-2018), as well as a frequently asked questions page, in which it expands on its views regarding cryptocurrencies. The media statement advises that Sars does not regard cryptocurrencies as 'currency' for purposes of South African income tax legislation but rather as an 'amount' and/or 'asset', to be dealt with under the ordinary principles of South African tax legislation.

Although Sars does go on to provide some guidance on its views regarding the treatment of cryptocurrencies – which are mined, invested in or exchanged for goods or services – the circumstances of the specific taxpayer in question would be of great importance in determining, *inter alia*, the capital or revenue nature

of trades involving cryptocurrencies and, therefore, whether gains from such trade would be subject to income tax or capital gains tax (and, conversely, whether losses will be deductible for income tax purposes or realised as a capital loss).

This analysis will remain relevant should the Taxation Laws Amendment Bill of 2018 (the Bill), released for public comment on 16 July, be promulgated in its present form, in which it is proposed that 'any cryptocurrency' be included in the definition of 'financial instrument' contained in s 1 and that cryptocurrency losses be ring-fenced under s 20A, of the Income Tax Act 58 of 1962.

Unless the Bill is promulgated in its current form, it is also arguable that any supply of Bitcoin in exchange for value in the form of goods or services or currency, is potentially vat-able as the supply of a service. This is on the basis that the value added tax (VAT) consequences of a particular trade would depend, *inter alia*, on whether the trade is considered the supply of a 'good' or 'service', as defined in s 1 of the Value-Added Tax Act 89 of 1991 (the VAT Act). The rights to performance are personal rights against another person, rather than rights in a thing (which are real rights). Personal rights are incorporeal by their nature, and are classed as movable property.

Personal rights are transferred by cession rather than by *traditio* (as in the case of tangible, corporeal movable assets) since, by their very nature, they are incapable of physical delivery. The transfer of personal rights cannot be the supply of 'goods' as defined in the VAT Act, because those personal rights are not 'goods', being incorporeal by nature, they are neither corporeal movable things, nor fixed property, nor a real right in a corporeal thing or fixed property, nor electricity. In our view, it



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is therefore likely, that cryptocurrency such as Bitcoin constitutes an incorporeal right, the sale of which should constitute the supply of a 'service' for purposes of the VAT Act.

Sars have, however, indicated in the media statement that, pending a policy review as regards the VAT implications of transactions involving cryptocurrencies (including Bitcoin), it will not require VAT registration as a vendor for purposes of the supply of cryptocurrencies. Since the legal status of the media statement, as well as the media statement's impact on existing VAT vendors, is unclear, the proposed inclusion of 'the issue, acquisition, collection, buying or selling or transfer of ownership of any cryptocurrency' in the list of activities deemed to be financial services, contained in s 2 of the VAT Act, may well resolve one of the main concerns about

cryptocurrency trades. In addition, the proposed inclusion may have an impact on VAT input claims and the VAT apportionment formula applied by vendors, should they enter into any transaction/s involving cryptocurrency.

Conclusion

Given the uncertainty and potentially significant tax and exchange control implications that may still arise in the context of trading in and using cryptocurrencies, such as Bitcoin, despite the commentaries and proposed legislative amendments already released by the SARB and National Treasury, it is very important for any party to a transaction that involves cryptocurrency to obtain advice on their specific circumstances prior to implementation. In addition, it is important for readers and their advisers to make use of any opportunities

provided by regulators, such as the SARB and Sars to make recommendations with regard to the most appropriate regulatory framework and bespoke rules for transactions involving such cryptocurrencies going forward, for example by submitting comments on the relevant proposals contained in the Bill (due by close of business 16 August).

With this in mind, the 2018 Tax Indaba will include a session regarding the manner in which cryptocurrencies, specifically Bitcoin, will be taxed going forward.

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

Bills

Small Enterprises Ombud Service Bill B14 of 2018.
Criminal Procedure Amendment Bill B15 of 2018.
State Liability Amendment Bill B16 of 2018.
Hydrographic Bill B17 of 2018.
Powers, Privileges and Immunities of Parliament and Provincial Legislatures Amendment Bill B18 of 2018.
Local Government: Municipal Structures Amendment Bill B19 of 2018.
National Qualifications Framework Amendment Bill B20 of 2018.
Property Practitioners Bill B21 of 2018.
Aquaculture Development Bill B22 of 2018.

Commencement of Acts

Insurance Act 18 of 2017. *Commencement:* 1 July 2018 – ss 48, 52, 53, 56, 59 and 60 of the Long-term Insurance Act 52 of 1998, specified in item 4 of the

third column of sch 1 to the Act in respect of the Long-term Insurance Act; and ss 46, 47, 51, 53 and 54 of the Short-term Insurance Act 53 of 1998, specified in item 4 of the third column of sch 1 to the Act in respect of the Short-term Insurance Act. GN639 GG41735/27-6-2018 (also available in Afrikaans).

Promulgation of Acts

Division of Revenue Act 1 of 2018. *Commencement:* 4 June 2018. GN559 GG41678/4-6-2018 (also available in Sesotho).

Selected list of delegated legislation

Auditing Profession Act 26 of 2005
Firm fees payable to IRBA. BN86 GG41722/22-6-2018.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Increase of the minimum and maximum amount of earnings. GN333 GG41701/13-6-2018.

Amendment of sch 4: Manner of calculating compensation. GN334 GG41701/13-6-2018.

Increase in monthly pensions. GenN335 GG41701/13-6-2018.

Deeds Registries Act 47 of 1937

Amendment of regulations: Fees. GN R557 GG41669/31-5-2018.

Financial Advisory and Intermediary Services Act 37 of 2002

Prescribed form of a licence authorising an applicant to act as a financial services provider. BN89 GG41738/29-6-2018.

Financial Sector Regulations Act 9 of 2017

Levies imposed on financial institutions by the Financial Sector Conduct Authority. GenN362 GG41746/29-6-2018.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Amendment of regulations relating to hazard analysis and critical control point system. GN607 GG41707/14-7-2018.

General and Further Education and Training Quality Assurance Act 58 of 2001

Policy for re-issue of national certificates. GN642 GG41738/29-6-2018.

Regulations governing general hygiene requirements for food premises, transport of food and related matters. GN638 GG41730/22-6-2018 (will also be made available in isiZulu and Northern Sotho).

Government Employees Pension Law, 1996

Amendment of the rules of the Government Employees Pension Fund. GenN314 GG41673/1-6-2018.

Labour Relations Act 66 of 1995

List of private agencies that have been accredited by CCMA for conciliation and/or arbitration and/or inquiry by arbitrator from 1 June 2018 to 30 April 2019. GenN298 GG41667/1-6-2018.

Mineral and Petroleum Resources Development Act 28 of 2002

Restriction on the granting of new applications for technical cooperation permits, exploration rights and production rights in designated areas. GN657 GG41743/28-6-2018.

Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013

Determination of the rate of levy for 2016 tax period and payment date. GN646 GG41738/29-6-2018.

National Credit Act 34 of 2005

Fee guideline pursuant to the guideline issued by the National Credit Regulator in terms of reg 19(13) on 3 November 2017. GenN327 GG41685/8-6-2018.

Pharmacy Act 53 of 1974

Rules relating to good pharmacy practice. BN84 GG41710/15-6-2018.

Rules Board for Courts of Law Act 107 of 1985

Amendment of rules regulating the conduct of proceedings of Magistrates' Courts of South Africa (rule 45, 46, 49, 55 and annexure 1). GN R632 GG41723/22-6-2018 (also available in Afrikaans).

Skills Development Act 97 of 1998

List of occupations in high demand: 2018. GN637 GG41728/22-6-2018.

Superior Courts Act 10 of 2013

Amendments to the joint rules of practice for the Eastern Cape Division of the High Court. GenN357 GG41733/25-6-2018.

Draft Bills

Electoral Amendment Bill for comment. GenN317 GG41677/1-6-2018.

Draft Independent Police Investigative Directorate Amendment Bill. GenN300 GG41667/1-6-2018.

Climate Change Bill for comment. GN580 GG41689/8-6-2018.

Draft Immigration Amendment Bill. GN583 GG41698/11-6-2018.

Draft Public Investment Corporation Second Amendment Bill. GN593 GG41704/15-6-2018.

Draft Regulation of Gatherings Amendment Bill. GenN353 GG41727/21-6-2018.

Draft Medical Schemes Amendment Bill. GN636 GG41726/21-6-2018.

Draft National Health Insurance Bill. GN635 GG41725/21-6-2018.

Draft National Ports Amendment Bill. GenN355 GG41731/22-6-2018.

Draft Delegated Legislation

Proposed revised and restructured code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005. BN73 GG41667/1-6-2018.

Draft licensing exemption and registration notice in terms of the Electricity Regulation Act 4 of 2006 for comment. GN563 GG41685/8-6-2018.

Granting B-BBEE facilitator status to the African Small Enterprise Finance Agency in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 for comment. GenN330 GG41693/8-6-2018. Amended Draft Schedule 1 of 2018 in terms of the Broad-based Black Economic Empowerment Act 53 of 2003. GenN343 GG41709/15-6-2018.

Draft Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 in terms of the Broad-based Black Economic Empowerment Act 53 of 2003. GN611 GG41714/15-6-2018.

Draft curriculum and assessment policy statements for learners with severe intellectual disability Grades R to 5 in terms of the National Education Policy Act 27 of 1996. GN587 GG41704/15-6-2018.

Draft Code Series 400 of 2018 in terms of the Broad-based Black Economic Empowerment Act 53 of 2003. GenN344 GG41709/15-6-2018.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R633 GG41723/22-6-2018.

Draft National Inland Fisheries Policy. GN614 GG41722/22-6-2018.

Exposure drafts issued by the Accounting Standards Board for comment. BN87 GG41722/22-6-2018.

Draft Refugees Regulations, 2018 and draft rules of the Standing Committee for Refugee Affairs in terms of the Refugees Act 130 of 1998. GN644 GG41738/29-6-2018.



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Dual claims under the Employment Equity Act and the Labour Relations Act

In *Simmadari v ABSA Bank Ltd* [2018] 7 BLLR 710 (LC), the applicant referred two claims to the Labour Court – an unfair discrimination claim in terms of the Employment Equity Act 55 of 1998 (EEA),

and an automatically unfair dismissal claim in terms of the Labour Relations Act 66 of 1995 (LRA). These claims were subsequently consolidated.

The respondent raised a point *in limine* alleging that the applicant sought relief for an unfair dismissal and not relief for alleged unfair discrimination and that the claim under the EEA and the claim under the LRA arose from the same facts and constituted the same dispute. Thus, it was alleged that the court did not have jurisdiction to determine the claim under the EEA. The respondent raised this point *in limine* on the basis

that s 10(1) of the EEA excludes disputes about unfair dismissals. The court found that reference to an unfair dismissal in this section meant an automatically unfair dismissal. It was, therefore, held that disputes about automatically unfair dismissals must be determined under the LRA and not the EEA. This, however, does not preclude an employee from referring two separate claims – one under the EEA and the other under the LRA. Reference was made to cases in which it was held that there is no bar to claiming compensation for both an automatically unfair dismissal and unfair discrimina-

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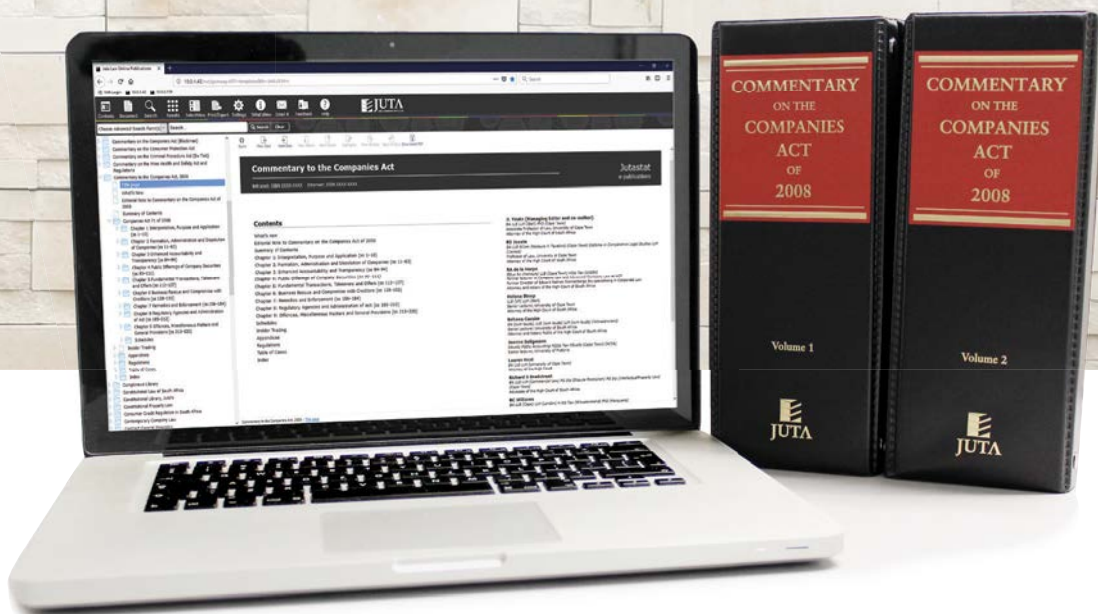
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tion. In this case the applicant did not claim damages, but it was held that this did not bar her from claiming compensation under both the EEA and the LRA. The court accordingly dismissed the point *in limine*.

The respondent also raised an exception that the applicant's statement of claim in both referrals did not disclose a valid cause of action. It was held by Steenkamp J that the pleaded unfair discrimination claim should fail for the following reasons:

- The applicant did not identify a comparator, but merely alleged that there was differentiation on grounds of race.
- The applicant failed to satisfy the element of causation, namely, she failed to establish that there was a link between her race and the alleged disparate treatment.

Thus, the exception was upheld on the basis that the applicant's claim under the EEA did not disclose a valid cause of action.

As regards the automatically unfair dismissal claim, the applicant was required to show that the automatically unfair reason was the factual and legal cause of the dismissal, which she failed to do. It was held that she had not established that she was dismissed on the grounds of race rather than misconduct and as such the exception in relation to this claim was also upheld. The applicant's claims were accordingly dismissed with costs.

Dismissal for hate speech

In *Dagane v Safety and Security Sectoral Bargaining Council and Others* [2018] 7 BLLR 669 (LC), the applicant was employed as a police officer and posted a comment on Facebook in which he threatened genocide against white people. A newspaper reporter saw the applicant's comments on Facebook and published an article stating that a member of the South African Police Service (SAPS) had made such comments. The SAPS then received a complaint from the Parliamentary Portfolio Committee and conducted an investigation. The applicant was subsequently charged with four counts of misconduct, including –

- prejudicing the discipline and efficiency of SAPS and contravening the SAPS regulations, Code of Conduct and Code of Ethics by unfairly and openly dis-

criminating against others on the basis of race;

- making blatantly discriminatory racial remarks;
- threatening the future safety and security of white persons; and
- making remarks on Facebook, which amounted to hate speech.

The applicant was dismissed and referred an unfair dismissal claim to the bargaining council. The arbitrator found that the dismissal was fair and the employee then instituted review proceedings in the Labour Court (LC), but filed the record nearly two years later.

The LC, per Steenkamp J, nevertheless condoned the late filing of the record on the basis that the applicant had been badly served by two firms of attorneys and it would not be in the interests of justice to deny him a hearing at this stage. The LC was required to consider whether the arbitrator's finding that the dismissal was procedurally and substantively fair was a conclusion that a reasonable decision maker could make.

As regards procedural fairness, at the end of the arbitration the applicant had challenged the procedural fairness of his dismissal alleging that the charge sheet was inadequate as it did not set out the date, time and place where the misconduct occurred. The arbitrator found that the applicant had been given an opportunity to state his case and there had been substantial compliance with following a fair procedure. Furthermore, the arbitrator was satisfied that the applicant understood the nature of the alleged misconduct and was able to respond to these allegations. Steenkamp J found that the review on the ground of procedural unfairness must fail as the failure to include precise details in a charge sheet does not in itself constitute procedural unfairness as an employer is not required to draft charges in the same detail required in criminal indictments. The employee is simply required to understand the nature and import of the charges.

As regards substantive fairness, Steenkamp J found that the arbitrator reached a conclusion that a reasonable arbitrator could make. In this regard, she applied her mind to the evidence before her and found that there was a rule in the workplace that governed the conduct of members of SAPS and outlawed discrimination on the basis of race. As re-

gards the applicant's version that there was no social media policy in place at the workplace, the arbitrator found that it is common sense that people must exercise caution when making utterances on social media as this is in the public domain.

The arbitrator then went on to consider whether the rule had been breached by the applicant. In doing so, she considered print-outs of the Facebook postings and comments. The applicant alleged that this was inadmissible hearsay evidence. The arbitrator found that while it was hearsay evidence, she nevertheless had the discretion to admit the hearsay evidence if it was in the interests of justice to do so, which she was satisfied that it was. Steenkamp J found that the arbitrator did not commit an irregularity by admitting this evidence.

The applicant further alleged that he did not make the comments and alleged that someone had either created an account using his details or had hacked into his account and made the postings. The arbitrator tested the applicant's version against SAPS' version in relation to inherent probabilities, reliability and credibility and found that the applicant's version that someone had created another account was improbable. As regards the version that the Facebook account had been hacked, the arbitrator found that this was also not probable as the applicant had not distanced himself from making the remarks. Furthermore, he had not taken steps to investigate and provide proof that his account had in fact been hacked. The arbitrator accordingly found that on a balance of probabilities the applicant was the author of the remarks and had posted them.

The arbitrator also considered whether dismissal was an appropriate sanction. She found that it was an appropriate sanction as the applicant's conduct had brought SAPS into disrepute. Furthermore, the applicant was employed as a police officer with a mandate to protect all citizens irrespective of race. Steenkamp J concluded that dismissal was a fair sanction as the applicant not only used disgraceful and racist language constituting hate speech but did so in the capacity of a police officer and on a public forum, which is accessible to thousands of Facebook users. The review application was accordingly dismissed with costs.



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Inconsistency – not determinative in establishing unfair dismissal

Assmang (Pty) Ltd t/a Khumani Mine v Commission for Conciliation, Mediation and Arbitration and Others (CC) (unreported case no JR2416/15, 24-5-2018) (Lagrange J)

There seemingly is a prevailing misconception among practitioners and arbitrators that a decisive factor in assessing the fairness of a dismissal is that of consistency.

Once an employer is shown to have acted inconsistently by dismissing one employee, while not another who committed the same or similar misconduct, the prevalent view is that it automatically follows that the employee's dismissal is substantively unfair.

The case in question brings to light the correct approach in addressing the parity principle.

The third respondent employee was employed by the applicant, in accordance with the Mine Health and Safety Act 29 of 1996, as a drill dig supervisor. His position placed a statutory obligation on him to adhere to and enforce a number of safety regulations.

On a particular day the employee was observed leading a large number of workers, on foot, across a bridge, which was designated for vehicles only and as such, in breach of a particular safety regulation.

Pursuant to his conduct the employee was dismissed whereafter his trade union, the fourth respondent, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At arbitration the employee raised the argument of consistency. It was common cause that none of the employees who followed the employee across the bridge, were identified by the employee or the employer and hence not charged for the

same breach of the safety regulations. It was also accepted that had such employees been identified, they would have been subjected to the same disciplinary process.

In finding the dismissal substantively unfair, the arbitrator held:

'Somerset [the third respondent's SHEQ officer] had singled out the applicant because, according to his testimony, he was the supervisor of the crew ... on that day. It is inexplicable how when safety is [the] responsibility of everyone that the applicant could be found to have committed a [more] serious offence than the other employees. It is also inexplicable how the applicant could be singled out when [the] safety transgression does not discriminate depending on the levels of seniority. It boggles my mind that when this offence is considered to be so serious as to ... lead to dismissal that other discretions of the same offence were left out without being disciplined.

...

The respondent has failed to bring disciplinary action against the other employees [that] walked over the bridge. It therefore denied itself an opportunity to determine [whether] the merits of the cases of the ... other transgressors would have been the same or different and justifies [the] action against the applicant *vis-à-vis* the other cases merits. Had it taken action against the other transgressors it would have been able to distinguish the merits of the applicants' case to those of others.'

Having concluded that the trust between the parties had not broken down, the arbitrator awarded the employee reinstatement.

On review the employer relied on the following two grounds to set aside the award –

- the arbitrator failed to consider the fact that the employee's position placed a statutory obligation on him to adhere to and ensure his subordinates adhere to safety regulations; and
- reinstatement was not an appropriate remedy.

Referring to a Labour Appeal Court judgment, Lagrange J held:

'In a more recent restatement of the role of inconsistency in substantive fairness the LAC [had] this to say ... :

Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. *However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the*

past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they will not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each ... case will be treated on the basis of its own facts and circumstances' (my italics).

Following this quote, the court held:

'The arbitrator in this case clearly did consider the issue of consistency to be dispositive of the issue of substantive fairness. It is perhaps this underlying misconception coupled with his single-minded focus on the failure to initiate disciplinary action against the members of the third respondent's team which resulted in the arbitrator failing to address important factors which did distinguish why it was justified in dismissing the third respondent, even if it should not have simply failed to make an effort to also charge his subordinates.'

Although the court held that the arbitrator could not be faulted for finding that safety was an issue all employees were obligated to observe, the distinguishing factor between the employee and his subordinates, which the arbitrator failed to consider, was the position of seniority the employee occupied – which position carried a greater degree of responsibility as set out in statutory regulations.

In addition, even though the court found that the arbitrator's finding, that the employer ought to have identified and disciplined the employee's subordinates, was less open to criticism, it nevertheless held

'that could not on any ground be dispositive of the question of the fairness of the third respondent's dismissal. At best, such selective initiation of disciplinary action might have provided a basis for a finding of a degree of inconsistency in the application of disciplinary action. What the arbitrator did was to collapse the distinction between a finding of selective initiation of disciplinary proceedings with the entire question of whether the third respondent's dismissal in any event was warranted.'

The award was set aside and replaced with a finding that the employee's dismissal was substantively fair. There was 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>Advocate</i>	Advocate	General Council of the Bar of South Africa	(2018) 31.1
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) 21 May
<i>SJ</i>	Speculum Juris	University of Fort Hare, Faculty of Law	(2017) 31.1
<i>SLR</i>	Stellenbosch Law Review	Juta	(2017) 28.3

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RISKALERT

AUGUST 2018 NO 4/2018

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RISK MANAGEMENT COLUMN

CYBERCRIME CLAIMS – GROSS NEGLIGENCE OR A RECKLESS FAILURE TO HEED THE WARNINGS?

It is widely lamented that, unfortunately, some members of the legal profession do not read the documents that they are meant to. Regrettably, this also appears to be true of risk management information published for the benefit of the profession. This has a damaging effect on the reputation of the practitioners concerned and the legal profession as a whole. Those members of the profession who take time to read risk management information and heed the warnings published are lauded for their conduct.

Since 2010, the AIIF has regularly published warnings to the profession on the risks associated with cybercrime and cyber scams. These warnings have, *inter alia*, been published in the following editions of the *Bulletin*:

- August 2010 (pages 1 and 8)
- May 2012 (page 3)
- August 2012 (page 1)
- February 2013 (page 1)
- May 2013 (page 3)
- November 2014 (page 5)
- July 2015 (page 1)
- August 2015 (page 1)
- November 2015 (page 1)



Thomas Harban,
Editor

- February 2016 (pages 1 and 2)
- May 2016 (page 2)
- July 2016 (page 1)
- August 2016 (page 7)
- November 2016 (page 4)
- February 2017 (page 2)
- July 2017 (page 1)

The only topic which has received comparable coverage in the last eight years has been prescription of Road Accident Fund (RAF) claims. Previous editions of the *Bulletin* can be accessed

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RISK MANAGEMENT COLUMN continued...

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Despite the extensive coverage of cyber risk in the *Bulletin* and the general coverage of the risks associated with phishing scams and cybercrime in the wider press, a large number of practitioners are, unfortunately, still falling victim to this risk. In some instances, the same firm has fallen victim to the same scam on more than one occasion.

The frequency with which practitioners are falling victim to cybercrime (and the extent thereof) raise the question whether the underlying problem is one of gross negligence when it comes to the management of cyber risks and funds entrusted to them or simply recklessness on the part of the practitioners concerned. The possibility of collusion between parties involved in the transaction and the perpetrators of the fraud in some instances has also been raised.

The cybercrime exclusion in clause 16(o) of the AIF policy (the policy) came into effect on 1 July 2016. Since that date, we have been notified of over 110 cybercrime related claims with a total value in excess of R70 million. The AIF policy will not respond to these claims as they fall within the exclusion. The firms concerned will have to bear the associated losses themselves if they do not have alternate appropriate insurance cover in place.

Cybercrime is defined in clause IX of the policy as:

“Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one of them. (The device may be the agent, the facilitator or the target of the crime or offence).”

This definition of cybercrime was arrived at after extensive consultation with, *inter alia*, the profession and the wider insurance market. Cover for cybercrime is available in the open insurance market and this risk would more appropriately be insured under such a policy – clause 16 (c) of the AIF policy would thus also apply to cybercrime claims. Cyber risks do not, in the ordinary course, fall within the ambit of professional indemnity policies.

The exclusion of cybercrime in the policy has been upheld after it was disputed by an insured attorney. It will be noted that the wording of clause IX is wide and it will not matter whether the cyber breach occurred in the environment of the legal practice, the estate agent, the beneficiary of the funds or some other party involved in the transaction – the test is whether or not:

- (i) there was a criminal or other offence facilitated by the use of electronic communication or information systems;
- (ii) any device or the internet (or any one thereof) was involved;
- (iii) the device was the agent, the facilitator or the target of the crime or offence.

There does not have to be evidence of hacking for the exclusion to apply. Some practitioners have sought to argue that the cause of the loss was not cybercrime (as they believe that their email system was not hacked) but, on their own submission, was caused by negligence, gross negligence or even recklessness of a member of their staff in being duped by the electronic communication to make the payment. Their argument is thus that clause 16(o) should not apply. Our response to this argument is that as long as the circumstances fall within the definition in clause IX, the exclusion in

clause 16(o) will apply. Hacking is not a prerequisite for the exclusion to apply. Furthermore, even if it is argued (wrongly in our view) that the liability to pay compensation arises out of any purported negligence, gross negligence or even recklessness, the AIF policy will not respond as the policy does not cover any claim for compensation that falls within the exclusions (see clauses IX, 1 and 16) and the fraudulent misrepresentation in the email purporting to change the banking details is:

- (i) a criminal or other offence;
- (ii) the misrepresentation that caused (facilitated) the payment into the fraudulent incorrect account;
- (iii) conveyed by electronic communication (the email system); and
- (iv) conveyed via a device and/or the internet.

It will be noted from our previous publications that many of the cybercrime related claims arise out of circumstances where practitioners and their staff have fallen victim to phishing scams, the most common of which is a fraudulent instruction to a conveyancer to pay funds due to a beneficiary into a different bank account to that on record. The phishing email will emanate from an email address which looks similar to that of the person to whom the funds are due. Hovering with the cursor over the email address will display the real underlying fraudulent email address. The AIF has been notified of at least one instance where the target of the phishing scam was the proceeds of a RAF claim. In another recently notified claim, the guarantee issued by a bank was intercepted and the banking details thereon were changed.

In the February 2017 edition of the *Bulletin*, we suggested some risk mitigation measures that practitioners

RISK MANAGEMENT COLUMN continued...

could consider implementing in their firms in order to guard against this risk. We republish this list with additional comments. Practitioners can:

- (i) **Ensure that adequate risk mitigation/avoidance measures are in place to deal with cyber related risks;**
- (ii) **Make staff aware of the various scams – this is a matter for training of staff;**
- (iii) **Place appropriate insurance cover in place to deal with this risk – cybercrime policies and commercial crime policies for example;**
- (iv) **Properly supervise staff and have a proper system of delegation and checks and balances where changes in banking details can only be authorised by a senior practitioner after having verified all aspects of the instruction to effect the change;**
- (v) **Be aware of spoof/phishing emails – do not click on links to unsecure emails. Do not enter your passwords on any unverified email attachment;**
- (vi) **Ensure that proper FICA verification processes are in place and that the identity and bank account details of all clients are properly verified;**
- (vii) **Contact the clients (using the telephonic details on record) in order to verify any purported change in banking details;**
- (viii) **Insist that changes to payee details can only be done after verification with the party to whom the funds are due and in person at the attorney's office with original documents being provided – it is preferable to have a client complain of the inconvenience of a fastidious attorney rather than have a client**

make a claim against the firm for a loss suffered as a result of cybercrime;

- (ix) **Obtain advice from IT experts on the appropriate security measures to be implemented in order to avoid falling victim to cybercrime; and**
- (x) **Keep up to date with the constantly changing risk environment in the general commercial world.**

It is pleasing to note that a number of firms have taken risk prevention steps such as adding a prominent notification close to their email signatures stating that their banking details have not changed and that any change in their banking details will not be communicated via email.

The payment of funds to incorrect parties also demonstrates a failure to ensure that adequate internal controls are implemented to ensure that trust funds are safeguarded as prescribed by the rules applicable to practitioners. The rules prescribe that practitioners must ensure:

- (i) That the design of the internal controls is adequate to address the identified risks;
- (ii) That the internal controls have been implemented as designed;
- (iii) That the internal controls which have been implemented operate effectively at all times; and
- (iv) That the effective operation of the internal controls is monitored regularly by designated persons in the firm having the appropriate authority.

There are a number of products available in the commercial market which can be used by practitioners to verify the authenticity of bank accounts before making payment. A staff member

at one of commercial banks has indicated that a simple exercise conducted at an automatic teller machine (ATM) can also be used to check the details of the account holder: using a note of a small denomination (say R10), the account details on the email communication are entered as if trying to deposit the R10 through the ATM into that account. Before the completion of the transaction, the ATM will display the name of the account holder and, in this way, the name compared to that of the legitimate beneficiary. The transaction can then be cancelled/abandoned once the details of the account holder have been viewed on the ATM screen and the ATM will return the R10 note. This may seem to be a tedious process, but could save a firm the losses following on the payment of a large amount of funds into an incorrect bank account.

The sale of a property is a significant transaction in the life of any person. The fact that the banking details of a party to whom funds are due would purport, without prior notice, to change close to the date on which the funds are to be paid should, in the ordinary course, itself raise a red flag for any person dealing with the matter. The perpetrators of the scam often attach fraudulent documents purporting to be bank statements to their emails. An examination of these 'bank statements' will show that the 'transactions' listed thereon often do not fit the profile or the geographical location of the beneficiary.

It is hoped that practitioners will heed the warning and take steps to avoid falling victims to cybercrime.

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RISK MANAGEMENT COLUMN continued...

THE IMPORTANT ROLE PLAYED BY SUPPORT STAFF IN MANAGING RISKS

Many professional indemnity claims faced by legal practitioners arise from a failure to develop, implement and adhere to appropriate internal office procedures. Administration is an integral part of every legal practice. Typically, the legal practitioner deals with the matters concerned with the rendering of legal services and the carrying out of clients' mandates and the administration aspects (the so called back-office functions) of the firm are left to administrative or support staff. The legal practitioner may, in addition to dealing with matters on behalf of clients, have other responsibilities such as marketing the firm to existing and potential clients. Administrative functions are, generally, carried out by staff who do not have qualifications in law. There may be those people who find administration to be laborious and tedious and do not see any value therein. Administration, on the face of it, may not be seen as a potential income generating work-stream.

Administration is an important part of the law firm. In some practices the operations of the entity may be headed by a Chief Operations Officer (COO), a Chief Administrative Officer (COA) or even the practice manager. These are senior positions and the key performance areas of the incumbents should include components of risk management. Smaller firms or those who do not have such positions within their structures can still take measures to ensure that the administrative and support staff play an active role in risk management.

Support staff must be trained on their responsibilities in so far as risk management in the firm is concerned. The management of risk is an enterprise wide responsibility and not just a concern for the senior professionals or

management in the firm. A successful practice may be threatened as a result of a breach of an administrative procedure in the firm. The administrative staff in the firm will often be the persons responsible for carrying out the internal controls for the financial functions referred to in previous article.

Have you, for example, considered the risks to your firm in the event that a member of your support staff makes an error? Such potential errors could include:

- A messenger serving or filing a document out of time
- A failure by a member of the secretarial staff to accurately diarise a prescription or some other important date on in respect of a matter
- An error in the payment of trust funds
- The misfiling of important documents
- An error in the typing of a document that is only discovered after signature and an application for rectification is then necessary (at the cost of the firm)

Encourage and empower your support staff to play an active role in risk management and ensure that they are properly trained. Many educational institutions (including LEAD) offer courses aimed at introducing support staff to risk management.

Some of the suggestions for getting support staff into a risk management regime are:

- Encouraging staff to 'manage up'- ensure that support staff are empowered to raise risk management concerns they observe in the work of their seniors and to raise these in a professional manner with the party/parties concerned

- Having a peer review system between a secretary and the practitioner where each is encouraged to review and audit the work of the other
- Implementing a dual diary system between professional and support staff to ensure that nothing 'slips through the cracks'
- Including risk management measures in the minimum operating standards/standard operating procedures of the various administrative functions/processes in the firm and encouraging staff to give their input thereon
- Incentivising the development of innovative risk management measures
- Conducting regular file audits and giving constructive feedback where necessary
- Developing a structured training regime within the firm
- Encouraging the implementation of personal development programmes for support staff
- Implementing a proper segregation of duties in respect of all finance related functions
- Encouraging support staff to attend the various risk management seminars held on various topics related to their functions

It is sometimes said that support staff are the backbone of any legal practice and it is thus crucial that this important function of a firm is adequately empowered to deal with the risks faced by the practice. The risks associated with cybercrime, for example, can be mitigated and even avoided if support staff are properly trained thereon.

Practitioners must thus not underestimate the role support staff can play in managing risks in the firm.

GENERAL MATTERS

***DRAKE: A REDEFINING JUDGEMENT ON BREACH OF MANDATE AND CONTRACTUAL DAMAGES**

By Ayanda Nondwana, partner, and Palesa Letsaba, associate, at Hogan Lovells (South Africa)

In a precedent setting judgment, the Supreme Court of Appeal in *Drake Flemmer & Orsmond Inc & Another v Gajjar NO* [2017] ZASCA 169 (1 December 2017) pronounced on the principles applicable in respect of the assessment of contractual damages arising from the breach of mandate by an attorney.

In this matter, the court had to determine the date damages against the attorneys for professional negligence should be assessed.

The facts of the case

On 2 July 1997, Mr Sutherland (the claimant), later substituted by the *curator ad litem*, was involved in a motor vehicle accident. He sustained a brain injury (not investigated by the firm initially instructed) and fractures of the pelvis and right *femur*.

The claimant instructed Drake Flemmer & Orsmond Inc (DFO) to institute his Road Accident Fund (RAF) claim in order to recover the damages he suffered as a result of the injuries he sustained in the accident. DFO had only referred the claimant to an orthopaedic surgeon.

On 21 December 1999, on the instruction of the claimant, DFO accepted the RAF's offer of settlement in the sum of R98, 334 (inclusive of general damages and medical expenses) and an undertaking for future medical expenses. No claim for loss of income was pursued by DFO against the RAF.

On 19 September 2000, the claimant addressed a letter to DFO seeking to review the settlement of his claim with the RAF. DFO advised him that it

was not possible to do so. At the time, the claimant's complications resulting from the head injury had worsened and he had struggled to retain jobs and attempts to pursue a business venture had failed dismally. Effectively, the claimant was unemployable in the open labour market due to the consequences of the head injury he had sustained.

In July 2001, the claimant terminated the mandate of DFO and instructed Le Roux Inc (LRI) to pursue a claim against DFO for under-settling his RAF claim. On 25 April 2002, LRI assessed that the claimant's claim with the RAF had been under-settled.

On 21 April 2005, LRI, on behalf of the claimant, served summons in an action against DFO for the recovery of damages flowing from the under-settlement of the RAF claim. However, at the time of institution of the legal proceedings against DFO by LRI, the claim had prescribed due to the incorrect computation of the commencement date of prescription by LRI.

On 18 November 2011, LRI informed the claimant that on the advice of new counsel, as his claim against DFO for professional negligence had prescribed in their hands, they would withdraw as attorneys of record.

From April 2005 to November 2011 LRI had represented the claimant inadequately until its realisation that the claim against DFO had prescribed, despite having knowledge of this allegation in DFO's plea in June 2005.

The matter went on trial in November 2015 and both DFO and LRI conceded liability. The only remaining issue to be decided by the court *a quo* was the damages the claimant would have been entitled to, had his claim against

the RAF been properly prosecuted. For that purpose, the claimant's claim was actuarially valued as at 1 December 2015. The court *a quo* substantially accepted the claimant's quantification of his damages but reduced it by 43,69 % because of a supposed delay of about seven years by the claimant in suing LRI. This effectively resulted in a valuation date of September 2009. The court of first instance, in awarding compensation to the claimant, deducted from the reduced sum the actual settlement, grossed up to its September 2009 value, and awarded the claimant the difference.

On appeal, DFO and LRI contended that the claimant's claim should have been valued at the date of settlement (1999) or at the date of a notional trial against the RAF, and that for this reason, his claim should have been dismissed.

At the outset and having regard to the circumstances of the matter, the court observed that the underlying issues for determination were (i) applicable law; (ii) the permissible evidence; and (iii) the time-value of money.

Having considered the applicable issues at length, the SCA summarised its findings as follows (paragraph 88 of the judgement):

"...[W]here an attorney's negligence results in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney must assess the amount the client would probably have recovered at the time of the notional trial against the original debtor. Where the original claim is one for personal injuries, the evidence available and the law applicable at the notional trial date would determine

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the recoverable amount. The nominal amount in rands which the client would have recovered against the original debtor represents the client's capital damages against the negligent attorney. If justice requires that the client be compensated for the decrease in the buying power of money in the period between the notional trial date and the date of demand or summons against the attorney, the remedy lies in s 2A(5) of the Interest Act. If s 2A(5) were invoked, the court would not necessarily apply the prescribed rate but might choose instead to adopt a rate which would neutralise the effect of inflation. A similar approach applies where, as in the present case, a second

attorney has allowed the claim against the first attorney to prescribe."

This judgment has far-reaching implications for attorneys in general and for practitioners specialising in the pursuit of professional indemnity claims, in particular, following the mishandling of personal injury matters.

The court closed by sounding the warning bells and remarked that the circumstances of this matter were exceptional and that this case should not be used as a licence by claimants in future cases to approach matters as the plaintiff did. The writers hold a different view, with respect. The circumstances of this matter are not

unique at all but are quite prevalent. Invariably, in trying to accommodate the claimant in this matter, the court has, effectively, redefined the law in terms of assessment of contractual damages arising from personal injury claims.

Attorneys, you are forewarned and it definitively cannot be business as usual.

*This article was first published in the Hogan Lovells Insurance Newsflash on 19 April 2018 <https://www.hoganlovells.com/en/publications/drake-a-redefining-judgment-on-breach-of-mandate-and-contractual-damages> (accessed on 22 June 2018)

'HIT AND RUN' RAF CLAIMS: IS THE TWO YEAR PRESCRIPTION PERIOD CONSTITUTIONAL?

The February 2017 edition of the *Bulletin* included an article by Jonathan Kaiser analysing some conflicting decisions in respect of the prescription of RAF claims. RAF related claims continue to make up the largest claim type both in terms of the number and the value of claims notified to the AIIF. An analysis of the claims notified indicates that a large number arise from circumstances where the RAF has relied on the two-year prescription period in claims arising out of circumstances where neither the driver nor the owner of the vehicle is identified (so called 'hit and run' cases). We encourage practitioners to challenge the two-year prescription period raised by the RAF in this respect and to report such matters to the AIIF as soon as possible so that we can, where

necessary and appropriate, assist the practitioners with such a challenge.

In these matters, the RAF relies on Regulation 2(1)(b) of the regulations promulgated under the Road Accident Fund Act 56 of 1996. Regulation 2 (1) (b) provides that:

"A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity if neither the owner nor the driver thereof has been established, shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose, unless a claim has been lodged in terms of paragraph (a)"

Regulation 2(2) prescribes a two-year

prescription period irrespective of any legal disability to which the claimant concerned may be subject.

The AIIF's contention is this regard is that:

- (i) Regulation 2(1)(b) read with Regulation 2(2), in imposing the two-year prescription period, unfairly discriminates between plaintiffs with legal disability injured in accidents where neither the driver nor the owner is identified as opposed to those in claims where the driver and/or the owner is identified;
- (ii) In cases where the driver or the owner is identified, in a claim for compensation in terms of section 23(1) of the RAF Act, prescription will not run against a claimant with some or other legal disability;

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- (iii) The distinction between the two classes of claimant may be arbitrary and injudicious;
- (iv) This discrimination is unconstitutional and infringes the rights of the claimants concerned to equality as enshrined on section 9 of the Constitution;
- (v) The regulations also infringe on the rights of the claimants concerned to approach a court of law as enshrined in section 34 of the Constitution;
- (vi) The powers of the Minister of Transport in terms of section 17(1)(b) and section 26 of the RAF Act to make regulations do not expressly provide the power to impose prescriptive periods where the owner or the driver is not identified;
- (vii) Section 16 of the Prescription Act 68 of 1969 provides that the

provisions of that Act shall apply to all debts, unless ousted by the provisions of an Act of Parliament which is inconsistent therewith and only to the extent of such inconsistency. The offending Regulations do not have the status of an Act of Parliament and thus do not meet the requirements of the exception in section 16 of the Prescription Act; and

- (viii) The offending Regulations may be *ultra vires* the Minister's powers in terms of the RAF Act.

We have studied a number of judgments where the courts have considered the prescription issue, including:

- *Moloi and Others v RAF* 2001 (3) SA 546 (C)
- *Geldenhuys & Joubert v Van Wyk and Others: Van Wyk v Geldenhuys & Joubert & Another* 2005

(2) SA 512 (SCA)

- *Engelbrecht v RAF* 2007 (6) SA 96 (CC)

The article by Jonathan Kaiser analyses the relevant cases in-depth.

It is important that practitioners notify us of appropriate cases as soon as possible. In this way, the AIIF will be in a position to timeously assist practitioners with the drafting of a replication to the special plea of prescription raised by the RAF on the basis of the offending Regulations.

This is a matter that has important implications for all stakeholders, including the claimants concerned, their attorneys and the AIIF. We look to the profession to assist us in curtailing the resultant hardship faced by the claimants who have been deprived of their rights of action by the RAF in raising prescription in these matters.

PROFESSIONAL INDEMNITY CLAIMS AGAINST ATTORNEYS: DO NOT CITE THE AIIF

In bringing a professional indemnity claim against an attorney the cause of action is usually framed in contract in that the attorney concerned is alleged to have breached a material term of the mandate granted by the plaintiff, resulting in the latter suffering a loss. The parties to the agreement (mandate) will be the plaintiff and the attorney concerned. The plaintiff will contend that as a result of such breach, damages have been suffered and the attorney is then called upon to compensate the plaintiff for such damages allegedly suffered. In some cases the claim is framed in delict in the alternative. It thus seems

clear that the plaintiff's claim, whether framed in contract or delict, is against the practitioner/firm concerned who/which should be cited as a defendant in the matter. However, some attorneys acting for plaintiffs in professional indemnity claims appear not to understand the applicable legal principles.

In recent times, there have been an increasing number of claims where the AIIF as an entity is cited as a defendant in the professional indemnity claims brought against practitioners though, in all the cases concerned, no cause of action is made out against the company. In many of these cases

the prayer in the papers does not indicate against which of the parties (the AIIF or the firm being sued) damages are claimed.

Practitioners acting for plaintiffs should ask themselves: is there any basis in law in terms of which it can be alleged that the AIIF as entity, with no *nexus* (legal or otherwise) to the plaintiff, is liable to the latter for the alleged damages suffered? On what basis can the action be instituted against the AIIF when there is no allegation that the entity (by act or omission) caused the damages allegedly suffered by the plaintiff?

GENERAL MATTERS continued...

One of the considerations practitioners need to apply their minds to in taking an instruction to act in any litigation on behalf of a plaintiff is who the parties to the litigation are and what the cause of action is. When suing a legal practitioner for an alleged breach of contract, the action will be against the legal practitioner concerned. The AIIF is not a party to that contract (mandate) and thus cannot, in law, be a defendant in any action brought against the practitioner. The AIIF cannot breach a contract to which it was not a party and thus had no obligations.

The contractual relationship (mandate) between the client and the attorney must be distinguished from that between the AIIF and insured attorneys. The two contractual relationships are separate and independent of each other.

The AIIF policy regulates the insurance relationship between the company (as insurer) and the legal practitioner against whom the claim is made (as insured). The third party (the plaintiff) is not a party to this insurance relationship and cannot seek to enforce any rights in terms of the AIIF policy. The *res acta inter alios* maxim will apply as the plaintiff is not a party to the insurance relationship. Practitioners acting for plaintiffs should ask themselves whether, in a case involving a claim for damages to a vehicle in an accident (a so-called crash and bash claim), the driver and/or owner of the vehicle alleged to have caused the damage is sued or the insurer? The same would apply in a claim pursued for damages arising out of any breach of contract claim- action would be instituted against the party alleged to be in breach and not against the insurer of the party concerned. Similarly, a professional indemnity claim must be instituted against the legal practitioner concerned and not against the AIIF. The only circumstances where action can be pursued against an insurer directly are those where section 156 of the Insolvency Act 24 of 1936 is applicable.

The AIIF policy does not give any

rights to a third party (such as a plaintiff). Clause 39 of the policy makes this clear. The only right which can be claimed in terms of the AIIF policy is the right to indemnity provided thereunder and only an insured practitioner (as defined in the policy) can claim such indemnity.

This matter has been communicated to practitioners on numerous occasions, yet there are those attorneys acting for plaintiffs who persist in citing the AIIF as a party in circumstances where it is clear on the facts and the law that the claim lies against a practitioner and not against the insurance company. Such matters result in a waste of resources in that the AIIF has to expend time and funds in defending the matters. The AIIF will seek punitive costs orders against all plaintiff's attorneys who cite the company as a defendant in circumstances where it should not be cited. Some of the reasons given by the plaintiff's attorneys for citing the AIIF in these cases are:

- (i) **A lack of knowledge of what the AIIF is and how it works-** attorneys should not be acting in matters where they have no knowledge of the law applicable and who the defendant(s) should be. It is dangerous to pursue a defendant when you do not know who/ what the defendant is, the basis on which it provides indemnity and to whom such indemnity is provided. The attorneys concerned are thus pursuing matters where they do not have the relevant basic knowledge to pursue the mandate from their clients and thus placing themselves and their clients' interests at risk;
- (ii) **Rather than pursue a colleague (the attorney alleged to have been negligent) a decision is taken to pursue the insurer as that is the more likely line of recovery** – in addition to there being no basis in law for such causes of action, they smack of underlying collusion and will be reported to the law society

having jurisdiction. The AIIF will not entertain claims where cover is not triggered under the policy by an insured against whom a claim is made by reporting a matter and complying with the policy conditions. We have noted those matters where, after the AIIF has disputed or repudiated a claim, the underlying litigation is then not pursued against the law firm allegedly liable to the plaintiff;

- (iii) **With claims against the Attorneys Fidelity Fund, that entity is cited** – the Attorneys Fidelity Fund and the AIIF deal with different and separate risks. The attorneys who raise this argument, with respect, fail to understand the basis of the liability of the respective entities and the indemnity each provides. **The Attorneys Fidelity Fund (in terms of section 26 of the Attorneys Act 53 of 1979) indemnifies members of the public for losses arising out of the theft of trust funds. The member of the public will thus be the claimant and pursue the claim against the Attorneys Fidelity Fund directly. The AIIF on the other hand, affords professional indemnity cover under the policy (and in terms of sections 40A and 40B of the Attorneys Act) to an insured legal practitioner as defined in the policy. Only the legal practitioner concerned as the counter party to the insurance relationship can thus bring an application for indemnity in terms of the policy in respect of a claim brought by a third party (the plaintiff) against the practitioner.**

We trust that practitioners will desist from citing the AIIF as a party in litigation where there is no basis in law for doing so. Remember that you also run the risk of an adverse costs order being made against you, your client's claim being delayed (and possibly prescribing) while you pursue the litigation against the AIIF as the incorrect party.