

RETIREMENT BENEFIT PAYMENTS USED FOR CHILD MAINTENANCE

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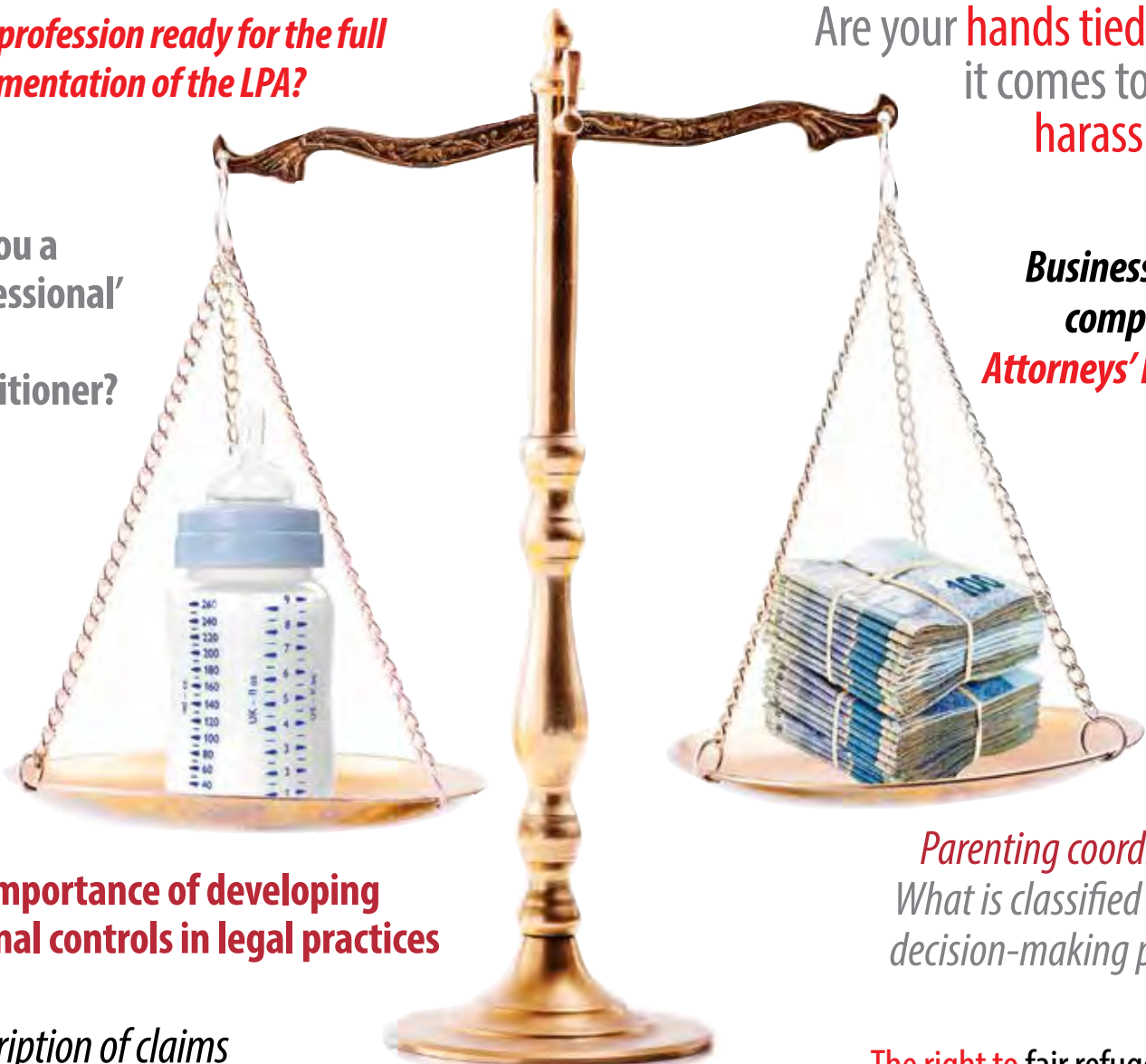
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The new *Commentary on the Companies Act* incorporates comprehensive commentary on the Companies Act 71 of 2008, including the 2011 amendments and the Companies Regulations, 2011. Published online and in loose-leaf format, the commentary is regularly updated to reflect legislative changes and new case law. Abundant references to South African and foreign case and statute law, as well as legal literature, are contained in the footnotes. Also available online together with an archive version of the previous edition, *Blackman: Commentary on the Companies Act of 1973*.



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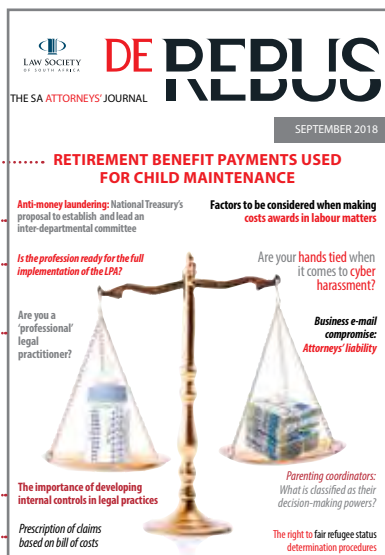


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20 Retirement benefit payments used for child maintenance



Child maintenance is a common law duty entrusted on each parent in line with their relative means and circumstances and the needs of the child from time to time. This duty does not terminate when the child reaches a particular age, but continues after majority. This article, written by **Clement Marumoagae**, discusses the circumstances under which the duty to maintain the child may be discharged through payments from retirement benefits and in particular, payment of future child maintenance.

22 Are your hands tied when it comes to cyber harassment?



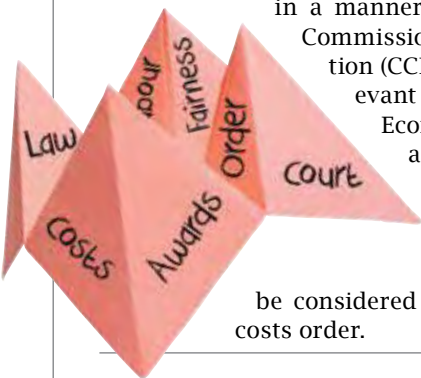
With the dawn of social media and the increased use of digital mediums for communication, a number of unwelcome negativities came along, including 'cyber harassment', a term often used and experienced, but yet to be defined in South African and international law. **Amanda Manyame** writes that it is an umbrella term that describes conduct that is harassing in nature, facilitated by or involving the use of electronic means of communication. Ms Manyame asks: If you think or know you are being cyber harassed, what legal recourse, if any, do you have?

24 Anti-money laundering: National Treasury's proposal to establish and lead an inter-departmental committee

The Financial Action Task Force is an inter-governmental body that sets policies to counter money laundering and terrorist financing. It implores its member countries to strive towards effective anti-money laundering and counter terrorism financing regimes, which are highly motivated to realise a set 'high level' objective. In this article, **Nkateko Nkhwashi** will discuss the immediate outcome for 'risk, policy and coordination' and clarify some of the noted misconceptions surrounding various developments regarding SA's anti-money laundering and counter terrorism financing regime, especially the recently proposed inter-departmental forum on anti-money laundering and the combating the financing of terrorism committee.

27 Factors to be considered when making costs awards in labour matters

In this article **Deon Mouton** discusses the Labour Relations Act 66 of 1995 (LRA), which states that a commissioner may make a costs order in accordance with the requirements of law and fairness, in a manner conforming with the rules made by the Commission for Conciliation, Mediation and Arbitration (CCMA) and having taken into account any relevant Code of Good Practice issued by National Economic Development and Labour Council and guidelines issued by the CCMA. Mr Mouton discusses that the Labour Court may make a costs order according to the requirements of the law and fairness and s 162(2) of the LRA sets out the factors to be considered when deciding whether or not to grant a costs order.



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Is the profession ready for the full implementation of the LPA?

Once the Legal Practice Council (LPC) takes over the regulation of the legal profession later this year – when the Legal Practice Act 28 of 2014 (LPA) is fully implemented – various aspects of legal practice will be affected:

- The legal profession will no longer regulate itself. The four statutory law societies will be replaced by a single unified statutory LPC, accountable to the Minister of Justice and Constitutional Development. The LPC will regulate the affairs of all legal practitioners, candidate legal practitioners and juristic entities.

- The LPC will establish nine provincial councils, which will have delegated functions.

- The regulatory functions of the Advocates' Bar Councils and Associations (training, examination and disciplinary functions) will be transferred to the LPC.

- Although the attorneys and advocates who will serve on the LPC and provincial councils will be elected by practising attorneys and advocates, the promotion of the interests of legal practitioners will not be an object of the LPC. The constituent members of the Law Society of South Africa (LSSA) (a voluntary organisation, which will not be abolished by the LPA) have agreed that the LSSA should provisionally continue to exist to carry on with its professional interest functions, including the operations of the Legal Education and Development (LEAD) division, *De Rebus*, communication and its specialist committees. Practitioners should support the LSSA as their professional interest organisation.

- Effective and transparent procedures for the resolution of complaints against practitioners will be implemented. Lay persons will sit on disciplinary committees, which will be open to the public and the media and will be subject to the oversight of the Legal Services Ombud. The outcomes of disciplinary proceedings will be published on the LPC's website.

- Advocates will be able to accept briefs directly from the public, provided that they have trust accounts.

- The Attorneys Fidelity Fund will become the Legal Practitioners' Fidelity Fund, which will have the power to

inspect trust practitioners' books of account, apply for striking and suspension of transgressors and to levy contributions.

- Maximum fee tariffs are due to be prescribed for litigious and non-litigious work, initially by the Rules Board for Courts of Law and later by the minister in the Regulations.

- It will be compulsory for attorneys and trust account advocates to provide clients with fee estimate notices when taking instructions.

- Continued practice development (CPD) and community service will become compulsory.

- The LPC will prescribe minimum salaries for candidate legal practitioners.

- Pupils will have the right of appearance similar to that of candidate attorneys and will be able to charge fees.

It is of the utmost importance that all legal practitioners familiarise themselves with the objectives and provisions of the LPA, the Regulations, Rules and Code of Conduct, in order to re-align their practices with the new requirements and opportunities. All these documents, including specimen fee estimate notices, can be accessed under the 'Legal Practice Act' tab on the LSSA website at www.LSSA.org.za.

The National Forum on the Legal Profession (NF), established in terms of ch 10 of the LPA as a transitional body to oversee the transformation of the governing structures of the attorneys' and advocates' branches of the legal profession into the new LPC, has completed most of its work. The NF and statutory law societies are still attending to practical transitional arrangements to be put in place before the effective date of transfer, which was intended for 31 October. This may be delayed for a month or two, pending the approval of the draft Regulations by Parliament.

Before the existing statutory law societies can be abolished, the new structures must be capable of regulating the legal profession. The transitional arrangements, which are still being finalised, include the transfer of staff, movable and immovable assets, liabilities, finances, databases and regulatory work in progress. The financial and operational (including disciplinary) procedures and systems currently in place at the various law

societies have to be standardised and aligned with the new Rules and Regulations.

As soon as the Regulations are promulgated, ch 2 of the LPA can be implemented, in terms of which the establishment of the LPC can begin and the first election of Council members can be conducted.

The election of the ten attorneys and six advocates to serve on the LPC will be conducted under the supervision of the NF. The election of the legal practitioners to serve on the nine provincial councils is due to be conducted by the LPC. In order to participate in the elections, practising attorneys and advocates should ensure that their contact details are updated at their respective provincial law societies, Bar Councils and associations. Unaffiliated advocates should submit their particulars to the Executive Officer of the NF at CMhlungu@justice.gov.za.

In my view, the profession is ready for the full implementation of the Act, provided that all role-players continue to cooperate as they have been doing until now and problems are dealt with in a constructive manner. If the regulations can be promulgated timeously to enable the NF to conduct the election of the first LPC before the NF ceases to exist on 31 October, the transitional arrangements remaining at that stage can be finalised by the LPC in co-operation with the law societies, Bar Councils and associations.

Jan Stemmett is a member of the National Forum on the Legal Profession.



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THE SA ATTORNEYS' JOURNAL **DE REBUS**

LETTERS

TO THE EDITOR

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Response to Grumpy Attorney

Dear Grumpy Attorney,

I commend you for your honest ramblings. While reading your article ('Ramblings of a Grumpy Attorney' 2018 (July) DR 52) I frequently yelled out 'Yes! Thank you' in the office, to the astonishment of my colleagues.

The truth, the brutal truth, rang strong within my very fibre and, as I was reading, I had flashbacks to some tumultuous first hand experiences that I have endured.

My greatest concern, and one that I felt you neglected to address, was the clerks of the courts. Gone are the days when legal practitioners were feared, admired, respected and idolised. We have been reduced to squabbling, begging commoners baying for the approval of the clerk behind the desk and their stamp of approval (literally and figuratively).

Your knowledge and hard work no longer allows you to be more successful in this industry, but rather your ability to grovel before the clerks.

I have been informed that my urgent matter will not be issued as they cannot deal with every urgent matter and that, to a legal practitioner, every matter is urgent. My matter was about to prescribe. I had to beg until my knees had scabs before the clerks decided they would help.

But since there are no consequences for the clerks if they do not do their jobs effectively, why would they?

I thank you for your honesty as it made me feel less alone in this exciting

and yet very frustrating profession that we so greatly love. This profession is much the same as teenagers. You never know where you stand with them, but you love them anyway.

Grovelling candidate attorney,
Cape Town

Long march towards an ubuntu approach to conflict resolution and reconciliation

How far is an employer expected to go towards embracing individual cultural norms and traditions in a culturally diverse workplace? Would the practice of those cultural norms strip the employer of its powers to manage discipline?

Permit me to expand on this – by way of an actual occurrence – where the dismissal of an applicant in a case before the Commission for Conciliation, Mediation and Arbitration (CCMA) was held to be unfair for assault on a fellow employee outside the workplace. What transpired was that after the assault the complainant was hospitalised and while he was recuperating there, a delegation (including the dismissed employee) visited him with the purpose to apologise and make peace and pay a token amount as a sign of genuine contriteness. This was in accordance with the African cultural norm and tradition regarding conflict resolution.

A follow-up visit to the complainant's rooms in the hostel continued negotiations as to the amount. Fast forward to the matter being reported to the em-

ployer, which resulted in a dismissal and subsequent reinstatement order in the CCMA. Even though, it was held that employers may not be bound by cultural traditions, they cannot simply ignore the reality of their existence, especially where the cultural norms and traditions are aimed at achieving social good and are not in conflict with the Constitution. Where, the perpetrator of the misconduct showed genuine remorse and initiated the process to make amends through cultural norms and traditions, the employer would be expected to consider same earnestly in a good light. This was held, albeit *obiter* as opposed to *ratio decidendi* by Nkutha-Nkontwana J in *Harmony Goldmine Company Limited v Raffee NO and Others* (LC) (unreported case no JR1205/15, 8-5-2018) (Nkutha-Nkontwana J).

The judge held (at para 17) that Harmony Gold seriously misconstrued the African tradition of peace-making, by choosing to pursue individual members of that delegation whose conduct was perceived as tantamount to defeating the ends of justice through bribery and corruption. Dr Timothy Murithi in 'Practical Peacemaking - wisdom from Africa: Reflections on Ubuntu' (2006) 1 *The Journal of Pan African Studies* 25 remarked that: 'Ubuntu societies maintained conflict resolution and reconciliation mechanisms, which also served as institutions for maintaining law and order within society'.

Saber Ahmed Jazbhay,
attorney, Durban



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New International Arbitration Act a start of a new era for South Africa

Werksmans Attorneys hosted a seminar on arbitration in Johannesburg on 14 June. Senior Counsel at the Johannesburg Bar, Patrick Lane said it was the dawn of a new era for South Africa (SA). He pointed out that it took SA 24 years to modernise arbitration laws. He noted that for many years the domestic courts felt that arbitration was a privatisation of law for a small minority. However, he added that through the Southern African Development Community (SADC) and international pressure there has been a realisation that the world requires neutrality in relation to cross-border disputes.

Mr Lane said the significance of the International Arbitration Act 15 of 2017 (the new Act), is that it adopts the Uncitral Model Law on International Commercial Arbitration with a few minor variations. He added that the new Act coming into effect in SA, has positioned SA as a primary seat for arbitration. He pointed out that the Uncitral Model Law came into existence in 1985 and was guided by the General Assembly of the United Nations. It was likely to lead to a realistic degree of harmonisation in practice, as its policy was one of liberalisation of the international arbitration, with unlimited interference by national courts and emphasising the consensual nature of arbitration, removing the courts as far as possible from intervention.

Mr Lane said arbitration was set out to establish a call for mandatory divisions to ensure fairness, due process and the creation of a framework to conduct international arbitrations and to clarify certain issues. He added that the objectives of the new Act facilitate the use of arbitration as a method of resolving international dispute. However, he noted that the Arbitration Act 42 of 1965 (the 1965 Act) remained enforced in as far as domestic disputes are concerned. The Acts will run parallel for the time being and Mr Lane pointed out that the Uncitral definition that constitutes an 'international dispute' has been adopted in the new Act. He added that another ob-

jective of the new Act was that it adopted the model law to use for international commercial dispute and facilitates the recognition and enforcement of certain arbitration agreements and arbitral awards. He pointed out that the new Act has given effective obligations, under the convention on the recognition and enforcement of foreign arbitral awards.

Investments dispute

Director at Werksmans Attorneys, Pierre Burger, said as a rule there cannot be arbitration proceedings without an arbitration agreement. However, he added that the exception to the rule is the Investor-State Dispute Settlement (ISDS), which does not depend on the party to party agreement, but instead depends on a higher-level agreement, namely a state to state agreement. He pointed out that the two states involved in a dispute must agree that in that event the dispute will be referred to international arbitration. He noted that the state to state agreement is encapsulated in investment treaties.

Mr Burger said such an agreement generally includes protection for the country's respective investors. He noted that the agreements, include -

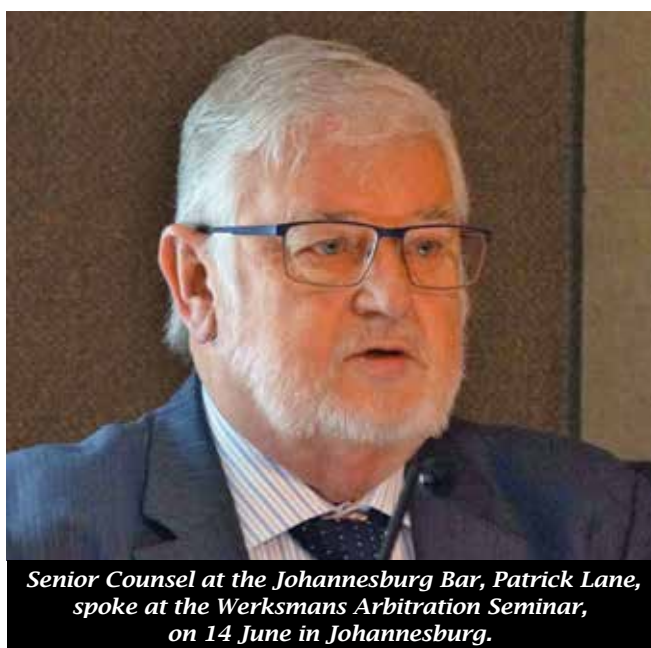
- national treaties, which means an investor gets treated no less favourably than if they were a national in the country, which they have invested in;
- protection from arbiter expropriation;
- security;
- the ability to transfer the proceeds of their investment back to their home state; and
- ISDS by means of arbitration.

He pointed out that investment treaties can take a form of bilateral investment treaties meaning that it is a bilateral agreement between two countries. He added that it can be a form of international treaty or international agreement.

Mr Burger pointed out that there were 153 contracting member states of the International Center for Settlement of Investment Disputes (ICSID), of which SA is not a member state. However, he said many bilateral treaties referred investment disputes to international arbitration under the ICSID. He added that SA has at least three bilateral investment treaties that referred investment disputes to international arbitration under the ICSID. He noted that a state did not have to be a member of the ICSID to take advantage of its facilities.

Mr Burger said in 2009 the South African government announced a review, which was aimed at replacing previous treaties with the model bilateral investment treaties. However, he pointed out that by 2013, SA started terminating bilateral investment treaties. He said ten of the bilateral investment treaties had been terminated, of which nine were from European countries and the most recent one from Argentina. He added that the intention of government was to phase out all bilateral investment treaties and replace them with domestic legislation. Mr Burger pointed out that what the South African government did not take into account was the sunset clauses in the bilateral investment treaties that were terminated, which meant that when government terminated the bilateral investment treaties, they continued to have effect for a lengthy period of time, in some instances up to 20 years.

Mr Burger said if government did not consent to international arbitration after exhausting all domestic remedies, arbitration will be conducted between SA and the home state



Senior Counsel at the Johannesburg Bar, Patrick Lane, spoke at the Werksmans Arbitration Seminar, on 14 June in Johannesburg.



Director at Werksmans Attorneys, Pierre Burger, discussed investment disputes at the Arbitration Seminar.

of an investor. He pointed out that there was also the SADC Protocol on Finance and Investment and it has an investment annex, which gives investors the right to refer a dispute with the SADC states to international arbitration. He added that it extended benefits to investors from non-SADC states.

Arbitration of building and construction disputes

Director and Head of the Construction and Engineering practice at Werksmans Attorneys, Jason Smit, pointed out the standard contracts used in the engineering and construction sector were slowly moving away from arbitration. He added that arbitration was no more efficient and no better in resolving disputes than being in court. He said there was a growing trend in the engineering and construction industry to try and avoid arbitration, as it turned out to be acrimonious, unpleasant and no better in keeping parties working together than being in court. He noted that there were other mechanisms that could be used to avoid arbitration.

Mr Smit, said the engineering and construction sector have started recognising the need to not get involved in formal litigation processes, outside of court and increasingly not in arbitration. He added that there were three standard forms of contracts, that one could pick up and apply to their project, namely -

- the Joint Building Contracts Committee (JBCC);
- the New Engineering Contract (NEC); and
- the International Federation of Consulting Engineers (FIDIC) contract.

He noted that the JBCC was mostly used for local construction of buildings. He pointed out that such contracts utilised a tier of dispute resolution and the idea of pre-arbitration dispute resolution in the engineering and construction sector was to get a rough resolution of the matter, so people can continue building or designing.

Mr Smit said the engineering and construction sector spoke of an idea of rough justice, with the focus of keeping basic ideas under control. He added that there were ways not to end up in NEC arbitration and that there was an introduction of dispute board processes. He pointed out that people did not use the procedure to avoid disputes, but rather used it to position themselves for future disputes. He noted that under the standard form of FIDIC, there was a Dispute Avoidance Board (DAB), in which a party could compel the appointment of a DAB if another party did not want to.

Enforcement of arbitration awards

Director at Werksmans Attorneys, Roger Wakefield, said the new Act was based on the Uncitral Model Law. He added that the model law was an off the shelf template for international arbitration statutes, which states can simply adopt into their own domestic statute law. He pointed out that it has many features and most importantly it gives full effect to the principal of party autonomy. He noted that the principal party autonomy was the freedom for parties to choose how they wanted to resolve disputes. He said the courts in terms of this new Act were obliged to uphold the party's choice.

Mr Wakefield pointed out that the model law was incorporated in the new Act in sch 1 by express reference. He said art 1 of the model law defined what an international arbitration was. He added that international arbitration is when parties - at the time when they entered into an agreement - had their places of business in different countries. He said it was also an international arbitration if parties expressed an agreement, that the subject matter of arbitration agreement related to more than one country.

Mr Wakefield said an important concept in all these matters was the judicial seat of arbitration. He added that under art 20, parties are free to choose where the judicial seat of arbitration will be and if parties fail to agree the tribunal is empowered to determine where the seat should be. However, he pointed out that nothing prevents parties from choosing a venue that is different from the judicial seat. He said that prior to the commencement of the new Act, the 1965 Act, was inadequate to deal with international disputes, which naturally had a cross-border aspect.

Mr Wakefield said none of those aspects were catered for under the existing 1965 Act, which still applies to domestic arbitration. He added that the powers of the arbitral tribunal under model law, were vast and that the arbitral tribunal had more significant powers than the 1965 Act. He pointed out that the powers of the courts to intervene in the arbitral process have been reduced substantially. He noted that art 16 was important, as it avoids preliminary disputes about whether a dispute was in court or whether a dispute was about the validity of an arbitration agreement. He added that art 16 upholds the principle of what is known in the language of arbitration as 'competence-competence', which is the power of the tribunal to rule on its own jurisdiction, which includes the power to rule on any objections with respect to the existence or validity of an arbitration agreement.



Director at Werksmans Attorneys, Jason Smit said there was a growing trend in the engineering and construction industry to try and avoid arbitration.



Director at Werksmans Attorneys, Roger Wakefield, discussed enforcement of arbitration awards at the Werksmans Arbitration Seminar.

Mr Wakefield said the new Act goes further to treat the arbitration clause independently, from other terms of the contract. He pointed out that if the contract was declared invalid, the arbitral provision still stands. He added that it was not all clear under the 1965 Act, whether the tribunal had the power, even though it was established in common law. He noted that the question of jurisdiction can be dealt with in terms of art 16, either as a preliminary issue or by a tribunal at the end of the process in its award, once it has made its ruling.

Mr Wakefield said parties have a period of 30 days, in which they can approach the court to resolve the issue. He added that the court's decision on the issue will be final and it was of no use to appeal the matter. He pointed out that the arbitration process was not prohibited or obstructed and what was interesting was the power granted to the tribunal to award interim measures under art 17. He said the power given under art 17 was exclusively preserved by the court and while the court still had the power the circumstances were limited.

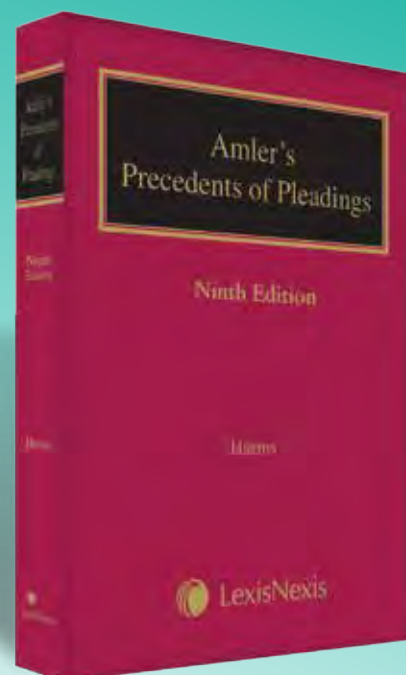
Mr Wakefield gave an example that if the tribunal had not yet been established and the matter was urgent, the tribunal may order parties to maintain or restore the *status quo* pending the determination of the dispute. He said it may also order the party to refrain from taking any action that is likely to prejudice the arbitration process. He added that a party can enforce interim measures, which is awarded by the tribunal under art 17, on the application to court and then the court enforces the interim measures even if the measure was issued outside SA.

Mr Wakefield pointed out that the tribunal may appoint experts on its own to deal with matters, which require expert opinions. The tribunal can also determine the substantive law applicable to the dispute if a party fails to agree. The tribunal has the power to correct its award or award to manifest error. He added that the court's role was reduced substantially compared to the 1965 Act. Its role now is to support the process and give effect to the principal of party autonomy. Mr Wakefield noted that art 33, which is a reviews provision in the 1965 Act, and empowers the courts to set aside an award, where a tribunal has misconducted itself or conducted a gross irregularity in the conduct of its proceedings or has exceeded its powers.

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Small and medium sized law firms need to be innovative

LexisNexis together with the Gauteng Law Council held a Boot Camp for small and medium sized law firms on 20 July at the CSIR Convention Centre in Pretoria. Law Firm Strategy Consultant and former Senior Partner at Webber Wentzel, David Lancaster said 2017 was a rough year for the legal profession in South Africa (SA) and as a result some law firms have struggled. He added that for legal practitioners to run a successful firm a business plan was needed to set out where the legal practitioner would like the firm to be within five years. He pointed out that the plans should include –

- the services the legal practitioner wants to offer;
- the clients the legal practitioner would like to represent; and
- which technology to use in the running of the law firm.

He noted, however, that small and medium sized law firms have advantages such as, where to house the law firm, because small and medium sized law firms are more flexible than big law firms. He advised that small and medium sized law firms should be situated in areas where there is more work for them.

Mr Lancaster added that another advantage small and medium sized law firms can use to their benefit was costs. He said clients focus on a need to get 'more for less' and that small law firms could position themselves to provide the right legal services at the right cost. He pointed out that the key to the future of the legal profession is to develop distinctive specialisation areas. Mr Lancaster said the days when one legal practitioner did everything in the firm was long gone. He noted that legal practitioners and small law firms needed to better position themselves and have a website to state what services they offer.

Mr Lancaster further said that small law firms could enter into alliances and partnerships with other law firms, particularly when specialising in areas of work different from the other firms. He pointed out that small law firms could specialise in more than one field. He added that small law firms should set a goal of employing the best people – from the support staff to the professional staff – for the firm to flourish. He mentioned that there was an increase in competition in the legal markets in SA and that the 'buyers' of legal services are in control of the markets. He said there was a push back on legal fees and on the



Law Firm Strategy Consultant and former Senior Partner at Webber Wentzel, David Lancaster, spoke at the boot camp for small and medium sized law firms hosted on 20 July by LexisNexis together with the Gauteng Law Council, at the CSIR Convention Centre in Pretoria.

delivery of services. He added that the clients are in the driver's seat.

Mr Lancaster added that there was an increased focus by clients on cost effectiveness, predictability, efficiency and added value. He said clients want to know how long their matter will take and how much it is going to cost. He pointed out that there was also a war of talents in law firms, that law firms are fighting to get the best legal practitioners to work at their firms. He added that legal practitioners must find ways on how to rework the economic model, because the old way of running law firms are over.

Mr Lancaster said it was important for legal practitioners to understand the complexity of legal landscapes in SA and added that statistics show that 80 to 90% of legal practitioners in SA, practice either for themselves or in small or medium sized law firm. He added that legal practitioners tend to forget about the competitive landscape and suggested that legal practitioners take a look at two points of view. First legal practitioners must look at the client's point of view. He said when a client is looking for a legal practitioner, they look at their options and who they can give work to. Secondly, legal practitioners must look at talent, who might be looking for a job and which platforms they use when looking for a job.

Mr Lancaster touched on what South African markets looked like. He mentioned the big six legal firms, medium sized law firms, boutique law firms, specialist intellectual property firms, legal service providers, global firms (who are opening a whole new world of competition) and networks such as Lex Africa. He added that there was also growth in the in-house legal teams and that more work that used to be done by external legal practitioners, was now being done in-house.

Medical malpractice

Advocate John Mullins SC said there is no dark cloud hanging over medical malpractice and it will continue as it is. He said that the time for motor vehicle accident claims, which was major source of income for the legal profession, might have come to an end, but added that there was nothing wrong with legal practitioners saying that medical malpractice might be the way out. He pointed out that legal practitioners did not hold innocent people liable, but instead held guilty people liable. He said there was nothing shameful or wrong about legal practitioners helping the innocent get compensation.

Mr Mullins said it was important for legal practitioners to note that medical malpractice is different and, by nature,



Advocate John Mullins SC, discussed medical malpractice at the boot camp for small and medium sized law firms in July.



Director in Sales at AJS, Chris Pearson, spoke at the boot camp for small and medium sized law firms at the CSIR Convection Centre in Pretoria.

far more complex. He pointed out that doctors do not operate on patients unless necessary and that there had to have been a problem before a doctor could operate on a patient. He added the mere fact that things go wrong during an operation did not mean that the somebody did something wrong. He said in the practice of medicine things often go wrong. He added that medical malpractice claims required more preparation than motor vehicle accident claims. It required thought and expert reviews.

Mr Mullins pointed out that the saying 'facts speak for themselves' cannot work in medical malpractice. He added that medical malpractice was a fascinating and rewarding field. He said it was fascinating because legal practitioners deal with the medical field, and in the process get to learn about it. They also learn to measure doctor's situations and what things are like at provincial hospitals and how nurses can neglect patients. He mentioned the State Liability Amendment Bill B16 of 2018 (the Bill). He noted that a few months ago the state introduced the Bill and said the Bill was a complicated piece of legislation.

Mr Mullins discussed the possibility of periodic payments in the Bill, such as, the future loss of income, medical expenditure and perhaps an instalment payment, particularly if the award is over a Million Rand and added it could be for any medical negligence award. However, he pointed out that the Bill did not specify what or how periodic payments would be determined. He said there were two components to the Bill, namely, periodic payments and provisional treatments. Mr Mullins added that the provisional treatment provisions were unconstitutional and that he could not see the provisions ever being passed by the Constitutional Court. He noted that periodic

payments could be a problem and whatever the structure of the periodic payments would be, it has to accommodate the need of the legal practitioners to be rewarded to act for people.

Practical business advice to legal practitioners

Director in Sales at AJS, Chris Pearson, said the legal profession was facing challenges because it is changing, probably more so in the first world countries than it is in SA. He pointed out that clients in first world countries are driving the pricing model and demanding fixed fee arrangements. He added that as a result there is pressure for legal firms to work efficiently. He said the whole change was being fuelled by technology and that technology was making a difference in a big way in how law firms work.

Mr Pearson said in 2027, 10% of things produced will be 3D printable. He pointed out that the legal profession was changing faster than ever before and that it was never going to slow down. He added that innovation was not just about technology and that there are many ways law firms can be innovative. He gave an example that small law firms can be innovative by working from home and by attracting quality but less costly staff members who can work from home. He further said law firms can also give their younger staff a voice, because young people know how to be innovative.

Mr Pearson said legal firms can also be innovative by listening to their clients, as clients can tell them exactly what they want. He added that another way to be innovative is to realise the potential of the existing technology that the law firm already has and added that 90% of the legal profession do not use the tools available to them. He pointed out that law firms must give their staff members the right tools and train them to use those tools. He noted that legal practitioners can work from anywhere as there is existing technology that allows one to work through a remote browser.

The Financial Intelligence Centre Amendment Act

Director of the Members Affairs Department at the Law Society of the Northern Provinces, Johan van Staden, said the saying 'one size fits all' in legal practices is wrong. He added that legal firms needed to develop risk management programmes, as there is increased scrutiny as legal practitioners are exposed in the country. Discussing the Financial Intelligence Centre Amendment Act 1 of 2017 (the Act), Mr van Staden went through some of the provisions in the Act and said legal practitioners needed to take a look at the Act and apply it as part of



Director of the Members Affairs at the Law Society of the Northern Provinces, Johan van Staden, discussed the Financial Intelligence Centre Amendment Act at the boot camp for small and medium sized law firms.

their business management practice and strategy.

Mr van Staden said provisions in the Act – that came into effect in October 2017 – deal with the changes in money laundering, risk-based approaches in business and provides for risk management and compliance programmes, including the obligation to keep identity and verification and transaction records safe.

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Would you like to write for *De Rebus*?

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- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 17 September and 22 October 2018.

The rebirth of the BLA's, *African Law Review*

The Black Lawyers Association – Legal Education Centre (BLA-LEC) officially relaunched its *African Law Review Journal* on 17 July in Johannesburg.

Former Judge of the International Criminal Tribunal for the former Yugoslavia and former Director of the BLA's-LEC, Bakone Justice Moloto, gave a brief history of how and why the Black Lawyers Association (BLA) was formed. He said that the BLA was born out of the idea to fight battles for black lawyers in Johannesburg.

He added that as a result black lawyers came together and formalised an association now known as the BLA. He said after the association was formally formed, the BLA established namely, the BLA-LEC, which had four objectives:

- To improve legal skills of black lawyers through education, as black lawyers were regarded as poor litigants in court. The trial advocacy was established to train young legal practitioners in trial skills.
- To do community work. The BLA decided to take on law cases for the indigent, mainly black people. Black law firms took turns to represent people at the Bantu Affairs Commissioners Court.
- To address issues of the day. The *African Law Review* was established as a forum and a platform where legal practitioners and the members of society could share ideas and make contributions to the development of the country with regard to the law.
- Increasing the number of black legal practitioners.

Judge Moloto said the one problem



Former Judge of the International Criminal Tribunal for the former Yugoslavia and former Director of the BLA's-LEC, Bakone Justice Moloto, spoke at the launch of the African Law Review Journal on 17 July in Johannesburg.

during that time was there were very few black law firms in the country. He said because of the historic events in the country, black law firms were picking up the crumbs from the legal profession and that resulted in black lawyers not having a large amount of article clerks. He pointed out that the BLA-LEC raised funds and came into agreements with black law firms to give articles of clerkship where the BLA-LEC paid 50% of the salary and the other 50% was paid by the law firm. He added that the BLA-LEC also sent young black legal practitioners to the United States (US) to be trained in skills of trial advocacy and asked legal practitioners who were more advanced from the US to come to South Africa (SA) to train legal practitioners.

Message of support from the Progressive Professionals Forum

The President of the Progressive Professionals Forum, Mzwanele Manyi, pointed out that the initiative of the *African Law Review* being relaunched, must be welcomed as it was long overdue. He said he hoped that the BLA and the BLA-LEC would work hard to make sure that the legal profession rises to the occasion and addresses certain issues. He pointed out that he was worried about several issues and thought there were a lot of things that the legal profession can do, such as, saving people money and time.

Mr Manyi also announced that Afrotone

Media Holdings was offering an evening television slot to the BLA-LEC, as a platform where they can deal with matters of the law transparently and also tell people about the services the legal profession provides.

New era for intellectual endeavours

Minister of Justice and Correctional Services, Michael Masutha, said that the relaunching of the *African Law Review*, was a new era of pulling together collective intellectual endeavours in the legal profession, of African black legal practitioners in general. To concentrate the collective efforts in contributing to many current discourses in the same manner, former President Nelson Mandela, Oliver Tambo, and many other icons in SA's history made contributions. The contributions made as legal practitioners, political and human rights activists at the time and shaping the nation of today.

Mr Masutha added that there were several challenges that needed to be confronted. He said the legal profession remained untransformed and pointed out that since his term in office, of the applications for silks he had received, only three were from black applicants. He said that in the whole of SA there are less than six African female silks. Mr Masutha said the profession had a duty to make sure that it created conducive conditions for young emerging, black and female legal practitioners and to create space for them to enter the profession, to grow and evolve all the time.

Mr Masutha added that established le-



President of the Progressive Professionals Forum, Mzwanele Manyi, challenged the BLA, to address the issue of land expropriation without compensation.



Minister of Justice and Correctional Services, Michael Masutha, said the legal profession in South Africa remained untransformed.

gal practitioners, both black and white, needed to have young legal practitioners, especially black and female, tag along with them. He said maybe it should become a rule that every bar be obligated to develop young legal practitioners. He pointed out that big white law firms were preferred to deal with lucrative matters, however, he said those big white law firms needed to make sure that they lead transformation and must be responsible for skills transfer and to ensure that opportunities are open for those who have been historically excluded.

Mr Masutha said he believed that the *African Law Review* will offer a fresh platform for the legal profession to bring something new and different with fresh ideas. He added that tools like the *African Law Review*, should be used to

overcome some of the injustice that continues to trouble the legal profession, society and the country.

Pledge from the LSSA

Acting Chief Executive Officer of the Law Society of South Africa (LSSA), Anthony Pillay, said the LSSA has a duty to support the *African Law Review*, financially and in terms of resources. He added that the LSSA was committed to raising funds to make sure the journal that gives a voice to the marginalised for many years becomes a success. 'We are happy this publication will again be available, largely for black practitioners, but [also] to the ... legal profession as a whole'.

In a statement released by the BLA-LEC it was stated that the *African Law Review* will be a quarterly journal, published

under the auspices of the BLA-LEC. According to the BLA-LEC, the journal was designed to offer a legal perspective on issues of national importance, for public consumption. The BLA-LEC further stated that the *African Law Review* was a platform to promote black excellence and a diversity of views. BLA-LEC added that the journal was strategically revived to trigger national debates, intensify national and international discourse and promote necessary legal reforms and transformation.

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People and practices

Compiled by Shireen Mahomed

Livingston Leandy Inc in Durban has four new appointments.



Charne Goosen has been appointed as an associate in the conveyancing and property department.



Ishara McKenna has been appointed as an associate in the corporate and commercial department.



Mags Mothilal has been appointed as an associate in the Road Accident Fund department.



Anja Schramm has been appointed as a consultant in the family law and matrimonial department.

Norton Rose Fulbright in Johannesburg has appointed Candice Gibson as a senior associate.



The present directors of Swemmer & Levin Attorneys are from left: Pieter Smit, Dolf Nel, Kobus Potgieter, Richard Phillips, Johann Maree, and Jan Fourie.

Abrahams & Gross in Cape Town has appointed Farzanah Mugjenkar as an associate in the conveyancing and property law department.



Swemmer & Levin Inc celebrated its centenary on 4 September 2018. The firm has a proud history dating back to 1918 when Justus Hendrik Swemmer established the first attorney's practice on the West Coast and was joined by Stephen John Levin, who for a number of years was the president of the Law Society of the Cape of Good Hope. Swemmer & Levin prides itself on continuity, tradition and high standards and of the 15 partners in 100 years, no less than six are still currently practising. The firm now looks forward to the next 100 years.

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

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

Judicial skills pivotal in the administration of justice

Opening the Judicial Skills workshop in East London in July, the Judge President of the Eastern Cape Division, Selby Mbenenge impressed on participants that judgeship is not about social status but about serving the community. He said: 'We converge here this week with a view to honing the skills of all who are pivotal in the administration of justice. In other words, when we hone our skills as lawyers we do so because our main objective is to improve and enhance our legal system. Much as you will benefit from your attendance, the constituency that we all serve is the paramount, ultimate beneficiary.'

The workshop was presented jointly by the Law Society of South Africa's (LSSA) Legal Education and Development (LEAD) division and the National Association of Democratic Lawyers (NADEL).

Referring to acting appointments, Judge President Mbenenge noted that he had been 'nudged' by practitioners who wanted to be recommended for appointment as acting judges. He said: 'I must say that is not a dispensation I revere at all. I have simply referred such individual applicants to their professional bodies and requested that such bodies furnish me with names of persons they regard worth considering for acting judgeship. In my view, we become judges because

others see in us qualities for being judges, than otherwise. More often than not others resort to judgeship because their practices seem to not be doing well and seek security of tenure. That is a self-serving reason, which none of us should cherish. More often than not those who keep ducking and diving, postponing availing themselves for acting judgeship prove to be the ones worthy of consideration for judicial appointment.'

The aim of the workshop was to equip legal practitioners with the technical and soft skills required of a judicial officer. The high-level workshop, facilitated by serving judges, offered both formal lectures and practical activities, which allowed the participants to come to grips with the demanding life of a judicial officer and test their ability to apply their knowledge practically. Twenty-five candidates were selected to attend this course, with preference given to practitioners from previously disadvantaged backgrounds.

Makgoka JA, Legodi JP, Mbenenge JP, Ledwaba DJP, Roberson J, Bloem J, Tokota J and Jolwana J who not only facilitated the course, but also assisted with the curriculum design to ensure that training achieved the desired outcome.

LSSA Co-chairpersons Ettienne Barnard and Mvuzo Notyesi (who is also President of NADEL) addressed participants at the opening ceremony of the

course. They congratulated the participants on their selection to attend the course and also impressed on them to use the skills that they would acquire to serve the public with dignity and diligence.

In a statement, NADEL said: 'The Judicial Skills workshop is one of the intervention strategies by NADEL to ensure that the pool of candidates for judicial appointment is widened, especially to accommodate candidates from historically disadvantaged backgrounds. NADEL, in partnership with the LSSA LEAD, are adding to the commendable initiatives and projects of the Chief Justice through South African Judicial Education Institute. These initiatives become more relevant as black practitioners are still battling to access certain types of legal services, if not being denied briefs at all by the conservative white capital, which remain preferring white practitioners. The briefing patterns in this country remain a major stumbling block to transformation as black practitioners remain side-lined by corporate business and, to some extent, by government itself as it often prefers white male practitioners for lucrative work. The black practitioners are largely excluded and remain intellectually undermined though expected in terms of the Constitution to avail themselves for judicial appointment.'



Participants at the Law Society of South Africa's Legal Education and Development division and the National Association of Democratic Lawyers Judicial Skills workshop in East London in July. The judges who facilitated the training are in the front row.



By
Emmie
de Kock

Are you a ‘professional’ legal practitioner?

Do you like family photos that include at least three generations? Is it not interesting to see how different your grandfather is dressed from your father? Or how different your hairstyle is from your son’s? It is a huge privilege to have an extensive family with more than two generations in one family alive at the same time.

Today, most legal practices have a similar privilege in the sense that many law firms may have a team of legal practitioners from at least two or three different generations. These generations may include –

- the Baby Boomers (born roughly between 1946 – 1964);
- Generation X (born roughly between 1965 – 1980); and
- the Millennials or Generation Y (born roughly between 1981 – 2000).

Each of these different generations have different traits, behaviours and attitudes, which often manifest in the workplace. In the article ‘Professionalism across the generations’, (www.employeedevelopmentssystem.com, accessed 28-5-2018), Baby Boomers, are for instance, known for their strong work ethic and discipline to work hard. Generation X are generally self-reliant employees who want structure and directions from leaders but are also happy to design and innovate new concepts and be entrepreneurial. Millennials generally like more supervision and need to know that their work is meaningful.

Belonging to a specific generation may help you develop your attitude towards technology, communication, behaviour and appearance. Does this mean that the different generations have different standards for professionalism in legal practices?

The purpose of this article is to explore some of the essential traits or standards of a professional legal practitioner. Below are some professional traits or behaviours to consider.

Dress for success

Regardless of your age or generation, if you want to be taken seriously as a professional, you should be aware that colleagues and clients first judge you by what they see, before listening to what you have to say. This is human nature. Have you heard the expression, ‘a man is judged by his shoes’?

However, according to psychology research on clothing, it is not only other people who judge you on your clothes, but more importantly how the clothes

you wear make you feel. In this regard, clinical psychologist, Dr Jennifer Baumgartner (‘What your clothes say about you’ (www.forbes.com, accessed 28-5-2018)), explains that a study conducted in 2012 at the Northwestern University (in the United States) coined the concept ‘enclothed cognition’. This concept can be defined as ‘the systematic influence that clothes have on the wearer’s psychological processes’, which basically means what your clothes are saying to you (ie, how it makes you feel), not about you.

Researchers in the study distributed standard white laboratory coats to participants, telling some of them that it was a doctor’s coat, and others that it was a painter’s smock. All participants performed the same task, but those wearing the ‘doctor’s coat’ were more careful and attentive. It was clear that the actions of the participants were influenced by their clothing.

Researchers concluded that ‘enclothed cognition’ gives scientific proof to the idea that you should dress not how you feel, but how you want to feel. Do your clothes make you feel professional, competent and confident?

When you get dressed for work, remember to give attention to your whole appearance. Attend to your hair, have clean nails and hands and smell good. Does your appearance convey the right message to those around you?

If your firm’s dress code is casual, consider if scaling up the dress code could perhaps improve the moral or productivity of your firm?

Communicate with respect

Due to the nature of legal work, verbal, and especially written communication are essential skills for a professional legal practitioner. Do you remember the adage ‘the pen is mightier than the sword’?

In the article ‘4 ways Millennials can improve their communication skills’ (www.inc.com, accessed 28-5-2018), Susan Steinbrecher states that communication skills can be a challenge, in particular for many Millennials. Factors, which may affect the communication skills of the Millennials, include –

- social media;
- texting; and
- other short forms of communication.

Ms Steinbrecher indicates that it appears that Millennials spend less time socialising face to face than previous generations, possibly resulting in lower levels of communication or social skills than previous generations.

Legal practitioners of the Baby Boom-

ers or Generation X could experience frustration when training Millennial attorneys, who may not have had the same opportunities to develop proper professional communication skills prior to entering the work-force. Baby Boomers and Generation Xers should assist as mentors and be good role models in this regard.

Another aspect, which could cause communication frustration in a legal practice, is the expectation and requirement for communication to be formal and respectful. In this regard, many law firms operate on strict hierarchical structures, where senior legal practitioners seem to always reign above junior legal practitioners and require such due recognition through communication.

To avoid misunderstandings, and improve the flow of communication, practitioners could assist with adopting a firm policy stating, for example, that internal written communication between members of the firm could be informal, but all written communication to clients must be formal (no spelling errors, full words and sentences etcetera). It is also important to consider, and possibly regulate, how and what you communicate on social media, as this could reflect on your personal professionalism and your firm’s position on subjects you comment on.

It is further important to keep in mind that the communication preferences and expectations of the different generations are also likely to apply to clients of different generations. Do you consider what communication style your clients prefer or expect? In addition, consider if aspects of s 35 of the Legal Practice Act 28 of 2014 could assist by prescribing professional communication with clients on costs and procedures relating to billable matters.

To be professional means to communicate respectfully with clients and colleagues of all generations. Respect is not always conveyed only by what you say, but also by how you say it. Verbal and non-verbal communication should be respectful.

Be on time and prepared

‘The early bird catches the worm’. This idiom generally means that a person who is active early in the morning is likely to be apt for success. It can also mean that the person who arrives early, may get the best opportunity or the prize. Are you an early bird or do you know of any successful professionals who do not rise early in the morning?

Are you late for meetings? Being late

is a habit, which can be changed, if you want it to. Top professional legal practitioners are always on time and are always prepared.

Being late for meetings or deadlines all the time could communicate to others that you are disorganised and not on top of things, or that you do not value them. In this regard, especially in western culture, it could be regarded as disrespectful if you are late.

Being on time, every time, on the other hand, is likely to convey a message that you are a trustworthy and competent legal practitioner. Be aware that punctuality may be a strong value of many of your clients and colleagues, which could cause stress and upset your working relationships if not adhered to.

If you have the habit of being late, or are a very time optimistic person, be mindful to always allow sufficient time to prepare. Arrive early at meetings to earn and keep the trust of all your clients and colleagues.

Being busy is not an excuse for being late as everyone is busy. How do you feel when others make you wait?

Keep promises and deliver

A relationship between a legal practitioner and a client is based on trust. It is the role of the professional legal practitioner to inspire trust. This trust implies that

the client can reasonably expect a legal practitioner to keep promises made; to deliver work on time and in the manner instructed and agreed. This trust calls for higher performance and legal practitioners to lead with integrity. How do you feel when someone breaks a promise to you?

If you find it hard to follow through on an instruction, or you feel out of your depth, get support to ensure that you can deliver on your undertaking to a client. Involve other people in your legal practice to assist you if it is a big matter and keep the lines of communication open with the client. Always have clarity on the urgency of a matter or deadlines relating to an instruction. Set reminders and put a diary system in place to remind you to ensure that you adhere to deadlines.

In legal practices, workload pressures can sometimes be very unpredictable. In this regard, it may be best to always under-promise and over-deliver. Legal practitioners performing on this principle will build and maintain good, long-standing relationships with clients.

Conclusion

Although the family photo of your law firm may include people from all ages, cultures and generations, the above sug-

gested traits and standards of a professional legal practitioner should not differ. Will professionalism ever get old?

'Professionalism' is not exclusively attributed to the professions, such as legal practitioners or doctors. Professionalism relates to the general behaviour of a person in the workplace. However, considering the nature of legal work and the leadership role of legal practitioners in society, professionalism is certainly something, which should be associated with legal practitioners and be part of each professional legal practitioner's make-up.

Legal practitioners should set the example and standard of professionalism in their legal practices. Legal practices who require assistance with professional development or up-skill of staff members could consider professional coaching or approach their provincial law society regarding its mentorship programme. For further information about mentorship programmes visit www.LSSALEAD.org.za.

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

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By
Thomas
Harban

The importance of developing internal controls in legal practices

The statistics received from the Attorneys Fidelity Fund (the Fund) indicate that as at 31 May the Fund had 1 166 contingent claims on record with a combined value of R 550 961 864. Most of the contingent claims arise from conveyancing related matters (43%), followed by estate related matters (20%) and Road Accident Fund (RAF) related matters (19%).

The pie chart below gives a breakdown of the contingent claims at the Fund as at 31 May.

The theft of money and property entrusted to attorneys is a serious cause for concern and practitioners must put appropriate measures in place in their firms to mitigate against this risk. Section 34(7)(c)(ii) of the Legal Practice Act 28 of 2014 (the LPA), provides that all present and past shareholders of commercial juristic entity (in other words, an incorporated practice), partners or members, as the case may be, are jointly and severally liable, together with the commercial juristic entity, in respect of any theft committed during their term of office.

One of the most effective ways of proactively mitigating the risk of professional indemnity (PI) claims and the theft of trust funds is the development and implementation of appropriate internal controls in the firm. The appropriate internal controls to be developed in each firm will depend on the individual structure and circumstances of the firm.

The attorney's duty of care in respect of trust funds is well-established in South African law. A claim will lie against the practitioner whether the loss is caused by theft or negligence. In *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA) (at para 19) the court held that '[a]n attorney is under a legal duty to deal with trust account money in such a way that loss is not negligently caused, inter alia, to the depositor'.

The Supreme Court of Appeal (SCA) in considering whether or not there was a legal duty on an attorney to deal with funds in their trust account without negligence, set the following four principles in the matter of *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) (at para 30):

- The appellant, being a firm of practis-

ing attorneys, proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly.

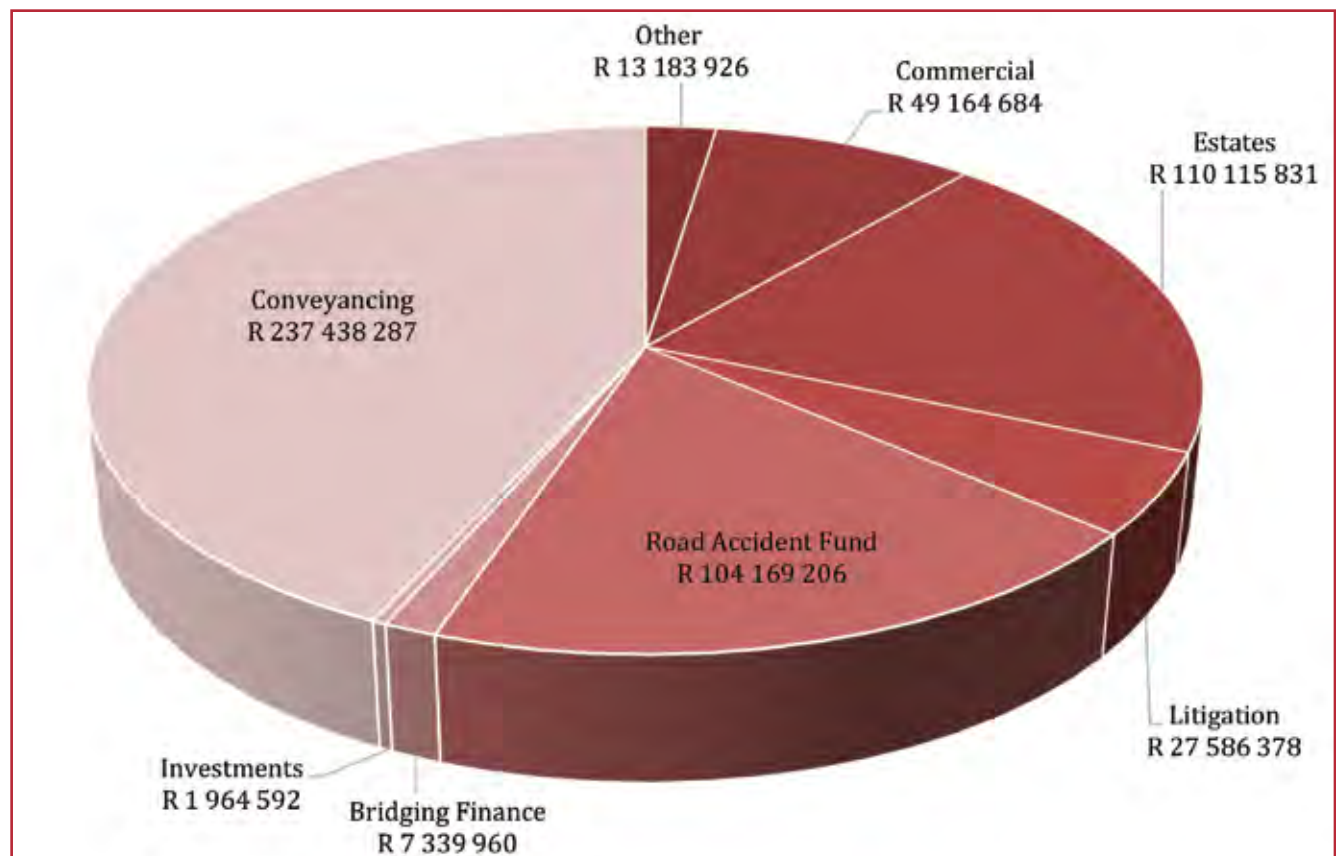
- The depositor of the funds (the respondent) relied on that, and particularly on the fact that the money would be in the appellant's trust account, until he instructed otherwise.

- Even where an attorney discovers an anonymous and unexplained deposit it requires minimal management to transfer the money to a trust suspense account.

- Unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary. 'The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances.'

The court, in this case, thus found that indeed there was a duty on the attorney to deal with the money in his trust account without negligence. The identity of the depositor of the funds in that case was unknown to the attorney at the time that the deposit was made.

The rules for practitioners, which will



come into effect under the LPA, were published in July (GN401 GG41781/20-7-2018) and provides that:

'54.14.7 A firm shall ensure:

Internal controls

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

54.14.7.1.1 that the design of the internal controls is appropriate to address identified risks;

54.14.7.1.2 that the internal controls have been implemented as designed;

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

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

The provisions in r 54.14.7 are similar to those in the current rules (r 35.13.7, which came into effect on 1 March 2016). While r 54.14.7 (and r 35.13.7) specifically refers to the accounting functions, the underlying principles can be applied to all areas of the practice. Internal controls can be developed to cover all the functions and operational areas in the practice. An enterprise-wide internal control system would be most effective in addressing any gaps and risks identified.

The development of the internal controls should not be viewed as a tick box exercise and the value of such controls for the protection of the firm and all stakeholders (including practitioners, staff and clients) must be recognised. There is no 'one size fits all' solution to the development of the internal controls and practitioners must avoid simply copying from controls developed in another context or within another entity. The advice of auditors or other risk management disciplines, for example, can be called on in assisting the practitioners with the development of the internal controls. Staff across the firm can be involved in developing the controls and must be trained on the implementation, application, and adherence to the controls.

Some steps that firms can consider implementing are:

- Conducting an assessment of the internal and external environments in which firms operate in order to identify the applicable risks. It is only after this exercise has been conducted that the necessary controls can be designed to address the identified risks.
- Implementing the controls in accordance with the risk assessment exercise. The effectiveness of the controls in addressing the identified risks must be assessed. The controls can be embedded in the minimum operating procedures of the firm and must be based on the risks. There should be controls in place for each risk identified. The effectiveness of the controls must be monitored and documented.
- Ensuring that the responsibility for the regular monitoring of the implementation and effectiveness of the internal controls is given to a member of the firm with sufficient seniority and authority to ensure that the controls are effectively applied. The responsibility for ensuring compliance with the LPA and the rules relating to trust accounts are complied with lies with every partner of a firm, every director of an incorporated practice and every advocate practising with a Fidelity Fund Certificate in terms of s 34(2)(b) of the LPA (see r 54.19). The liability of partners, directors and members of the firm arising from s 34(7)(c)(ii) must also be taken into account.
- Implementation of a proper system of segregation of duties. This is particularly important in relation to the finance function. A situation where, for example, one party is responsible for the requisition, authorisation and release of payments is a huge risk for any law firm no matter how trustworthy or reliable that person is. The underlying reason for every payment made and the details of the payee must be properly documented and scrutinised.
- Proper supervision of staff and all aspects of the operations of the firm.
- Conducting regular audits. This will assist the practice in regularly monitoring

the effectiveness of the internal controls and ensuring that controls are effective.

- The consideration of risk transfer measures, such as the purchase of insurance. Insurance products, such as, misappropriation of trust fund cover, fidelity guarantee cover, cybercrime cover or commercial crime policies can be considered by the firm. Section 47(1)(e) of the Attorneys Act 53 of 1979 and s 56(1)(c) of the LPA limit the liability of the Fund, where the fidelity of the practitioner has been guaranteed by another person, to the extent of such guarantee. The insurance policy in place will thus need to respond before the Fund will be liable in appropriate cases. Clause 16(c) of the Attorneys Insurance Indemnity Fund NPC (AIIF) Master Policy contains a similar provision to the effect that that policy will not respond to a liability for compensation, which is insured or could more appropriately be insured under any other valid and collectible insurance available to the practitioner.
- The employment of suitably qualified staff. Proper background checks and a thorough vetting of all staff should take place before any appointment is made.
- Taking appropriate action against any person in the firm who breaches the internal controls. Where a crime has been committed (such as the misappropriation of trust funds), this must be immediately reported to the law society and the law enforcement agencies.

We trust that practitioners will heed the warnings and take active steps to proactively manage the risks faced by their firms. The staff at the AIIF and the Fund have extensive experience in dealing with the risks faced by practices and are available to give firms guidance in the development of internal controls where necessary.

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By
Lesirela
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The right to fair refugee status determination procedures

The Constitution grants everyone the right to human dignity, life and freedom and security of the person under ss 10, 11 and 12(1). The protections under s 12(1) provides the right –

- ‘(a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.’

Further, in terms of s 33(1) and (2) of the Constitution, everyone ‘has the right to administrative action that is lawful, reasonable and procedurally fair’. Accordingly, a person ‘whose rights have been adversely affected by administrative action has the right to be given written reasons’. In terms of s 33(3) government enacted the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to afford persons aggrieved by administrative action a platform to approach courts or tribunals for redress.

Section 39(1) enjoins the courts, tribunals or forums, when interpreting the Bill of Rights, to: ‘Promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ and to ‘consider international law’. It may also ‘consider foreign law’. Subsection (2) provides that when interpreting any legislation, and when developing the common law, every court, tribunal or forum must ‘promote the spirit, purport and objects of the Bill of Rights’. ‘Any legislation’ in this article refers to the Refugees Act 130 of 1998 (the Refugees Act), the Prevention of Combating and Torture of Persons Act 13 of 2013 (the Anti-Torture Act), and PAJA.

The Refugees Act

South Africa is a party to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. To fulfil its treaty obligations, in 1998 and 2013 South Africa (SA) enacted the Refugees Act and Anti-Torture Act respectively. These Acts ensure that the

country receives and treats refugees within its territory, in accordance with the standards and principles established in international law. It may equally not expel or extradite persons if doing so would expose them to persecution outside the country. Section 6 of the Refugees Act provides that it must be interpreted and applied with due regard to the above international human rights law instruments and the Universal Declaration of Human Rights. Compliance with the international norms and standard means that SA will under ss 2 and 3 of the Refugees Act, read together with s 8 of the Anti-Torture Act, protect and grant asylum to any person within its territory who –

• ‘(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

• (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

• (c) is a dependent of a person contemplated in paragraph (a) or (b)’.

The interrelation between ss 2 and 3 is explained in *Gavric v Refugee Status Determination Officer, Cape Town and Others* [2016] 2 All SA 777 (WCC) at para 68:

‘Section 2 of the Act enshrines the international customary law rule of non-refoulement and it protects all the citizens and not only refugees. This means therefore that as per the language used in sections 2 and 3 of the Act, even persons who are found not to be refugees, if they meet the requirements in section 2 can be protected against return to their home countries.’

Procedure for refugee status determination

The procedure for refugee status deter-

mination is regulated under chs 3 and 4 of the Refugees Act. To that end, it established the Refugee Reception Office (the Office), which is composed of Refugee Reception Officers and Refugee Status Determination Officers; Standing Committee for Refugee Affairs (the Committee); and Refugee Appeal Board. The Office receives asylum applications in terms of s 21 via the completion by the applicant of the Eligibility Determination Form for Asylum Seekers (BI-1590), and must ensure that it is properly completed before submitting it to the Status Determination Officer for status determination. The Committee and Refugee Appeal Board respectively exercise review and appeal functions over Status Determination Officer’s decisions and do so independently.

In terms of s 24(1) of the Refugees Act, the Status Determination Officer may on receipt of the BI-1590 application form, in order to make an informed decision –

- request any information from an applicant or the Office concerned;
- where necessary, consult with and invite a United Nations High Commissioner for Refugees (UNHCR) representative to furnish information on specified matters; and
- may with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.

Subsection (2) enjoins the Status Determination Officer, when considering asylum applications, to have due regard for the rights set out in s 33 of the Constitution. In particular, the Officer is required to ensure that the applicant fully understands the procedures, their rights, responsibilities and the evidence presented. In practice, the Officer considers the contents of the BI-1590 application form and conducts a face to face interview with the asylum applicant. Thereafter, the Status Determination Officer must –

- grant asylum;
- reject the application as ‘manifestly unfounded, abusive or fraudulent’;
- reject it as ‘unfounded’; or
- refer any question of law to the Committee for review.

The nature of the Status Determination Officer’s rejection determines whether review by the Committee or appeal before Refugee Appeal Board should take

place. A finding that a claim is manifestly unfounded, abusive or fraudulent, will trigger automatic review by the Committee, while the Refugee Appeal Board will, on application, determine an appeal over a finding that the claim is unfounded.

Adjudications of the Committee Reviews and Refugee Appeal Board appeals

If the Status Determination Officer rejects the asylum claim as manifestly unfounded, abusive or fraudulent, it must in terms of s 24(4) of the Refugees Act furnish the applicant with written reasons within five working days after the decision, plus advise them of their right to make written submission to the Committee within 14 days. The Status Determination Officer must also, within ten days of its decision, submit to the Committee the record of proceedings and a copy of the reasons given for the decision. Problems abound about this –

- there are no clear guidelines on how applicants' written submissions are received and processed by the Committee; and
- there exists little or no evidence that such submissions ever receive any meaningful attention whatsoever.

The Status Determination Officer's

decisions are often merely endorsed by the Committee without any input by the affected applicant. This is often because an affected asylum seeker would have been ignorant of the need to make written submissions on time or at all, due to language barriers. Under s 25(5) the Committee may reverse the Status Determination Officer's decision or to make directions for the reconsideration of the claim, with the necessary guidance on what is to be done to achieve this. The Committee's endorsement of a Status Determination Officer's decision is final and only subject to review by the High Court under PAJA's provisions.

If the Status Determination Officer rejects an asylum claim under s 24(3) (c) as 'unfounded', the applicant has 30 days after receiving the decision within which they may lodge a notice of appeal. Section 26(4) provides for the appellant to be allowed legal representation if so requested. The Refugee Appeal Board must where necessary afford the appellant the services of an interpreter at the appeal hearing, failing which it must afford seven days within which, they may procure their own interpreter (reg 5 of the Refugee Regulations (Forms and Procedure) 2000). In *Bolanga v Refugee Status Determination Officer and Others* (KZD) (unreported case no 5027/2012, 24-2-2015) (Penzhorn AJ) the court em-

phasised the importance, during refugee status determination, of ensuring that the applicant is not disadvantaged by a language barrier.

Section 13 provides that three Refugee Appeal Board members must preside over appeals, namely the chairperson and two other members, one of whom must be legally qualified. Decisions where the Refugee Appeal Board was not properly constituted were held to be invalid and set aside on review. This was the case in *Harerimana v Chairperson, Refugee Appeal Board and Others* 2014 (5) SA 550 (WCC), where only one Refugee Appeal Board Member had presided during the appeal hearing. As with the Committee, the Refugee Appeal Board may under s 26(3) of the Refugees Act consult other sources of information to verify the asylum claim before reaching its decision. Overlooking relevant country of origin information would go against the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011) at paras 196 and 197. This is in recognition of the fact that as they flee, asylum seekers hardly ever carry evidentiary material for use in the host country of asylum. The decision in *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T), in addition to emphasising the Refugee Appeal Board's latter role, offers an

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analysis on the Refugee Appeal Board's wide appellate role over Status Determination Officer's decisions.

As to the standard of proof, the UNHCR Handbook, at para 42 states that in general the applicant's fear should be considered to be well-founded if they can establish, 'to a reasonable degree', that their continued stay in their country of origin has become intolerable. The applicant is not required to prove a 'real risk' on a balance of probabilities. The appropriate standard is 'a real pos-

sibility of persecution'. Lastly, reg 3 of the Refugee Regulations states that the whole refugee status determination process is generally expected to conclude within 180 days from the date the asylum application was first lodged.

Conclusion

In conclusion, a fair refugee status determination procedure should be sensitive to the Bill of Rights, heed the warning in the UNHCR Handbook that 'unless he seeks adventure or just wishes to see

the world, a person would not normally abandon his home and country without some compelling reason,' and ensure that deserving cases enjoy the humanitarian protection in SA.

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By
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Prescription of claims based on bill of costs

This article discusses the law relating to the taxation of a bill of costs. In particular, it reflects on whether or not a successful party's claim against the other party based on the taxed bill of costs can prescribe in terms of the Prescription Act 68 of 1969 (the Act), whether the right to tax also prescribes, and if so, when? This article will not dwell on circumstances where a settlement agreement was entered into between parties (whether made an order of court or not in terms of r 41 of the Uniform Rules of Court).

There are two schools of thought relating to the prescription of claims based on taxed bills of costs.

- On the one hand, it is averred that a –
- right to tax a bill of costs prescribes after three years; and
- further taxed bill of costs prescribes after three years.

As such, a party who has been awarded costs should proceed with taxation and enforce its right of the taxed bill within the three-year period. That is so, because a party does not enjoy an unlimited period to quantify and recover its costs. As such, the prescription period of three years effects on a parties' right to tax a bill of costs and also the taxed bill of costs in itself.

On the other hand, it is argued that a taxed bill of costs should be regarded as one whole part of a claim to a judgment, which was ordered in favour of a party. Thus, the taxed bill of costs does not trigger a separate cause of action. Succinctly put, an *allocatur* of a Taxing Master does not amount to a judgment for purposes of execution, but is simply complementary to what a court could not quantify. This is so because quantification lies exclusively with the Taxing

Master and not a court. Furthermore, prior to execution, a judgment for costs should first be granted and the *allocatur* of the Taxing Master must follow. The judgment and the *allocatur* are not divisible, but mutually complementary in nature and taxation is a procedural step towards quantification and thus prescribes after 30 years.

As a general rule, a successful litigant will be awarded a costs order in their favour. Ordinarily, what would follow is a bill to be presented to the Taxing Master for taxation. As an aside, what consequential effect would there be if a bill of costs is presented more than three years since judgment?

For purposes of a right to tax a bill, and recovery thereof, due regard is had to s 11 of the Act, which provides various categories of debts that prescribe after certain periods under subs (a) to (d). For costs that have been taxed, s 11(a)(ii) is activated, because where a judgment has been granted for costs, a taxed bill of costs arises out of that judgment and will only prescribe after 30 years and not three years, also extending a right to tax.

The first school of thought may have found its reasoning in the old r 66 before its amendment. Rule 66 required a party to have a judgment revived after three years if they desired to execute the judgment, until the 30 year period, as envisaged in s 11(a)(ii), had expired.

Rule 66 as currently couched, jettisoned the aspect of superannuation. It could not have been the intention of the legislature that once judgment for costs have been granted, followed by taxation even after three years, the right to tax would prescribe while on the other hand the judgment costs still stands. As such, where judgment is granted, a right to tax a bill cannot prescribe in three years and

its enforcement *vice versa* (see *Botha and Others v Scholtz and Another; In re: Botha and Others v Member of the Executive Council: Local Government and Housing Free State Province and Others* (FB) (unreported case no 3424/2016 R182/2007, 9-3-2017) (Molitsone AJ)).

One of the main purposes of the Act is to guard and protect a debtor from old claims. That purpose, however, is distinguishable due regard had to be the prescriptive period of 30 years as opposed to three years. As a rule of thumb, if judgment creditors were allowed to be lackadaisical in pursuit of their claim without incurring the prescription sting, that purpose would be subverted. Unfortunately a taxed bill of costs is a sequela to a judgment (see *Jordan and Co Ltd v Bulsara* 1992 (4) SA 457 (E)).

The disadvantages of enforcement of a judgment against an erstwhile party liable for costs are one of the shortcomings an unsuccessful party must bear. The period of prescription of a taxed bill of costs is couched in terms wide enough to include the judgment for costs. As such, a right to tax a bill of costs and a taxed bill of costs only prescribes after 30 years. More so, a taxed bill of costs does not create a fresh cause of action, but is merely an integral part of the proceedings before a court and the Taxing Master (on quantification). In my view, a party does not enjoy an unlimited right to enforce or tax its bill of costs, but as long as the judgment – which ignites such rights is still in force – such rights are guarded.

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Retirement benefit payments used for child maintenance

By
Clement
Marumoagae



Picture source: Gallo Images/Getty

benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be –

...
(iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act'.

Section 21 of the Government Employees Pension Law (Proc 21 GG17135/19-4-1996) also provides that subject to s 24A '[n]o benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 26 or 40 of the Maintenance Act ... and section 7(8) of the Divorce Act ... be liable to be attached or subjected to any form of execution under a judgment or order of a court of law'.

In terms of s 26 of the Maintenance Act, when a maintenance order has been granted and the person against whom it has been granted failed to make payment in accordance with the order, such an order is enforceable by execution against the defaulter's property. If a specific amount was ordered, that amount attracts interest. In particular, s 26(4) of the Maintenance Act specifically provides that 'any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued ... in order to satisfy a maintenance order'.

Section 26(4) of the Maintenance Act appears to be making provision for the attachment on the basis of the maintenance that is currently due and to a larger extent the amount of maintenance that is outstanding and not necessarily that which is payable in future. It makes provision for payment of arrear child maintenance on behalf of the child from the retirement fund member's retirement benefits (see Naleen Jeram 'A warning to all maintenance court officials' (2014 (Sept) DR 43)). However, before the court can order that the other parent's retirement benefits should be attached, it must be satisfied that the party against whom such an order is made, has no other means of paying

Child maintenance is a common law duty entrusted on each parent in line with their relative means and circumstances and the needs of the child from time to time (*Burse v Bursey and Another* 1999 (3) SA 33 (SCA) at 36C – H). This duty does not terminate when the child reaches a particular age, but continues after majority (*H v H and Another* (WCC) (unreported case no 5995/14, 11887/12, 3801/12, 25-6-2014) (Gamble J) at para 16). Parents do separate and when one of them is residing with the child the other might be ordered by the court to financially contribute towards the maintenance and care of the child. Section 15 of the Maintenance Act 99 of 1998 partially codifies the common law and provides that 'a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue'.

This article discusses the circumstances under which the duty to maintain the child may be discharged through payments from retirement benefits and in particular, payment of future child maintenance. In South Africa (SA), pension law is regulated by various statutes, none of which directly provides for the payment of future child maintenance from retirement benefits. As such, the courts had to be innovative and use rules of interpretation to ensure that retirement fund members are forced to fulfil their child maintenance obligations through their retirement benefits.

Generally, s 37A(1) of the Pension Funds Act 24 of 1956 prohibits the reduction, hypothecation, cession, transfer and attachment of retirement benefits, unless such is specifically permitted by the Pension Fund Act, Income Tax Act 58 of 1962 and the Maintenance Act. Retirement funds are empowered by s 37D of the Pension Funds Act to '(d) deduct from a member's or deferred pensioner's

child maintenance. Claiming maintenance from the maintenance defaulting member's retirement fund benefit should be a measure of last resort. This will obviously be the case where a maintenance order has been granted and the person against whom it has been granted has defaulted in their payments and there have been no other means other than the retirement benefits to satisfy the maintenance order.

Neither the Maintenance Act nor any of the pension legislation in SA specifically provide for payment for future maintenance. Thus, the courts have had to be innovative by considering future child maintenance payment from retirement benefits. Section 26(4) of the Maintenance Act specifically deals with arrear maintenance and not future maintenance. In *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D) at 4874, the court held that:

'It is clear from the above section, including subsection (4) that arrear maintenance is referred to and not amounts which will become applicable in the future. It is clear from the case of *S v Botha* 2001 (2) SACR 281 (E) per Jansen J and Liebenberg J that where an order had been made for the payment of maintenance in terms of section 29 of Maintenance Act there is no bar to making a continuing order for payment from accused's pension fund, the Government Employees Pension Fund.'

The court then ordered the retirement fund concerned to retain their member's retirement benefits 'so as to make equitable and proper provision for the support and maintenance of the children, for such period as they are in need of such support and maintenance' (*Mngadi* at 4880). In this case, the member resigned from their employment in order to avoid paying child maintenance. Thus, the court was of the view that where a member resigned from their employment and thus exited their retirement fund with the specific objective of thwarting payment then the relevant sections of the Maintenance Act and Pension Funds Act may be interpreted to include the payment of future maintenance in one lump sum. It is not clear had the retirement fund member not resigned, if the decision would have been different. Nonetheless, the court ordered the retirement fund to pay for future maintenance. In *Magewu v Zozo and Others* 2004 (4) SA 578 (C), the court also had to determine whether our law allows for the securing of retirement benefits for the purposes of future child maintenance obligations of the member of the retirement fund. In this case, the retirement fund member was not in arrear at the time the court made its decision. The court held in *Magewu* at para 15 that:

'The Maintenance Act does not create

a closed list of mechanisms available in law to assist children who have claims of maintenance and their specific situations are not expressly set out in the Act. Section 2(2) of the Maintenance Act provides that it may not be interpreted so as to derogate from the common-law duty of support relating to the liability of persons to maintain other persons. In this instance, it is clear that the applicant's case may not fall flat due to the fact that the first respondent is not currently in arrears.'

The court then concluded at para 24 that:

'The attachment of pension fund benefits in respect of future maintenance claims *in casu* is a direct and effective means of ensuring that the rights of the child and the dignity of women are upheld. There is no reason why, in this instance, the pension fund should not be directed to withhold the withdrawal benefit in order to secure the future maintenance claims of the minor child'.

In *Soller v Maintenance Magistrate, Wynberg and Others* [2006] 1 BPLR 53 (C) at para 29 the court held that: 'The Maintenance Act clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered. They would certainly be justified if the rights and best interests of a child, which are securely entrenched in section 28 of the Constitution, should be infringed or threatened'. The court further held at para 30 that the court making a maintenance order 'must necessarily be, fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities or the like'. This indicates that it is possible for retirement funds to retain their members' retirement benefits when such benefits are due in order to direct such benefits towards the maintenance of such members' children for such period such children may be in need of such maintenance (see also *Burger v Burger and Another* [2007] 1 BPLR 50 (D) at 54). It appears, however, that retirement funds cannot retain such benefits when they are, due absent a court order.

A different approach appears to have been taken in *Sentinel Retirement Fund v Mtambo and Others* (GP) (unreported case no 75404/2013, 1-6-2015) (Jansen J) where the retirement fund sought clarity from the court as to 'whether the maintenance's court can order it to make a lump sum payment of future maintenance'. In this case, the court held that 'an order directing the [retirement fund] to pay an amount of future maintenance in one lump sum is contrary to the provisions of sections 37A and 37D of the Pensions Funds Act, 1956, read with the Maintenance Act, 1998'. The court, however, did not clarify whether or not payment of future maintenance in monthly

instalments will be in line with the applicable legislation, more particularly where the member is still active in the retirement fund.

It would be naïve to suggest that the law relating to payment of future child maintenance from retirement funds is settled in SA. Thus, I submit that there is a need for legislative amendments, which will explicitly determine the circumstances under which child maintenance may be deducted from retirement benefits in SA. Nonetheless, the approaches followed in *Magewu* and *Mngadi* to the extent that retirement funds should be ordered to pay future maintenance should there be a need to do so, appear to be sound in law. If courts lean towards ordering payment of future maintenance, it will be ideal to order monthly payments as opposed to lump sum payments. Lump sum payments may not be in the best interest of the child, who is in need of parental care and support, because of the potential abuse of such funds in a short period of time. It is crucial that decisions regarding payment of maintenance from retirement benefits should be made in line with s 28(2) of the Constitution and s 7 of the Children's Act 38 of 2005. An order for monthly future maintenance against a provident fund, which usually provides its members with lump sum payments might be a bit tricky. This is because currently, despite anticipated legislative changes relating to compulsory annuitisation, provident fund members are entitled to receive their entire benefits as lump sum payments when they retire (see Clement Marumoagae 'Moving towards compulsory annuitisation of provident fund benefits in South Africa' 2017 (2) *SAMLJ* 390). In such circumstances, there might be a need to interdict the provident fund in order to prevent it from making payment to its member when there is a need for such a member to satisfy future child maintenance obligations. Finally, I submit that when making an order for the payment of future child maintenance from the member's retirement benefits, the court must properly assess the member's personal circumstances as well as their means in order to determine the fair amount of future child maintenance that should be payable.

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Are your hands tied when it comes to cyber harassment?

By
Amanda
Manyame

Picture source: Gallo Images/Getty

With the dawn of social media and the increased use of digital mediums for communication, a number of unwelcome negativities came along, such as –

- cyberbullying;
- cyberstalking;
- Internet trolling;
- catfishing;
- kittenfishing; and
- just plain old harassment on the Internet.

With social media ‘cyber harassment’ was born, a term often used and experienced, but yet to be defined in South African and international law. It is an umbrella term that describes conduct that is harassing in nature, facilitated by or involving the use of electronic means of communication.

If you think or know you are being cyber harassed, what legal recourse, if any, do you have?

On 15 December 1999 the Domestic Violence Act 116 of 1998 (the Act) came

into effect, providing much needed effective and inexpensive legal procedures for victims of domestic violence.

Section 1 of the Act defines a ‘domestic relationship’ and includes a list of relationships encompassing all types of possible domestic associations between individuals and what is known in pop culture as ‘situationships’.

Furthermore, the section clarifies each act of domestic violence. Note-worthy is emotional, verbal and psychological abuse, which means ‘a pattern of degrading or humiliating conduct towards a complainant, including –

(a) repeated insults, ridicule or name calling;

(b) repeated threats to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security.’

‘Stalking’ is defined as ‘repeatedly following, pursuing, or accosting the complainant’.

Moreover, these acts may be conducted via e-mail, facsimile and other forms of communication that do not require the physical presence of the perpetrator.

Without a doubt, the scope of the Act is wide, and the legislator left the definition of an ‘act of domestic violence’ open and stipulated that it is ‘any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant’. Section 5(2) of the Act provides recourse for victims of such harassing behaviour, in a domestic relationship, by providing *prima facie* evidence of an act of domestic violence being perpetrated against a victim in a domestic relationship, the victim may be granted an interim protection order. In *S v Trainor* 2003 (1) SACR 35 (SCA) at para 9, the court held that ‘[e]vidence, of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety.’ Onus in harassment cases conducted electronically or otherwise, is on the complainant to show that they are entitled to protection against the perpetrator because the perpetrator’s conduct constitutes harassment in terms of the Act or any applicable legislation.

The complainant has to identify the perpetrator sufficiently and secondly, the complainant’s evidence – which will initially be adduced by way of affidavit – will have to, on a preponderance of probabilities, show that an act of domestic violence as defined by the Act has been or is being committed.

Harassment is difficult to prove legally as it is, to a large extent, subjective in nature. As a result, countless harassment cases and incidents are unresolved or unreported. The same is true, more so, for cyber harassment incidents because there is difficulty in establishing the identity of the perpetrator and/or a causal nexus between the alleged perpetrator and the harassment. The South African Law Reform Commission: Discussion Paper Project 130 ‘Report on Stalking’ (2004) states that harassment constitutes conduct that is repeated and is regarded as abusive and induces fear of harm. It follows that cyber harassment is behaviour that does not always constitute a crime or impose civil liability on the perpetrator, but it impacts negatively on various rights of an individual. In *SATAWU obo Dlamini v Transnet Freight Rail, a Division of Transnet Ltd and Another* [2009] JOL 24429 (Tokiso) it was held that the Constitution requires that the primary focus on determining harassment be on the effect on the complainant and ‘that the proper test for assessing if the conduct was indeed harassment is by reference to the “reasonable victim” instead of the usually applied objective test.

The Act, although it provides for recourse for victims of cyber harassment, does not empower victims with the practical mechanisms or regulatory measures to enable them to obtain the required evidence to obtain a protection order against a perpetrator. Clearly the Act fails victims, particularly in two respects:

- Providing *prima facie* evidence could prove to be an arduous task on the part of the complainant as a result of the nature of cyber harassment.
- Individuals not in a domestic relationship with the perpetrator are not afforded protection.

Fortunately, as a result of this void in the civil and criminal legal framework that did not adequately provide victims of cyber harassment with legal recourse, the Protection from Harassment Act 17 of 2011 came into effect on 27 April 2013. The Protection from Harassment Act provides for an inexpensive civil remedy in instances of cyber harassment and provides recourse for both domestic and non-domestic relationships. The definition of ‘harassment’ in s 1 of the Protection from Harassment Act broadly includes, cyberstalking and electronic communications that may be harmful.

The legislature in enacting the Protection from Harassment Act attempted to rectify the shortcomings of the Act, in particular bringing perpetrators of cyber harassment to justice by including provisions that enable a complainant being cyber harassed, to obtain the required evidence that can allow for positive identification of a perpetrator. For example, s 4 of the Protection from Harassment Act places an obligation on Internet Service Providers (ISPs) to aid law enforcement by providing any information to ascertain the identity of the perpetrator within five days of having been served with a request for same from law enforcement.

Section 4(6) of the Protection of Harassment Act further requires ISPs to inform the identified perpetrator that the ISP has furnished law enforcement with their identity and the ISP must also provide the perpetrator with the particulars of the court, which will preside over the matter, thereby lightening the burden of service of pleadings on to the perpetrator, for the complainant.

As an incentive to ISPs, s 4(8) of the Protection from Harassment Act states that the relevant minister may compensate the ISP that provides information to law enforcement. The Protection from Harassment Act has most certainly eased the burden of proof placed on the complainant.

Section 5 of the Protection from Harassment Act stipulates that a court may order an investigation to ascertain the name and address of the perpetrator. In addition, s 6 empowers the South Afri-

can Police Service to ascertain the name and address of the perpetrator to assist tracing agents.

The Protection from Harassment Act definitely assists the complainant to discharge their onus. The Protection from Harassment Act states that the perpetrator knew or ought to have known that harm may be caused to the complainant. The presumption of foresight of harm in the Protection from Harassment Act lessens the burden of proof for the complainant because the Act presumes that objectively construed, the actions of the perpetrator caused harm to the complainant and that the perpetrator should have known or foreseen that their actions would have a harmful or have a negative impact on the complainant. This makes it easier for the complainant to prove non-patrimonial harm or damages, such as pain and suffering, which are usually difficult to prove in harassment matters. Therefore, the victim must establish that the communication, caused fear of physical harm to person, property or serious mental, psychological or emotional harm. Finally, an objective harm must reasonably arise from the circumstances. This objective test, as held in the *SATAWU* case, is based on the reasonable victim test.

As evidenced by the above, cyber harassment is an act of domestic violence in terms of the Act. Sadly, the Act is not adequately equipped to provide legal recourse to a complainant of cyber harassment. Nonetheless, complainants of cyber harassment can turn to the Protection from Harassment Act to obtain a protection order against perpetrators in such instances, regardless of the relationship between the perpetrator and the complainant.

Notwithstanding the progress already made by the legislator, in enacting the Protection from Harassment Act, to address the issue of cyber harassment and fill the void the Act left, it is important to note that with the continued growth and use of digital forms of communication, such as, artificial intelligence, robotics and blockchain technology, mankind is evolving and developing a digital personality that has rights and responsibilities, which need to be catered for and protected by legislation. Although, in South Africa, the legislator has already enacted legislation such as the Protection from Harassment Act and the Protection of Personal Information Act 4 of 2013. South Africa still has a long way to go with enacting legislation to address acts and/or omissions that have civil and criminal ramifications.

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Picture source: Gallo Images/Getty



Anti-money laundering: National Treasury's proposal to establish and lead an inter-departmental committee

By
Nkateko
Nkhwashu

The Financial Action Task Force (FATF) is an inter-governmental body that sets policies to counter money laundering and terrorist financing. It implores its member countries to strive towards effective anti-money laundering and counter terrorism financing regimes, which are highly motivated to realise a set 'high level' objective. As such, the FATF entails a situation wherein 'financial systems and the broader economy are protected from the threats of money laundering and the financing of terrorism ... thereby strengthening financial sector integrity and contributing to safety and security' (www.fati-gafi.org, accessed 3-8-2018). This can to be achieved 'if the components of a country's [anti-money laundering and counter terrorism financing] framework are operating well together' (www.fati-gafi.org, accessed 3-8-2018).

In order to realise or strive towards this high-level objective the FATF has what it terms 'intermediate outcomes', which includes:

- 'Policy, coordination and cooperation [to] mitigate the money laundering and financing of terrorism risks;
 - proceeds of crime and funds in support of terrorism are prevented from entering the financial and other sectors or are detected and reported by these sectors;
 - money laundering threats are detected and disrupted, and criminals are sanctioned and deprived of illicit proceeds; and
 - terrorist financing threats are detected and disrupted, terrorists are deprived of resources, and those who finance terrorism are sanctioned, thereby contributing to the prevention of terrorist acts' (www.fati-gafi.org, accessed 3-8-2018).
- In order to achieve the intermediate outcomes, the FATF has on their website (www.fati-gafi.org, accessed 3-8-2018) further identified 11 'immediate outcomes'. These are -
- risk, policy and coordination;
 - international cooperation;
 - supervision;
 - preventive measures;
 - legal persons and arrangements;
 - financial intelligence;
 - money laundering investigation and prosecution;
 - confiscation;
 - terrorist financing investigation and prosecution;
 - terrorist financing preventative measures and financial sanctions; and
 - proliferation financing sanctions.
- This article will not try to explain all 11 immediate outcomes save for the first outcome, namely, 'risk, policy and coordination', which is very relevant for present purposes. This outcome, *inter alia*, presupposes (partly) an effective regime wherein '[m]oney laundering and terrorist financing risks are understood and, where appropriate, actions [are] co-ordinated domestically to combat money laundering and the financing of terrorism and proliferation' (www.fati-gafi.org, accessed 3-8-2018).
- All the above is assessed and ascertained by the FATF during, *inter alia*, its

mutual evaluation exercises. It is important to note that the FATF's standards are deemed as best international practice and adopted by various countries, even by those who are not official members yet. South Africa (SA), on the other hand, has been the only official member in Africa since 2003, thus it is supposed to comply with all of the above in all of its areas of developments.

Furthermore, the above is for the purposes of clarifying some of the noted misconceptions surrounding various developments regarding SA's anti-money laundering and counter terrorism financing regime, especially the recently proposed inter-departmental forum on anti-money laundering and the combating the financing of terrorism committee (inter-departmental committee).

Regarding the first outcome, in order to assess a country's anti-money laundering and counter terrorism financing regime and pronounce its effectiveness or not, the first thing the FATF looks for, is whether there is a formal mechanism in place to ensure that there is proper cooperation, consultation and coordination with all relevant stakeholders in efforts to combat identified threats. In support of this statement one only needs to take a quick scan of one of the recently published mutual evaluation reports (or executive summaries) by the FATF under the fourth round of mutual evaluations, namely, Mexico, Singapore, Netherlands and the United States.

This formal mechanism comes in the form of an inter-departmental committee. More often than not, it culminates from parliamentary processes, and as a result, is very key in demonstrating political will by a particular country on its commitment to fight both money laundering and terrorist financing. Mindful of a country's specific factors, which comes into play when constituting this committee, namely, the maturity of the regime, its set up, etcetera, the processes of setting up the same in SA has seen its fair share of challenges, for example, the reluctance by certain key stakeholders (see the reasons for this below) to sign a memorandum in Parliament sanctioning its Constitution and the impact this had on other key initiatives yet to be put in place in SA, for example, conducting a National Risk Assessment on money laundering and terrorism financing threats.

Why the need for an inter-departmental committee and who should be in charge of it?

It is important to note that the policy-maker on financial integrity is the National Treasury. National Treasury participates in various initiatives and

plenary meetings of the FATF. Unfortunately, due to capacity constraints and limited expertise within the department, the Financial Intelligence Centre (FIC), the regulator, leads SA's discussions and delegations (together with National Treasury) at these plenary meetings as they have capacity and expertise on anti-money laundering and counter terrorism financing work. In short, ideally the National Treasury is supposed to always be in charge with respect to any policy work on anti-money laundering and counter terrorism financing, but unfortunately due to some of the reasons noted herein this is not always the case and/or possible.

The background to the current discourse is that the 2009 FATF Mutual Evaluation Report of SA called for amendments to the Financial Intelligence Centre Act 38 of 2001 (FICA). One such amendment was the abolishing of the Counter Money Laundering Advisory Council. The Counter Money Laundering Advisory Council was meant to function as a consultative body or mechanism on various developments on FICA. It comprised of various stakeholders, including members of the government department's Security Cluster. The challenge it had was the fact that it comprised of high level delegates who often had difficulties attending its yearly meetings, its only contribution was to the early drafting of FICA Regulations.

Key developments including amendments to FICA had to first be brought before the Counter Money Laundering Advisory Council and the committee had to agree before anything could be done. Unfortunately (disregarding some of the political dynamics, which surrounded the amendment processes) the policy-maker and the regulator took a decision to repeal the entire chapter of FICA, which made provision for the Counter Money Laundering Advisory Council without first consulting all its stakeholders, including the Security Cluster. This was raised by the Security Cluster in various parliamentary processes and even by various stakeholders during the commentary period on the FICA Bill, whereby they also questioned the decision taken to abolish the Counter Money Laundering Advisory Council and not replace it with another structure. The policy-maker and regulator's responses were to the effect that SA's anti-money laundering and counter terrorism financing regime matured to such an extent that there was no need to maintain inflexible statutorily-based consultation structures and these (structures) would be established outside legislation as and when necessary (and for specific purposes).

Thus, the crux of the Security Cluster's argument on the potentially unconstitutionality of the Financial Intelligence

Centre Amendment Bill [B33A-2015] was the fact that they had no say, nor were they consulted when the decision to abolish the Counter Money Laundering Advisory Council was taken. It would not come as a surprise if this argument was raised in one of their legal opinions, which was never made public when Parliament called for such during deliberations on the 'warrantless searches' provision. Another argument raised relates to the fact that the FIC initially, owing to its statutory mandate, only reacted to information sent to it without being the initiator of such a process, but this was about to change owing to some of the new amendments, for example amendment to s 4.

All these had an impact on the swift signing of a cabinet memorandum formally establishing the inter-departmental committee. Such had been stuck in the parliamentary processes for close to three years. However, in mid-2017 the Security Cluster and intelligence community, finally gave its support for the establishment of this anti-money laundering and counter terrorism financing committee to be chaired by the Director-General of National Treasury and or its representatives working together with members of the Security Cluster, among others (Linda Ensor 'Treasury panel set up to steer battle on laundering' www.businesslive.co.za, accessed 6-8-2018).

The above developments were followed by various reactions from various stakeholders. Overwhelmingly these were good. There were, however, some reactions, which seemed to be out of context or motivated by other reasons, politics being one of them. Such were to the effect that, somehow, by the way in which the entire inter-departmental committee was to be set up, especially who was to be its head, suggested or demonstrated the fact that the Security Cluster had been 'snookered' in its bid to gain control of the FIC (Ensor (*op cit*)). Regardless of the credibility of these allegations, viewed within context, the configuration of the inter-departmental committee is rooted in international best practice and those who had been involved during the entire amendment processes will attest to the fact that the Security Cluster was not difficult throughout the same. It also proposed and held various meetings with the National Treasury in an attempt to engage and discuss some of these issues in a productive manner.

The functions of the inter-departmental committee, in order of importance are going to be as follows –

'i) to coordinate South Africa's response to the Financial Action Task Force (FATF), including preparing for the Mutual Evaluation and the National Risk Assessment to facilitate compliance with international obligations;

ii) to inform discussions on potential changes to the country's measures against money laundering and terror financing, including changes to laws, regulations and other measures;

iii) to assist in the allocation and prioritisation of resources by competent authorities to combat money laundering and terror financing;

iv) to harmonise and align approaches to financial investigations, prosecutions, convictions and asset forfeitures in money laundering and terrorist financing matters;

v) to assess the effectiveness of anti-money laundering and combating of financing of terrorism policies and practices and whether the key objectives of the South African institutional framework against these phenomena are being met in practice;

vi) to assess progress made in South Africa with implementing the [anti-money laundering and counter terrorism financing legal framework] against the benchmark of the international standards and making recommendation for improvement; and

vii) assist in preparing the relevant departments and agencies for regular country assessments, peer reviews to measure South Africa's compliance with

international standards on combating money laundering and the financing of terrorism.'

The above is taken from a written reply by the Minister of Finance to some of the questions raised in the National Assembly. Part to this response was the fact that other separate consultative structures to facilitate engagements with the private sector will be established. It was highlighted that one such structure had already been established for the banking sector. Presumably this refers to the anti-money laundering and combating the financing of terrorism steering committee established within the South African Reserve Bank. Having formed part of those responsible for its establishment, I can say that it has not been without its fair share of challenges either, namely, some of its members do not necessarily understand its mandate or functions, for example, whether it is geared towards affording the sector an opportunity to influence content of the Guidance Notes applicable to it within the new risk based framework or to create Guidance Notes for the bits and pieces, which are not catered for within the generic guidance notes issued by the FIC. Regardless of these challenges, the proposed and established structures, will

surely help and ensure that SA fares well during the upcoming 2019 FATF mutual evaluation exercise and other domestic future developments.

Conclusion

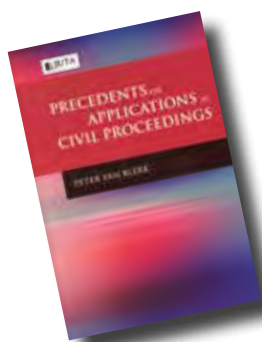
In short, the proposed inter-departmental committee is motivated by and in line with international best practices and standards rather than presumptuous political motives aimed at, among others, snubbing certain key stakeholders on the relevant processes or at least this is what the context indicates. Finally, this committee is the 'flywheel' of any effective anti-money laundering and counter terrorism financing regime.

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BOOK ANNOUNCEMENTS

Book announcements



Precedents for Applications in Civil Proceedings

By Peter van Blerk
Cape Town: Juta
(2018) 1st edition
Price R 870 (incl VAT)
755 pages (soft cover)

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. The book serves as an indispensable tool for vocational training for both attorneys and advocates.

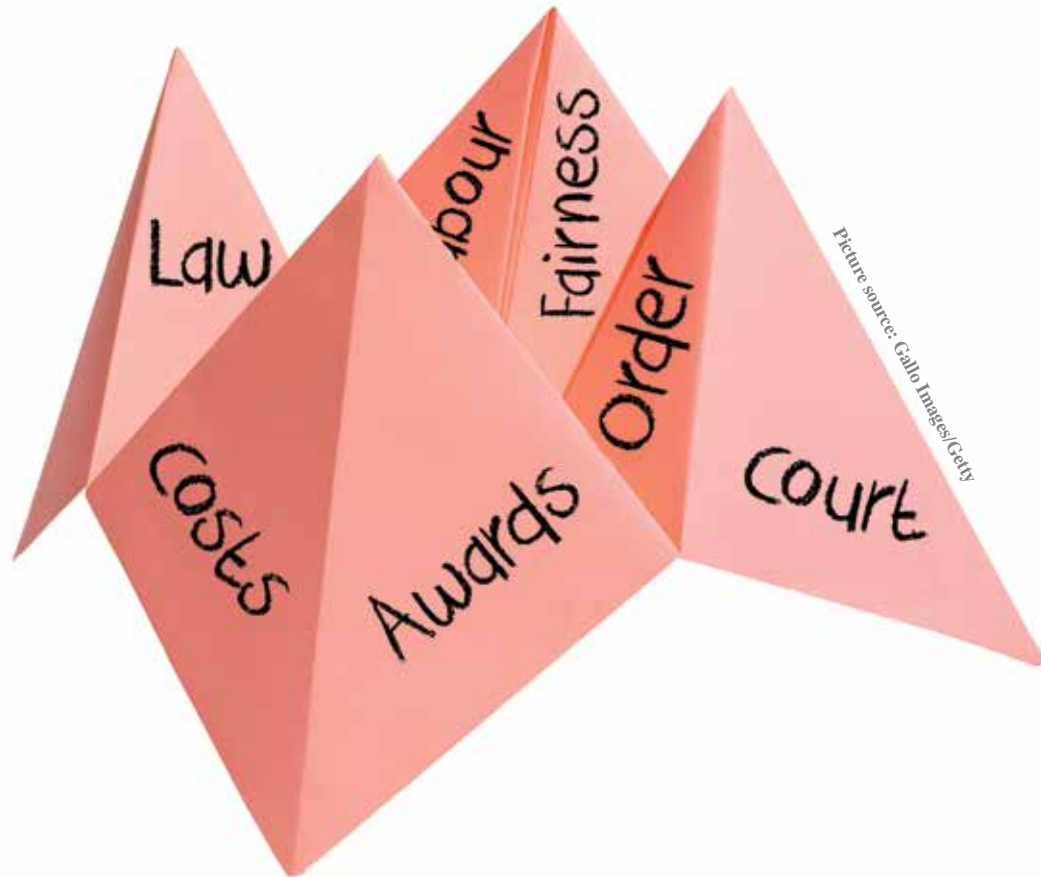


Undoing Delict: The South African Law of Delict under the Constitution

By Anton Fagan
Cape Town: Juta
(2018) 1st edition
Price R 495 (incl VAT)
305 pages (soft cover)

This book includes Anton Fagan's ten best previously published articles and essays. They deal with a range of topics, such as wrongfulness, causation, pure economic loss and defamation. Many of the views put forward in this book are controversial and their defence against contrary views is, at times, robust. But the aim throughout is to deepen or advance the understanding of important and interesting, and in some instances puzzling, aspects of the South African law of delict. □

Factors to be considered when making costs awards in labour matters



By
Deon
Mouton

The Labour Relations Act 66 of 1995 (LRA) states that a commissioner may make a costs order in accordance with the requirements of law and fairness, in a manner conforming with the rules made by the Commission for Conciliation, Mediation and Arbitration (CCMA) and having taken into account any relevant Code of Good Practice issued by National Economic Development and Labour Council and guidelines issued by the CCMA (s 138(10) of the LRA).

The CCMA Guidelines: Misconduct Arbitration (CCMA Guidelines) item 142, under 'Costs awards' confirms that an arbitrator must exercise its discretion to award costs in terms of the requirements of law and fairness.

Rule 39(1) of the CCMA Rules echo the LRA and set out factors, which the arbitrator should consider when making a costs award (s 138(10) of the LRA).

The LRA also states that the Labour Court (LC) may make a costs order according to the requirements of the law and fairness and s 162(2) of the LRA sets out the factors to be considered when

deciding whether or not to grant a costs order.

Withdrawals and postponements

The LC in *Van den Berg v SA Police Service* (2005) 26 ILJ 1717 (LC) at 1721-1722 held that r 13 of the rules of the LC allows a party to withdraw a matter and, when costs are not tendered, then the other party may apply for costs in terms of r 11. The rule does not require the withdrawing party to tender the costs. Costs are governed by the LRA and there is no general principle that the withdrawing party, as the losing litigant, is liable for costs of the proceedings. Generally, the LC may order the payment of costs, according to the requirements of law and fairness, having regard to the conduct of the parties in proceeding with or defending the matter. The general rule that costs should follow the result is a relevant factor to be considered. However, it may yield where fairness requires it. Proper consideration should be given to the facts and circumstances of a particular matter. Sight should not

be lost of the special nature of dispute resolution in the employment context. Parties should not be discouraged when approaching the court especially individual employees. Courts should be slow in making costs orders where a genuine dispute exists and the reasons for approaching the LC were reasonable.

Order of costs in the Appellate Division and the Labour Court

In the early nineties, the Appellate Division held in *National Union of Mineworkers v East Rand Gold Mine and Uranium Co Ltd* 1992 (1) SA 700 (A) at 738F that the legislature decided that both the law and fairness must be taken into account in exercising a discretion with regard to costs. The Appellate Division referred with approval to a judgment in the LC in *Chamber of Mines of SA v Council of Mining Unions* (1990) 11 ILJ 52 (IC) at p 73E – 80J) and set out the following considerations, which may be relevant in relation to costs:

- The provision that 'the requirements of the law and fairness' are to be taken

into account is consistent with the role of the LC, as one in which both law and fairness are to be applied.

- The general rule that in the absence of special circumstances costs follows the event is a relevant consideration. However, it will yield where the considerations of fairness require it.

- Parties, and particularly individual employees, should not be discouraged from approaching the LC in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following passage from the judgment in the *Chamber of Mines* case (at para 77G – I) was quoted in *National Union of Mineworkers*:

‘In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side’s costs. The industrial court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalised unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is *bona fide*.’

- The parties before the LC will frequently have an on-going relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a *bona fide* one, may damage that relationship and thereby detrimentally effect industrial peace and the conciliation process.

- The conduct of the respective parties is obviously relevant especially when considerations of fairness are concerned.

The Appellate Division in *National Union of Mineworkers* stated that these considerations were in no way intended to be a *numerus clausus*. A very wide discretion is given to courts with regard to the power they exercise and no less in respect of orders for costs. Such a discretion must be exercised with proper regard to all of the facts and circumstances of each case.

Labour Courts

In *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others* (LAC) (unreported case no JA15/2014, 10-1-2017) (Makgoka AJA) the general approach to costs of ‘the requirements of law and fairness’ in the LC was restated. ‘The requirements of law and fairness are on equal foot-

ing, and none is secondary to the other’ (*Vermaak* at para 10). The Labour Appeal Court (LAC) mentioned that the default position is no costs orders in the LC (*Vermaak* at para 14). When making costs orders the court may take into account, among others, the conduct of the parties in proceeding with the matter before the court and their conduct during the proceedings (*Vermaak* at para 10).

The LAC referred to *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC) at para 19 where the following was explained:

‘[T]he norm ought to be that cost orders are not made unless those requirements [of law and fairness] are met. In making decisions on cost orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.’

Order of costs in arbitrations

When exercising the discretion to grant a costs order in law and fairness, the arbitrator must take the following factors of r 39 of the Rules for the Conduct of Proceedings before the CCMA into account –

- ‘a) the measure of success that the parties achieved;

- b) considerations of fairness that weigh in favour of or against granting a cost order;

- c) any with prejudice offers that were made with a view to settling the dispute;

- d) whether a party or the person who represented that party in the arbitration proceedings acted in a frivolous and vexatious manner –

- i) by proceeding with or defending the dispute in the arbitration proceedings; or

- ii) in its conduct during the arbitration proceedings;

- e) the effect that a costs order may have on a continued employment relationship;

- f) any agreement concluded between the parties to the arbitration concerning the basis on which costs should be awarded;

- g) the importance of the issues raised during the arbitration to the parties as well as to the labour community at large; [and]

- h) any other relevant factor.’

Constitutional Court

In the recent Constitutional Court (CC) decision of *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] 4 BLLR 323 (CC) the court pointed out again that the correct approach in labour matters in terms of the LRA is that the losing party is not, as a norm, ordered to pay the successful party’s costs. The court held that the LC and LAC erred in not following and applying the principle in labour matters as set out in *Dorkin*. ‘The courts did not exercise their discretion judicially when mulcting the applicant with costs,’ the CC said (see paras 23 to 26).

It is proposed that the following considerations should be observed before seeking a costs order in labour matters governed by the LRA (CCMA Case Law Monitor 2ed (2010) at 11005-11006):

- The general rule of our law that in the absence of special circumstances, costs follow the event is a relevant consideration. This general rule will yield where considerations of fairness require it.

- Individual employees, in particular, should not be discouraged from approaching dispute resolution institutions created by the LRA.

- A *bona fide* litigant should not be penalised even if the litigant is misguided in bringing an application for relief.

- Where the parties will have an ongoing relationship after the dispute has been resolved, especially with a *bona fide* dispute, may damage the employment relationship and thereby affecting labour peace and conciliation.

- The conduct of the parties is relevant especially when considerations of fairness are concerned.

- Whether the issues raised are of fundamental importance, not only to the parties but to the labour community at large.

- A very wide discretion is allowed by the LRA and discretion must be exercised judicially with regard to all the facts and circumstances of each case.

- If the court is to err, it should err on the side of not discouraging parties from approaching these labour dispute resolution bodies with their disputes.

Conclusion

The LRA does not provide for a costs order to follow the result. Labour courts have a wide discretion on whether or not to make a costs order in favour of a successful party. Litigants should be made aware of this by their legal representatives.

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THE LAW REPORTS

July 2018 (4) South African Law Reports (pp 1 – 331);
[2018] 2 All South African Law Reports June (pp 597 – 892)

This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports and the South African Criminal Law Reports. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – *Editor*.

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
ECM: Eastern Cape Local Division, Mthatha
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LP: Limpopo Division, Polokwane
SCA: Supreme Court of Appeal

Animals

Ownership of escaping wild animals: The dispute in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Society* 2018 (4) SA 206 (SCA) concerned the ownership of a valuable herd of Cape Buffalo. The buffalo escaped from the fenced Thomas Baines Nature Reserve in the Eastern Cape, a provincial nature reserve managed by the appellant (Eastern Cape Parks) onto the respondent's (Medbury) land. Medbury declined to return the buffalo. Medbury argued that it had become the owner of the buffalo under the common law. Under the common law, when a wild animal escapes its owner it becomes *res nullius*, and susceptible to the ownership of another party by means of *occupatio* (ie, capture and control with intention to possess).

However, s 2 of the Game Theft Act 105 of 1991 (the Act) provides that notwithstanding the rules of common law –

‘(a) a person who keeps or holds game ... on land that is sufficiently enclosed as contemplated in subsection (2) ... shall not lose ownership of

that game if the game escapes from such enclosed land ...;

...
(2)(a) For the purposes of subsection (1)(a) land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, ... it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate.’

Eastern Cape Parks instituted an action for the buffalo's return and the matter proceeded on a stated case confined to the question, *inter alia*, whether the certificate in s 2(2)(a) was a prerequisite for the protection in terms of s 2(1)(a) of the Act. (Eastern Cape Parks had no certificate.) The High Court held that it was, and dismissed the action.

On appeal to the SCA, per Navsa JA, formulated the primary question before the court as follows, namely, whether a certificate in terms of s 2(2)(a) is the only basis for the protection, afforded by s 2(1)(a), against loss of ownership.

The court held that it would be absurd to construe the deeming provision in the manner contended for by Medbury, namely, that the certificate is a ‘prerequisite for the protection afforded by the [Act] to apply’. This would defeat the purpose of the Act, which is to ensure that owners of game, who had in fact taken adequate measures to enclose land in order to confine game, do not lose ownership in the event of loss of control due to escape. The result of following Medbury's

construction would be that even where the land is in fact sufficiently enclosed to confine a species to it, the protection provided by s 2(1)(a) would be rendered nugatory. The production of a certificate was meant ‘to facilitate proof’ that the land in issue is sufficiently enclosed to confine the species in question. It was not meant to deprive owners who had taken the necessary measures to sufficiently enclose game on land, merely because they are not in possession of a s 2(1)(a) certificate.

The appeal was allowed with costs.

• See law reports ‘Game Animals’ 2016 (Oct) *DR* 36 for the ECG judgment.

Arbitration

Grounds for setting award aside: The facts in *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* [2018] 2 All SA 660 (SCA) were as follows: The respondent (Motlokwa) tendered successfully for a contract to remove waste from the appellant's (Palabora) mine and smelter. Relations between Motlokwa and Palabora subsequently soured. The parties agreed to refer the dispute to arbitration. The dispute involved a claim by Palabora and a counterclaim by Motlokwa. The arbitrator held that a valid and binding contract had been concluded by way of a letter between the parties dated 23 December 2015. The arbitrator found that the pleaded defences of lack of consensus between the parties and that any contract was invalid by virtue of *iustus*

error were unsound and fell to be dismissed; and, that the contract had not been lawfully cancelled either. Palabora's claim was thus dismissed and Motlokwa's counterclaim was upheld.

Motlokwa then applied for the arbitration award to be made an order of court in terms s 31(1) of the Arbitration Act 42 of 1965 (the Act). The application was opposed and a counter-application brought by Palabora under s 33(1)(b) of the Act to set the award aside.

Section 33(1)(b) provides that ‘where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; ... the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

Wallis JA held that where an arbitrator for some reason misconceives the nature of the inquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct inquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it.

While s 33(1)(b) provides that if an arbitrator commits a gross irregularity or

exceeds its powers the court may make an order setting the award aside. It is silent on the situation where the irregularity or excess of powers affects only a discrete part of the award. The court held that there is no reason why an arbitration that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue. As the gross irregularity occurred in relation to the counterclaim alone, it was the award in respect of the latter alone that fell to be set aside.

Constitutional Law

Freedom of religion – limitations: The facts in *MEC for Health, Limpopo v Rabalago and another* 2018 (4) SA 270 (LP) were *res nova*. The applicant (the MEC) responsible for the Department of Health and Social Development in Limpopo Province, launched an urgent application in this court against the respondents for an interim interdict in terms of which a *rule nisi* was granted. The present application was to have the interim interdict confirmed.

The first respondent was a pastor of the second respondent (the congregation). In November 2016 it was reported in the printed media and later also in social media that the first respondent allegedly used Tiger Brand's

Doom insecticide to spray his congregants in order to heal members of his church assembly. Doom is generally freely sold to consumers in markets, shops and supermarkets for use in households. It is a multi-insect killer also registered as a pesticide to poison and kill insects. The MEC's application for an interdict was to prevent the first respondent from spraying the members of his congregation with Doom.

Phatudi J pointed out that it was common cause that Doom spray was poisonous and detrimental to one's health.

Section 15(1) of the 1996 Constitution guarantees the right to freedom of conscience, religion, thought, belief and opinion. Section 15(2) provides that 'religious observances' may be conducted at state or state-aided institutions.

In the present case the court was confronted with the question whether the respondents in exercising their 'religious observances' in their religion and beliefs, do so within the confines of s 15(2)(a) of the Constitution. The respondents relied on the provisions contained in s 31(1) of the Constitution, which stipulate that:

'(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

However, s 31(2) stipulates that '(t)he rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.

What, however, limits the right in ss 15(1) and 31(1) asserted by the first respondent, is the application and use of a toxic substance such as Doom spray on the human body contrary to the warnings on each can of Doom. The court thus held that the legislation that prohibits misuse of such insecticides or pesticides as Doom spray on humans, limits the very religious rights claimed by the first respondent under the Constitution. The freedom of worship, whether actuated by spirituality or not, has to be exercised reasonably within the confines of the law and the constitutional framework.

The *rule nisi*, which was granted in November 2016, was accordingly confirmed.

Contract law

Validity of demand for performance: The facts in *Mr LED (Pty) Ltd v Waxfam Investments (Pty) Ltd and Another* 2018 (4) SA 308 (GJ) were as follows: The appellant (LED) was the buyer and the respondent (Waxfam) the seller in terms of a contract of sale of a piece of land. When LED delayed in performing under the contract, it incurred an obligation to pay a sum of penalty interest. LED failed to pay the penalty. Waxfam's conveyancer, in a written letter, demanded payment of the engineering services fee, as well as penalty interest, a total of some R 1,16 million. The total penalty interest claimed was R 422 013,14. After warning, and continued non-compliance, the agreement was cancelled. LED later unsuccessfully sought specific performance of the agreement. LED appealed to the Full Bench (the present court). The issue was whether LED's demand for specific performance was valid.

On appeal LED averred that Waxfam had overstated the penalty interest owed. LED admitted owing a part of the penalty, and that that part was due.

Gautschi AJ held that on LED's own admission, made in the replying affidavit, an amount of *mora* interest of some R 64 000 was due and payable by it. The question is whether the demand, overstated as it was, was a good demand in terms of clause 18.1 and would entitle Waxfam to cancel the agreement. The court held that it was. The mere fact that a demand for payment of money is overstated does not make it ineffectual, where there is an admitted portion thereof, which is due and payable. Its calculation is incorrect and overstated by three days, but the exact figure does not matter for purposes of this analysis.

The court further held if the principle is that an overstated demand which includes an admitted indebtedness would constitute a valid demand, there is no room for degrees of overstatement.

Waxfam's cancellation of the agreement of sale was thus lawful. LED's application was rightly dismissed in the court *a quo*. The appeal was dismissed with costs.

Delict

Medical negligence: The crisp facts in *AN obo EN v Member of the Executive Council for Health, EC* [2018] 2 All SA 678 (ECM) were as follows: The plaintiff sued the defendant for damages for alleged negligence by doctors and nurses at a hospital falling under the control of the defendant. In her particulars of claim the plaintiff provided a long list of allegations of negligence by the defendant's employees, among others, their failure to monitor the plaintiff and her unborn foetus either properly or with sufficient frequency, which resulted in a failure to diagnose timeously the onset of foetal distress. As a result, so the plaintiff argued, her child was born with severe brain defects and was diagnosed with hypoxic ischaemic encephalopathy (HIE).

While admitting that the

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staff was bound to employ the skill and care as could reasonably be expected of staff in similar circumstances, the defendant nevertheless denied any wrongful, unlawful or negligent conduct.

Dawood J pointed out that the issue for determination was whether or not sub-optimal care by medical staff at the hospital caused or causally contributed to the child's condition, that is, whether there was a causal connection between the failure to monitor the foetal heart rate and the HIE of an acute profound nature, hypoxic cerebral palsy, developmental delay and serious brain defects suffered by the child. The matter turned on the probabilities and credibility did not play a role since all the experts were equally credible.

The defendant's case included an allegation that the baby was being monitored and that a nurse had taken a reading at 6:00am on the morning in question, showing that all was normal. However, so the court reasoned, the defendant failed to adduce the evidence of that nurse. The court was, therefore, unable to accept her recordings, especially since it was specifically placed in issue and questioned by the plaintiff's expert. The defendant accordingly could not rely on this as confirmation that at 6:00am, the foetal heart rate was normal and that there was no cause for concern at that time.

The main expert witness for the defendant was unfazed by the exclusion of the above evidence. He stated that although that was what he relied on, the exclusion of that evidence would not change his opinion since it was still an acute profound event that would have occurred in the last half an hour prior to delivery and, therefore, even with no monitoring, the outcome would have been the same. The court accepted that the witness had the necessary expertise to express an expert opinion, and that his version that the problem was a sudden occurrence and there was no time to have acted to prevent the incident was more probable than the

plaintiff's expert that there must have been forewarning and that prompt action could have resulted in the baby being delivered earlier reducing or eliminating the HIE. The plaintiff's expert's theory was unsubstantiated by any medical authority.

The court concluded that the plaintiff had accordingly failed to demonstrate a causal connection between the sub-standard care and the injury that ensued on a balance of probabilities. Having failed to discharge the onus resting on her to prove her case against the defendant on a balance of probabilities, her claim was dismissed with no order as to costs.

Personal injury: The facts in *Chowan v Associated Motor Holdings (Pty) Ltd and Others* 2018 (4) SA 145 (GJ); [2018] 2 All SA 720 (GJ) were as follows: The plaintiff (Chowan) was employed by the first defendant, Associated Motor Holdings (AMH) as group financial manager. She was dismissed with immediate effect at the end of September 2015.

Chowan was head-hunted for the position of group financial manager at AMH. At the time she already had extensive experience as a chartered accountant in the corporate world. On being recruited for the position of group financial manager at AMH, she sought an assurance that opportunities would be available to her for career progression. Suffice it to say that these opportunities did not materialise and at a later stage Chowan was told she would never be promoted as Chief Financial Officer of AMH and that she was a 'female, employment equity' person. Chowan considered the mention of her race and gender totally unprofessional and unacceptable and lodged a grievance, which was dismissed. AMH thereafter instituted disciplinary proceedings against her because she had abused the grievance procedures. She was subsequently dismissed from AMH's employment.

Chowan sued AMH in delict under the *actio legis aquiliae* for pure economic loss that she allegedly suffered

through AMH's wrongful and intentional acts. Her alternative claims for AMH's alleged repudiation of the employment contract between them; and a claim for damages under the *actio iniuriarum* as a result of alleged injuries to her reputation (*fama*) fall outside the scope of the present discussion.

Meyer J pointed out that central to Chowan's *aquilian* claim was her averment that her dismissal was wrongful because it contravened AMH's duty under the Protected Disclosures Act 26 of 2000 (the PDA) not to subject her, as employee, to an 'occupational detriment' for having made a 'protected disclosure' in terms of s 3 of the PDA. Section 3 provides that no employee may be subjected to any occupational detriment by their employer on account, or partly on account, of having made a protected disclosure.

Section 1, in turn, defines 'disclosure' as 'any disclosure of information regarding the conduct of an employer ... made by an employee ... who has reason to believe that the information concerned shows [*inter alia*] ... unfair discrimination'. Under s 6(1)(a) such disclosures, when made to employers, were protected if they were made in good faith and substantially in accordance with prescribed procedures. The court held that Chowan's disclosure was not an external one that fell under s 9 of the PDA. It was consented to by an employee of AMH and was thus an authorised internal procedure covered by s 6(1)(a) of the PDA.

Chowan's subjective belief that she was being discriminated against was 'reasonable' within the meaning of 'disclosure' in s 1 of the PDA. Because the disclosure was, on the evidence, also made in good faith, it was protected, and the occupational detriments to which she was subjected – suspension, disciplinary action and dismissal – were contrary to s 3 of the PDA and hence unlawful.

Turning to the plaintiff's *aquilian* claim, the court did not regard the availability of other remedies as a bar to extending the *aquilian* action

to import wrongfulness and fashion a remedy in delict for the plaintiff. The court pointed to the numerous public policy reasons in favour of imposing delictual liability in the case. AMH was, therefore, held liable for payment of the delictual damages proven by the plaintiff. That rendered it unnecessary to consider the plaintiff's contractual claim.

Chowan's *aquilian* claim was thus allowed with costs.

• See Henry Ngcobo and Nicole Deokiram 'Discrimination: The unfortunate tale of an "affirmative action" candidate' 2018 (July) DR 44.

Unlawful arrest and detention

The facts in *De Klerk v Minister of Police* [2018] 2 All SA 597 (SCA) were as follows: The complainant owed the appellant (De Klerk) money for services rendered. De Klerk went to the complainant's office on 11 December 2012, to demand his money and an altercation ensued. In the scuffle, the complainant bumped into the frame of a wall picture. The glass broke and cut the complainant's back. He reported the incident to the police who opened a docket for assault with intent to do grievous bodily harm. The police called De Klerk and invited him to make a statement. He went to the police station and after he unsuccessfully tried to contact his lawyer, according to the appellant's version he was arrested and detained for a week. He was released after the complainant withdrew the complaint.

De Klerk subsequently instituted action against the respondent, the Minister of Police (the minister), claiming damages for unlawful arrest and detention and malicious prosecution. The High Court stated that the primary basis on which it was alleged that the arrest was unlawful was because it took place without a warrant, but found that the police had acted reasonably. It dismissed the claim.

On appeal to the SCA, De Klerk contended that the court *a quo* erred in not considering that there were no objective facts in evidence underpinning any reasonable suspicion that an offence referred to in sch 1 of the

Criminal Procedure Act 51 of 1977 (the Act) had been committed. He contended further that the absence of a warrant made the arrest unlawful, because assault with intent to do grievous bodily harm is not one of the offences referred to in sch 1. The court *a quo* held that the police were entitled to arrest without a warrant for any offence, except the offence of escaping from lawful custody. However, it raised the issue *mero motu* and overlooked the fact that the respondent did not plead nor canvas that in evidence. The parties were also not asked to address the court on the matter, and the appellant also took issue with that on appeal.

Shongwe ADP, in a majority judgment, pointed out that it was common cause that at the time of De Klerk's arrest, the police were acting within the course and scope of their employment with the respondent. Consequently, the minister was vicariously liable for their wrongful acts. The minister bore the onus to prove the lawfulness of the arrest.

Schedule 1 of the Act does not include assault with intent to do grievous bodily harm. It lists an offence of 'assault when a dangerous wound is inflicted'. Therefore, one of the jurisdictional facts was absent in this case. It could not be said that the arresting officer entertained a reasonable suspicion that the listed offence had been committed.

The arresting officer failed to investigate the circumstances of the assault, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. The nature and seriousness of the wound was never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in sch 1. Arrest without a warrant in the circumstances was unlawful.

Although in his claim relating to unlawful detention, De Klerk referred to his detention for eight days, the court viewed it differently. The police had taken the appellant

to court within two hours of his arrest. It was, therefore, held that De Klerk was unlawfully detained for not more than two hours. What happened in court and thereafter could not be attributed to the minister.

The appeal was upheld and the court awarded De Klerk R 30 000 as compensation.

Stare decisis Principle

Lower courts bound by decisions of higher courts: In *Patmar Explorations (Pty) Ltd and Others v The Limpopo Development Tribunal and Others* 2018 (4) SA 107 (SCA) the court confirmed the sanctity and constitutional importance of the *stare decisis* principle.

The facts were as follows: The Limpopo Development Tribunal approved applications before it, at a time that the CC held the empowering act to be unconstitutional, but suspended the effect of that finding for a period of two years.

In *Mogalakwena Local Municipality v Semmogo Property Development (Pty) Ltd and Others* (unreported case no 18585/2013, 6-5-2013) (Mothle J) had previously held that the suspension applied to matters that had already been decided, but that the Tribunal was no longer entitled to rule on pending or new matters. Despite that court decision, the Tribunal dealt with the pending matters in this case and approved the applications of the applicants before the Tribunal.

Patmar, an objector to the applications before the Tribunal, brought an application before the LP contesting the validity of the Tribunal's powers. The court, without much discussion or analysis, held that the previous decision in the *Mogalakwena* case was wrong and made a contrary finding, namely that the Tribunal was still entitled to deal with pending matters.

A few days before leave to appeal against this decision was granted, the SCA handed down the decision in *Shelton v Eastern Cape Development Tribunal and Others* (SCA) (unreported case no 489/2015, 26-

9-2016) (Potterill AJA) (Lewis, Wallis and Saldulker JJA concurring) where it reached the same conclusion as in the *Mogalakwena* case, namely that the suspension also suspended the powers of tribunals to deal with pending matters.

Wallis JA held that the principle that courts are bound by their own earlier decisions and will abide by them unless they are clearly wrong (*stare decisis* principle), is an important constitutional principle and the rule of law ensuring legal certainty.

The bar in determining whether a previous decision is wrong or not, is set very high to preserve this principle. The mere fact that a later court may disagree or have a different point of view is insufficient, as there must be clear reasons that the earlier decision was clearly wrong.

This principle applies not only to the CC and the SCA, but also to provincial divisions. Although different provincial divisions may disagree on a point of law, judges in the same division are bound by earlier decisions unless the earlier decision was clearly wrong.

In the hierarchy of courts, lower courts are bound by the decisions of higher courts and are not at liberty to decide whether such a decision was wrong or not.

In the court *a quo*, the judge failed to properly heed the principles of *stare decisis* principle. There was no clear reasoning why the previous decision in the same division was wrong and the judge should have followed it, even if he disagreed with it. The decision was reasonable and justifiable and not clearly wrong.

The appeal was thus upheld with costs.

Trusts

Validity of election of trustees: In *Fesi v Ndabeni Communal Property Trust* [2018] 2 All SA 617 (SCA) the court was asked to pronounce on the validity of the election of a trustee of a trust established to administer and develop property received as a result of a land restitution claim. The salient facts were

as follows. In 1997, a land claim was successfully lodged in terms of the Restitution of Land Rights Act 22 of 1994. A trust was created to serve the interests of the claimant community and in contemplation of a successful land claim. The respondents were appointed trustees in August 2015, after the failure of the prior board to convene an annual general meeting to enable a new board of trustees to be elected.

The crisp issue in the present dispute was whether the six respondents were properly elected in terms of the trust deed by persons entitled to vote. And further, whether the respondents were entitled to assume office as trustees of the trust. The legality of the election was called into question by a number of persons. The second appellant (the Master) allowed a period of time for a court challenge to be launched. When that was not forthcoming, the Master, on 12 August 2015, issued letters of authority to the respondents. Shortly after the letters of authority were issued, the respondents concluded the first of a series of written agreements, which involved a property developer. The agreements provided for the sale of the property to a joint venture company (Devco) in which the developer and the trust would respectively hold 74% and 26% of the issued shares. The trust accepted Devco's offer for the land without obtaining independent valuations and despite previously having obtained a substantially better offer.

In October 2016, the first appellant issued summons in terms of which she contested the validity of the appointment of the respondents. Faced with the summons and having regard to the complaints received from interested parties concerning the actions of the respondents, the Master declined to issue the letters of authority. The respondents then successfully applied in the court below for an order directing the Master to issue letters of authority authorising the respondents to act as trustees of the trust. The present ap-

peal was against the High Court's order.

On appeal, the appellants argued that the respondents were not entitled to approach the court for an order compelling the Master to issue letters of authority. They contended that the proper procedure would have been for the respondents to launch an application in terms of s 23 of the Trust Property Control Act 57 of 1988 (the Trust Act) and in accordance with r 53 of the Uniform Rules, to review and set aside the decision by the Master to not issue the letters of authority.

Navsa JA held that the respondents were entitled to approach the court for relief in terms of s 23 of the Trust Act on the basis that they had. The essential question was whether relevant and sufficient facts were before the court enabling it to adjudicate the claim for relief. The court confirmed that the necessary facts were before the court below to enable the respondents' claim for relief and the grounds of opposition, with reference to the relevant statutory provisions, to be adjudicated.

For proper accession to the office of trustee, there must be –

- appointment in a lawful manner;
- proper qualification on the part of the trustee;
- acceptance of the office; and
- written authorisation by the Master.

The facts showed that the respondents could not be regarded as having been validly

elected in accordance with the trust deed. A letter of authorisation from the Master could only follow on appointment in accordance with the trust deed. The Master rightly had concerns about the election of the respondents and the court below erred in being too readily dismissive of the Master's concerns.

The fact that the respondents were not properly elected on its own disentitled them to the relief sought and granted in the High Court. The Master's refusal to issue letters of authority was clearly justified. The appeal was thus upheld with costs.

Water

Supra-natural flow of water from upper to lower property: The facts in *Pietermaritzburg and District Council for the Care of the Aged v Redlands Development Projects (Pty) Ltd and Others* 2018 (4) SA 113 (SCA) concerned an application by the owner of a lower property to interdict supra-natural flow of water from upper property. The two properties at stake were on a hill. The highest was owned by the respondents (Redlands). Beneath Redlands was a road owned by the municipality; below it two further properties; and then the land owned by the appellant, Pietermaritzburg and District Council for the Care of the Aged (PADCA). Rain-water on Redlands was combined and diverted into a catchment pit on the municipality's road, which was fed also by the gutter of another municipal road. From the pit

the water flowed by municipal pipe across the next two properties, and to a canalised watercourse on PADCA's property.

PADCA's application for an interdict was based on the *actio aquae pluviae arcendae* (that is, an action for the removal of obstructions erected by a neighbour to impede the natural flow of rain-water); alternatively, in neighbour law. The High Court dismissed the action.

On appeal to the SCA, Pillay AJA, pointed out that the municipality approved the storm water system within Redlands Estate during construction; the design plan met guidelines in place at the time for storm water disposal. Consequently, Redlands were lawfully authorised to dispose of their storm water into the municipal system. Lastly, in regard to the *actio*, the developers of the lower property knew the design plan; not only did the developers of both properties use the same firm of engineers, but also the same guidelines were then in force and applied to both properties. In anticipation of receiving increased volumes of water from its own and higher properties PADCA built its canal during the construction of the higher property. Contrary to the advice it received, PADCA did not line its canal with concrete. It built the canal in place of the natural watercourse.

As for PADCA's alternative claim based on the law of neighbours, the SCA held in *Regal v African Superslate*

(Pty) Ltd 1963 (1) SA 102 (A) that our common law must be investigated fully before considering the English law of nuisance, which has not replaced our common law. And, importantly, that liability flowed from our conventional principles of delict. In that case the appellant sought to prevent slate waste being carried down the river from the respondent's farm and being deposited across his land. Even if the *actio* did not apply, the developers of Redlands Estate had a duty to comply with the municipality's conditions. In fulfilling this duty, they acted reasonably. The municipality is the authority responsible and accountable publicly for assessing and managing the water disposal needs of the area. In these circumstances, PADCA cannot justifiably rely on neighbour law to hold the respondents liable.

The appeal was thus dismissed with costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, civil procedure, competition, contracts, divorce, immigration, land reform, litigation (norms and standards), local authorities, powers of police, review proceedings, selection of judges, telecommunication, tenders and winding-up of companies.



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The effect of non-compliance with federal constitutions

De Lille v Democratic Alliance and Others (WCC) (unreported case no 7882/18, 27-6-2018) (Le Grange J, Mantame J and Sher J)

On 27 June, the Western Cape Division of the High Court set aside the determination by the opposition party, the Democratic Alliance (DA) that the applicant, Patricia De Lille had ceased to be a member of the DA in terms of clause 3.5.1.2 of its Federal Constitution.

Factual background

De Lille held the office of executive mayor since 2011. More recently, the DA initiated internal disciplinary proceedings against De Lille in respect of various alleged irregularities, which she engaged in while in office as mayor.

In February, members of the DA caucus proposed a motion of no confidence, which failed by a single vote. Pursuant to this, the DA amended its Federal Constitution by inserting a 'recall clause', which states that:

'[I]f a member of the party who holds executive office ... has lost the confidence of his/her caucus the Federal Executive ... may, after giving him/her the opportunity to make representations to it, resolve to require such member to resign from office within 48 hours, and a failure to do so will lead to cessation of membership of the party in terms of [clause] 3.5.1.10 of its constitution.'

Clause 3.5.1.10 further provides that: '3.5.1 A member ceases to be a member of the Party when he or she:

... 3.5.1.10 fails to resign his or her position after the procedures stipulated in [clause] 6.2.6.3 have been followed.'

Accordingly, the procedure to be followed is that, prior to proposing a motion of no confidence in a member, the caucus is required to obtain the consent from the Federal Executive. On 18 April, the caucus obtained the requisite consent to invoke the recall clause, and a further motion of no confidence was brought on 25 April, which succeeded with the required majority.

On 3 May, De Lille was informed that her membership had ceased to exist as a result of a public declaration, which she had allegedly made during the course of a radio interview on 26 April, following the outcome of the successful motion of no confidence. The statements made by De Lille essentially pertained to whether she would 'walk away' from the DA and/or her role as mayor, once she had

'cleared her name'. Importantly, the DA's Federal Constitution provides that a person ceases to be a member when they publicly declare their intention to resign from the party (the cessation clause).

In accordance with the rules of the DA's Federal Legal Commission, De Lille was given 24 hours to provide 'clear and unequivocal' reasons why her membership had not ceased, which she did timeously, and in which she denied that the cessation clause had application to the statements made during the radio interview.

On 6 May, the DA's Federal Legal Commission appointed a panel to consider De Lille's submissions, and to make a determination on whether De Lille's membership had ceased. The panel found that De Lille's membership had indeed ceased, and accordingly recommended that the Federal Executive confirm the cessation. On 7 May, the Federal Executive confirmed the cessation of De Lille's membership.

As a consequence of the above, De Lille instituted legal proceedings to have the aforementioned determination reviewed and set aside.

The issue before the court was whether the DA complied with its Federal Constitution and its rules when it decided to invoke the cessation clause.

Judgment

In considering this issue the court had to determine whether the provisions of the cessation clause found application.

As mentioned above, the cessation clause provides that a person ceases to be a member when they publicly declare an intention to resign from the party. In this regard, De Lille claimed that the statements made pertained only to 'a possible expression of an intention to resign as Mayor after she had "cleared her name" and did not constitute the expression of an intention to resign from the party'. However, the court held that: 'For the purpose of this judgment we have assumed, in favour of the DA, that the jurisdictional pre-requisites which were necessary for the clause to find application, were present.'

Notwithstanding this, the court went on to find that even though the cessation clause found application, it did not necessarily mean that De Lille's membership had ceased – the implication being that something more was required.

The DA contended that the cessation clause operated automatically. In considering this contention, the court had regard to the DA's Federal Legal Commission rules, which dealt with the cessation clause, and found that the rules required that 'there be a determination of the cessation by [the DA's Federal Legal Commission] panel, which is then confirmed by [the Federal Executive]'

After analysing the composition of the DA's Federal Legal Commission panel, the court found that the panel had not been properly constituted in accordance with the DA's Federal Constitution. On this ground alone, the court found that the DA's non-compliance with its own Federal Constitution amounted to an irregularity, which justified a ground for review.

In this regard, the court held that where the DA's Federal Legal Commission's panel has not been properly constituted in accordance with the party's Federal Constitution there cannot be a valid determination made that membership has ceased, and furthermore, there can be no valid and effective confirmation of such a determination.

In addition to this, the court also found that the DA had failed to comply with ch 10 of the Federal Constitution, which required that before making an adverse finding against De Lille, they were to give her an opportunity to submit evidence in mitigation.

In conclusion, the court found that the DA failed to comply with the provisions of its own Federal Constitution when it decided to invoke the cessation clause. As a result of this material defect, the determination that De Lille's membership had ceased was set aside.

Conclusion

This judgment highlights the importance of political parties acting in strict adherence to their own constitutions. The failure of a party to comply fully with its constitution may amount to a fundamental irregularity, which could render its actions *ultra vires* and invalid. Consequently, all further decisions *in lieu* of such conduct will also be found to be invalid.

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By the Law Society of South Africa's Cybersecurity helpdesk - Anthony Pillay

Business e-mail compromise: Attorneys' liability

This is the first in a series of articles addressing the legal obligation to establish and maintain proper information security aimed at avoiding unauthorised access to and protecting the confidentiality of client information. The Law Society of South Africa has consulted with experts relating to business e-mail compromise (BEC) and will also be engaging with the Attorneys Fidelity Fund, the South African Banking Risk Information Centre, major vendors of attorneys' software and information and communication technology service providers to provide more comprehensive information addressing information security and avoiding or mitigating losses occasioned by BEC.

Among the scams that have increased exponentially in recent years, is what is termed as BEC. It is estimated that in 2018 global losses attributable to BEC will exceed US\$ 9 billion (approximately R 121 billion).

South Africa (SA), partly due to its failure to properly introduce and enforce legislation governing the protection of personal information and the failure of

entities and/or persons processing personal information to implement appropriate security measures, are easy targets for cyber criminals. South Africans are contributing significantly to BEC losses and one of the attack vectors is against attorneys and their clients. This article examines the nature of this cyber-crime and the liability and potential liability of attorneys.

In S Allen 'Business Email compromise: The Secret Billion Dollar Threat' (www.tripwire.com, accessed 31-7-2018) it states that:

'Often in the shadow of more extravagant, media-friendly super-hacks or ransomware compromises, BEC is leading the line on both the number of attack victims and the direct losses encountered by businesses.'

The attack is not a sophisticated technology attack. It is a simple fraud that leverages social engineering tactic to deceive a recipient into typically making a payment to a bank account controlled by criminals.

The scope of this article does not allow us to deal with all of the *modus operandi* that may be applied, nor the different nuances of this type of attack. Suffice it to say that a number of attorneys have been duped into paying money (very of-

ten money held in trust for clients) to criminals; while clients have been duped into paying money (in some cases large sums of money typically due by the client in conveyancing transactions) into accounts controlled by criminals.

As with any social engineering attack, the success of the attack largely depends on being able to credibly masquerade as the party to whom the payment is due. The attacks are exceptionally well thought through and structured. They are not a shotgun approach hoping that a victim will be recklessly negligent or stupid, but rather adopt an analytical consideration of communication passing between the parties, enabling the criminals to insert an appropriate communication that is in context with the expected communications, and would probably deceive the most reasonable recipient into believing the communication is legitimate. The communications replicate the letterheads, logos and information identical in almost every aspect to what a client may expect from the attorney, save for the bank account details, which are bank accounts controlled by the criminals. The e-mail addresses are carefully constructed and it can be extremely difficult to detect a variation from the e-mail address normally used by the ad-

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dressor. For example, the character 'I' may be replaced by the numeral '1'. A very similar name may be used to that of an attorney's staff member communicating with the client with minor variations in spelling. A punctuation mark may be added or omitted in the e-mail address. Even to careful recipients of the communication the e-mail's credibility is typically strengthened by the context and timing of the communication.

The reaction of attorneys where a client has made a payment into an incorrect banking account is often that the client was negligent. On closer examination, however, it may reveal that the attorney may have been negligent if the attorney had not properly safeguarded the information processed by the attorney or the information and communications technologies used in processing the information. Failure to implement appropriate information security may render the attorney guilty of contributory negligence. Indeed, the failure in security may be the primary or proximate cause of the loss suffered by the client.

Although the requirement for cyber competence and security has been in place in many jurisdictions and is mandated and enforced by Bar Associations and law societies around the world, there is no similar requirement placed

on South African attorneys. With a few shining exceptions, South African attorneys do not pay much attention to information security. The result is often that information processed and communicated by attorneys is insecure and is easily accessed by criminals. There are several contributory factors:

- The technology used by the attorneys is in itself insecure, alternatively is configured for convenience rather than security.
- There are no documented policies or processes governing the use of the technology or that define information management and security.
- Attorneys and their staff using the technology are not educated or aware of their information security responsibilities.

As a result of these failures, the attorney may not discharge the corporate responsibility to establish and maintain information security as required in terms of the Companies Act 71 of 2008 read with King IV Report on Corporate Governance or to establish the technical and organisational measures to prevent unauthorised access, loss or destruction of information. This obligation is an express stipulation of the Protection of Personal Information Act 4 of 2013, requiring that processors of personal

information establish and maintain appropriate technical and organisational measures to protect the confidentiality and integrity of personal information. These failures I submit, are also a failure to comply with the professional duty of attorneys to ensure that their clients' information remains secure and confidential.

Against this background, it is critical that attorneys fulfil their duty of care to clients by advising them of the potential for BEC. The communications must ensure that the client understands their responsibility to diligently ensure that payments are made to the correct bank account. In addition, attorneys must also understand that in order to avoid potential civil and criminal liability they too must fulfil their responsibility to establish and maintain a proper information security management system to protect their own information and that of their clients.

The Law Society of South Africa's Cybersecurity helpdesk is headed by Anthony Pillay. Mr Pillay is currently the Acting Chief Executive Officer of the Law Society of South Africa.



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By
Marici
Corneli
Samuelson

Parenting coordinators: What is classified as their decision-making powers?

Parenting coordination is a form of alternative dispute resolution processes in which a mental health professional or family law professional assists in on-going high conflict co-parenting matters. These professionals try to resolve pre- and post-divorce disputes, including parenting plan or child related disputes. For the sake of uniformity, the term parenting coordination and parenting coordinator (coordinator) will be used respectively in this article.

In South Africa there is currently no statute nor court rules governing the appointment or authority of parenting coordinators. The basis of a parenting coordinator's appointment is either by –

- a court order;
- a parenting plan; or
- a settlement agreement between the parties, which has been made an order of court.

The court order or relevant clause of the agreement or plan stipulates the scope of the coordinator's authority. The practice, which has evolved has given the coordinator's the power to make decisions or directives regarding disputes, which is binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.

The first reported case dealing with parenting coordination was in *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC). This case concerned disputes regarding the schooling, maintenance and other matters affecting the best interests of two children born of unmarried parents. The High Court placed the judicial stamp of approval on facilitation in this judgment and through this order, a great deal of authority was assigned to the facilitator. Not only was the facilitator authorised to facilitate the dispute but they were also entitled to give directives and make rulings that were binding on both parties.

However, in *CDH v OASH* [2013] JOL 30616 (GSJ) the Gauteng Local Division of the High Court was not prepared to grant a father's application for the appointment of a case manager to deal with and make decisions about certain post-divorce parenting conflicts in respect of the child. Sutherland J held that no court had the jurisdictional compe-

tence to appoint a third party to make decisions about parenting for parents who were the holders of parental responsibilities and rights in terms of ss 30 and 31 of the Children's Act 38 of 2005. The court went on to say that, with reference to s 33(5) of the Act, 'the role any "other suitable person" ... is to facilitate decision-making rather than be the decision-maker'. Sutherland J was of the view that the appointment of a decision-maker to break deadlocks was a delegation of the court's power that constituted an impermissible act.

The most recent case dealing with the appointment and decision-making powers of parental coordinators is *TC v SC* 2018 (4) SA 530 (WCC).

In this case, Davis AJ presided over an application in terms of r 43 for interim relief pending a matrimonial action. The applicant (father) and the respondent (mother) were in the midst of an acrimonious divorce. They had two young boys aged nine and seven.

The core issue was whether the High Court had the power, by virtue of its inherent jurisdiction as the upper guardian of minor children, to make an interim order appointing a facilitator to deal with parenting disputes over the objection of one of the parents.

The court concluded that although the contents of a parenting plan had to be agreed on, and could not be imposed on parents, it did not necessarily follow that the court could not, in appropriate cases, appoint a coordinator with limited decision-making powers to assist the parties in implementing the terms of an agreed parenting plan, which had been made an order of court. Davis AJ, however, warned that the appointment of and powers conferred on a coordinator can and should be limited to avoid an impermissible delegation of judicial authority.

Davis AJ emphasised the following guidelines to limitations on the appointment of a coordinator:

First limitation

'[P]arties must have already reached agreement on the terms of a parenting plan, whether interim or final, which has been made an order of court, and the coordinator's role must be limited to addressing implementation of ... an existing court order.'

Davis AJ resolved that an agreed parenting plan that had been made an order of court was necessary to provide the framework, which delineates the coordinator's proper function and authority. Without it, one runs the risk of an improper delegation of judicial decision-making power of the type, which the court was being asked to authorise. Where there is a court order in place, the coordinator may be confined to making decisions consistent with the court order to assist the parties to comply with it, and the coordinator's role may be conceived as supervision of the implementation of the court's order.

Davis AJ was of the view that the High Court, by virtue of the provisions of s 173 of the Constitution, enjoyed inherent authority to ensure that its orders were carried out and it was well-established that the High Court had inherent jurisdiction to enforce its orders by committal to prison for contempt of court. The judge, therefore, saw no difficulty with the notion that the High Court could, in the exercise of its inherent power to protect and regulate its own process, appoint a coordinator tasked with supervising compliance with the court's order to ensure that its terms were carried out.

Second limitation

Court orders have regard to the standard of the best interests of the child, which includes –

- care and contact;
- guardianship;
- the termination, extension, suspension or restriction of parental responsibilities; and
- rights, which cannot be changed by a coordinator.

For example, it would be unlawful to confer on a coordinator the power to change the primary residence of a child.

The coordinator's decision-making power must be confined to ancillary rulings, which are necessary to implement the court order, but do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order, for the coordinator not to trespass on the court's exclusive jurisdiction in terms of the Act.

Davis AJ stated that: 'The obvious

triviality of the sorts of issues which PCs may be authorised to decide should not cause one to lose sight of the importance of the PC's function.'

Davis AJ also referred to s 34(5) of the Children's Act that prescribes that parenting plans, which have been made an order of court may only be amended or terminated by an order of court on application, while s 22(7) provides that only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement, which relates to guardianship of a child. These provisions make it clear that a coordinator cannot make a valid directive, which has the effect of amending a court ordered parenting plan.

Third limitation

This limitation on a coordinator's power is to eliminate an impermissible delegation of judicial authority.

All decisions of the coordinator must be subject to comprehensive judicial oversight in the form of a full reconsideration of the court decision. This means that the rulings of the coordinator are not in effect final, even if they operate immediately pending review, because they are susceptible to alteration by the court. By permitting a coordinator's rulings to operate immediately, subject to a party's right to apply to court for a stay of the ruling pending a review, one strikes a necessary balance between the need for expeditious and effective conflict resolution by the coordinator and the need for judicial scrutiny of the coordinator's rulings.

Fourth limitation

Davis AJ made it clear that in the absence of the consent of the parties to the appointment of a coordinator and the terms of their appointment, a court should not impose a coordinator on parties without conducting the necessary inquiries and making the findings regarding the following:

- The welfare of the child or children involved is at risk through exposure to chronic parental conflict, because the parties have demonstrated a longer-term inability or unwillingness to make parenting decisions on their own (for instance by resorting to frequent, unnecessary litigation), to comply with parenting agreements or court orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.
- Mediation has been attempted and was unsuccessful or is inappropriate in the particular case. (This is a necessary finding to ensure that the appointment of a coordinator without parental consent is a last resort reserved for the cases of particularly intractable conflict.)
- The person proposed for appointment as the coordinator is suitably qualified

and experienced to fulfil the role of a coordinator. Before a court imposes a coordinator on parties without their consent, the court must be sure that the person appointed has the proper skills set, personal qualities and professional experience to do the job properly.

- The fees charged by the proposed coordinator are fair and reasonable in the light of their qualifications and experience and that the parents can afford to pay the services of the coordinator. One of the parents must agree to pay for the services of the coordinator.

Summary

In summary, Davis AJ stated that a High Court may, in the exercise of its inherent jurisdiction as the upper guardian of minor children:

- Appoint a coordinator with the consent of both parties, provided that –
 - there is already an agreed parenting plan in existence, whether interim or final, which has been made an order of court;
 - the role of the coordinator is expressly limited to supervising the implementation of and compliance with the court order;
 - any decision-making powers conferred on the coordinator is confined to ancillary rulings, which are necessary to implement the court order, but do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order;
 - all rulings or directives of the coordinator are subject to judicial oversight in the form of an appeal in the wide sense described in *Tikly and Others v Johannesburg NO and Others* 1963 (2) SA 588 (T) at 590G – 591A.
- Appoint a coordinator without the consent of both parties, provided that the court is satisfied with the conditions listed above are met, but also that –
 - the welfare of the child is at risk from exposure to chronic parental conflict based on evidence of the parents' inability or unwillingness to co-parent peacefully;
 - mediation has been attempted and was unsuccessful, or is inappropriate in the particular case;
 - the person proposed for appointment as the coordinator is suitably qualified and experienced to fulfil the role of coordinator;
 - the fees charged by the proposed coordinator are fair and reasonable in the light of their qualifications and experience, that the parents can afford to pay for the services of the coordinator, and that at least one of the parents agrees to pay for the services of the coordinator.

Conclusion

In light of the *TC* judgment it is clear

that the practice now will have to evolve to include correctly worded clauses in all parenting plans, settlement agreements and court orders dealing with a coordinator's appointment and their limited authority pertaining to decision making as set out by Davis AJ.

The *TC* judgment also leaves the practice with uncertainty regarding the validity/legality of past directives and coordinator clauses in existing parenting plans, which stipulate the scope of the coordinator's authority to include the power to make decisions or directives, without limitations, that are binding on the parties until a competent court directs otherwise.

South Africa is in need of a statute or court rules to govern the parenting coordination process so that there will be no more uncertainty regarding the position, appointment or authority of parent coordinators.

Marici Corneli Samuelson *Bluris* (UP) is the Director at Family Assist and a Mediator at Mediationworx in Pretoria.

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

Bills

Independent Police Investigative Directorate Amendment Bill B25 of 2018.
Electoral Amendment Bill B24 of 2018.
Competition Amendment Bill B23 of 2018.

Commencement of Acts

Protection of Investment Act 22 of 2015.
Commencement: 13 July 2018. GenN395 GG41766/13-7-2018 (also available in Tshivenda).

Courts of Law Amendment Act 7 of 2017. *Commencement:* 1 August 2018 (except s 14). Proc R22 GG41801/27-7-2018 (also available in Afrikaans).

Selected list of delegated legislation

Employment of Educators Act 76 of 1998

Improvement in conditions of service: Annual cost of living adjustment for educators from 1 April 2018. GN662 GG41750/3-7-2018.

Employment Tax Incentive Act 26 of 2013

Designation of special economic zones. GN700 GG41759/6-7-2018.

Financial Markets Act 19 of 2012

Amendments to the Johannesburg Stock Exchange exchange rules: Bond electronic trading platform rules. BN91 GG41773/16-7-2018.

Amendments to the Johannesburg Stock Exchange exchange rules: Interest rate and currency rules. BN92 GG41775/17-7-2018.

Income Tax Act 58 of 1962

Approval of the Richards Bay special economic zone. GN698 GG41758/6-7-2018.
Approval of the Maluti-a-Phofung special economic zone. GN697 GG41758/6-7-2018.

Approval of the Coega special economic zone. GN694 GG41758/6-7-2018.

Approval of the Dube Tradeport special economic zone. GN695 GG41758/6-7-2018.

Approval of the Saldanha Bay special economic zone. GN699 GG41758/6-7-2018.

Legal Practice Act 28 of 2014

Final rules in terms of ss 95(1), 95(3) and 109(2) of the Act. GenN401 GG41781/20-7-2018.

Magistrates' Courts Act 32 of 1944

Detaching portions of Taung Magisterial District to form a sub-district and detached court for the Kgomoetso area. GN738 GG41783/19-7-2018.

National Environmental Management: Waste Act 59 of 2008

Waste exclusion regulations, 2018. GN715 GG41777/18-7-2018.

National Health Act 61 of 2003

Material transfer agreement of human biological materials to be used by providers and recipients of biological material for use in research or clinical trials under the auspices of the Health Research Ethics Committees. GN719 GG41781/20-7-2018.

Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support with effect from 31 July 2018. BN94 GG41796/27-7-2018 (also available in Afrikaans).

Sectional Titles Act 95 of 1986

Amendment of regulations. GN R774 GG41798/27-7-2018 (also available in Afrikaans).

South African Police Service Act 68 of 1995

South African Police Service Employment Regulations, 2018. GN663 GG41754/6-7-2018.

Draft delegated legislation

Draft regulations for the mandatory display and submission of energy performance certificates for buildings in terms of the National Energy Act 34 of 2008. GenN369 GG41754/6-7-2018.

Proposed amendments to the National Waste Information Regulations, 2012 in terms of the National Environmental Management: Waste Act 59 of 2008. GN701 GG41760/6-7-2018.

Draft dispensing fee to be charged by persons licenced in terms of s 22C(1)(a) of the Medicines and Related Substances

Act 101 of 1965. GN702 GG41762/9-7-2018.

Draft dispensing fee for pharmacists in terms of the Medicines and Related Substances Act 101 of 1965. GN703 GG41762/9-7-2018.

Annual adjustment of single exit price of medicines and scheduled substances for 2019 in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN704 GG41762/9-7-2018.

Regulations relating to the approval of and minimum requirements for education and training of learner/student leading to registration in category midwife in terms of the Nursing Act 33 of 2005 for comment. GN713 GG41768/11-7-2018.

Regulations relating to continuing professional development in terms of the Pharmacy Act 53 of 1974 for comment. GN707 GG41766/13-7-2018.

Draft revised regulations relating to community rehabilitation in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. GenN381 GG41766/13-7-2018.

Regulations regarding the register for learner/student nurses and learner/student midwives in terms of the Nursing Act 33 of 2005 for comment. GN720 GG41781/20-7-2018.

Compulsory specification for processed meat products in terms of the National Regulator for Compulsory Specifications Act 5 of 2008 for comment. GN724 GG41781/20-7-2018.

Draft guidelines and conditions to a safeguard application in terms of the economic partnership agreement between the European Union and SADC states in terms of the International Trade Administration Act 71 of 2002 for comment. GenN402 GG41781/20-7-2018.

Proposed regulations to phase-out use of persistent organic pollutants in terms of the National Environmental Management Act 107 of 1998. GN R744 GG41790/24-7-2018.

South African Aeronautical and Maritime Search and Rescue (AMSAR) Amendment Regulations, 2018 in terms of the South African Maritime and Aeronautical Search and Rescue Act 44 of 2002 for comment. GenN419 GG41797/26-7-2018.

Amended National Policy Framework on Child Justice in terms of the Child Justice Act 75 of 2008 for comment. GN751 GG41796/27-7-2018.

Employment law update



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

Unfair discrimination on the basis of disability in circumstances where the employee was reasonably accommodated by the employer

In *South African Municipal Workers Union obo Damons v City of Cape Town* (LC) (unreported case no C306/2015, 20-4-2018) (Rabin-Naicker J) the applicant alleged that the city's advancement policy unfairly discriminated against him on the basis of disability as it prevented him from advancing to the position of senior firefighter. The applicant was a firefighter who was permanently injured while on duty in 2010. Following an incapacity process, the applicant was transferred to a position in the Fire Service Billing section and subsequently to the Fire and Life Safety Education section in which he performed administrative tasks and education work.

He retained the designation of firefighter despite the fact that he could no longer perform the core functions of a firefighter owing to his disability. The career path for a firefighter is from learner firefighter to firefighter and then to senior firefighter. In terms of the advancement policy, a firefighter must successfully undergo a practical assessment, including a physical application of theoretical knowledge in order to advance to a senior firefighter. Furthermore, the job description of a firefighter at all levels provides that the employee must be physically fit and able bodied. The applicant was not physically fit as required in the job description and was not able to perform the physical fitness assessment or routine physical drills.

The city's defence was that the physical requirement was an inherent requirement of the job and thus the applicant could not advance to senior firefighter. It was also argued that the policy did not contain a blanket ban on disabled persons and the applicant had been excluded on an individual basis for not satisfying the physical assessment requirement. The applicant said that he would never have agreed to the administrative role if he had known that there would be no career aspirations for him. Furthermore, he completed all the necessary courses for the promotion. The city conceded that as part of the incapacity process the applicant only agreed to the administrative role on the condition that certain requirements in relation to his current remuneration package and future promotions were met. Management did not reject these conditions and thus the offer of the alternative role was subject to these conditions.

Rabkin-Naicker J held that when considering issues of fairness under the Employment Equity Act 55 of 1998 (EEA) one must consider and balance the interests of the employee against the interests of the employer and a value judgment must be made based on the established facts and circumstances of the case. She held that the determining factor must be

the impact of the discrimination on the victim. She remarked that the EEA does not allow a justification analysis under s 36 of the Constitution as in the case of the right to equality under s 9 of the Constitution. Under the EEA, the employer has the onus to establish fairness on a balance of probabilities. This onus is only discharged if fairness is found on a balance of all the relevant factors and evidence.

Rabkin-Naicker J found that the city had reasonably accommodated the applicant after his permanent disability and kept him within the structure in the policy as a firefighter. Thus, the city could not rely on the inherent requirement of the job as a defence as this was undermined by the city's decision to retain the applicant as a firefighter notwithstanding that he could not perform active firefighting and could not perform the functions in the job description which are an inherent requirement of the job.

The court then had to consider whether applying the policy to the applicant in a manner, which would prevent his advancement due to his disability constitutes unfair discrimination. It was held that this barrier to the applicant's advancement impaired his dignity. The court also took into consideration the fact that the reason for his disability was that he was injured on duty. Rabkin-Naicker J accordingly found that the application of the policy to the applicant amounted to unfair discrimination and the city was ordered to reconsider the applicant's advancement application.

Dismissal for dishonesty

In *Nkomati Joint Venture v Commission for Conciliation, Mediation and Arbitration* [2018] 8 BLLR 773 (LAC), an employee who was employed as a payroll supervisor was dismissed for dishonesty after having tampered with the formula on a payroll spreadsheet, which had the effect of increasing his pay by R 1 500. The Commission for Conciliation, Mediation and Arbitration (CCMA) found that the dismissal was substantively unfair and ordered reinstatement as the commissioner was of the view that the employee had merely made an error with the spreadsheet. On review, the Labour Court found that the employer had not been able to prove that the employee was at fault as at least six people had access to the spreadsheet formula.

The evidence at the arbitration was that the employee's responsibility was to check the final payroll spreadsheet before sending it to the financial services manager for approval. The manager carefully inspected the spreadsheet and found that the bonus spreadsheet was altered to benefit the employee only. The evidence was that while six employees had access to the spreadsheet, it was only the employee and the financial services manager who had access to the passwords to alter the formulae in the final encrypted document. Given the fact that the employee's role was to check the veracity of the information in the document, he either failed to properly check the information in relation to himself or he deliberately tampered with the spreadsheet for his own benefit. The employee alleged that after giving the spreadsheet to the financial services manager he realised that he had made an error in relation to his bonus calculation and reported this to the manager. The arbitrator found that this was the more probable version and that the trust relationship could be restored.

On appeal, the Labour Appeal Court (LAC) found that since the employee was the only person who stood to gain from the error, the most reasonable inference to draw was that he knew of the formula change and thus his dismissal was fair. Thus, the arbitrator did not reach a decision that a reasonable decision maker could make.

The LAC remarked that regard must be had to the nature of the inquiry and evidence put before the arbitrator when determining whether an arbitrator's decision is one that falls into a band of decisions that a reasonable decision-maker could make. It was held that in this case the arbitrator misconceived the nature of the inquiry to be whether the employee tampered with the spreadsheet as opposed to whether or not he changed the formula. The arbitrator, therefore, ignored material evidence that the spreadsheet had been tampered with by way of a change to the formula and the fact that only the employee and the manager had access to the system to change the formula. It was held that the more plausible inference to be drawn from the facts was that the employee acted dishonestly. The appeal was accordingly upheld and the dismissal was found to be substantively fair.



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Resignation with immediate effect and the legal consequences thereof

It is trite law that an employee who resigns on notice may be disciplined and even dismissed during the course of serving their notice period. Under these circumstances, the employee's dismissal interrupts their resignation and it is recorded that the employee was dismissed as opposed to having resigned.

What, however, is the legal position when an employee resigns with immediate effect?

Does the employer automatically lose its right to discipline the employee or is it within the employer's rights to hold the employee to the contractual or statutory notice period and during such time, discipline and dismiss the employee before the notice period expires?

In *Mtati v KPMG Services (Pty) Ltd* (2017) 38 ILJ 1362 (LC), the employer informed the employee that they were investigating certain acts of alleged misconduct against her, whereafter she immediately tendered her resignation on four weeks' notice. During her notice period the employer served the employee a notice to attend a disciplinary hearing, which was scheduled before her notice period expired. The employee, on receipt of the notice, handed in a second resignation letter with immediate effect. On the first day of the inquiry the employee attended and argued before the chairperson that she was no longer an employee and thus the chairperson lacked jurisdiction to continue with the process. The chairperson rejected the argument prompting the employee to leave the inquiry and launch an urgent application at the Labour Court (LC) to interdict the disciplinary hearing from continuing.

The employee's argument at court was that once she resigned with immediate effect, she was no longer an employee and, her erstwhile employer did not have the jurisdiction to discipline her.

In its judgment and in summarising the legal position in respect of an employee resigning with immediate effect, the court held:

'In summary, the principle to discern from the above is that

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an employer has no authority or the power to discipline an employee who resigns from his or her employment once the resignation takes effect. In other words, where the resignation is with immediate effect, the employer loses the right to discipline the employee, also with immediate effect.'

In keeping with this legal position, the court went further to find:

'In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent. This means that the termination of the employment contract with immediate effect took away the right of the respondent to proceed with the disciplinary hearing against her.'

The court ruled that the employer did not have jurisdiction to discipline the employee after she tendered her second resignation with immediate effect.

In *Coetzee v Zeitz Moca Foundation Trust and Another* (LC) (unreported case no C517/2018, 14-6-2018) (Rabkin-Naicker J) the LC was faced with a similar situation. The employee received an invitation to make written submissions why he should not be placed on precautionary suspension and the next day, verbally resigned. It was agreed by both parties that a press statement be released announcing that an inquiry into the professional conduct of the employee had been initiated and that the employee had since tendered his resignation.

A dispute, thereafter, ensued between the parties. The employee argued he had resigned with immediate effect and, as such, the employer could not pursue disciplinary action against him, whereas the employer argued that it had not accepted the employee's resignation with immediate effect, nor had it waived its contractual right to the required notice period. On this basis, the employer argued that it was holding the employee to serve out his contractual notice period of four weeks, during which time, it would be within its rights to discipline the employee.

The employee approached the court on an urgent basis seeking relief, among which an interdict preventing the employer from continuing with the disciplinary action against him.

The court firstly set out the applicable legal principles, that being –

- a resignation is a unilateral act;
- when an employee resigns on notice, the employment relationship ends at the expiry of the notice period;
- if an employee resigns without serving the required notice period, the employee breaches the employment contract;

- an employer, in this scenario, may hold the employer to the contract and seek an order of specific performance, alternatively accept the employee's repudiation, cancel the contract and seek damages against the employee; or

- further alternatively, the parties could agree to the termination and waive any right they might have had in terms of the contract.

Having set out the above the court continued by stating:

'The above statement is a correct reflection of the law. Reference was made to the case of *Mtati v KPMG Services (Pty) Ltd* in submission before me. This judgment has recently been overturned on appeal on the basis, (as far as can be gleaned from the LAC *ex tempore* order) that the dispute before the Labour Court was moot. In as far as that judgment was in conflict with the summary of the law above, it is no longer persuasive. There is no need for the Court to deal with the facts and law applied in that case.'

Applying the law to the merits, the court identified the dispute as factual in nature. The employee argued he had resigned with immediate effect, while the employer argued it had not accepted the employee's resignation with immediate effect and held the employee to the notice period. Relying on the 'Plascon Evens' test when dealing with factual disputes in motion proceedings, the court found the employee had not made out a case for the order sought and dismissed the application with no order as to costs.

In my view what distinguishes the decision in *Mtati* from *Coetzee*, is the legal consequence, which flow from an employee resigning with immediate effect without serving their notice period.

The court in *Mtati* held that under such circumstances the resignation itself bring to an automatic end the employment relationship, whereas in *Coetzee*, the court found that if the employer does not accept the immediate resignation and holds the employee to the notice period; the employment relationship only ends at the expiry of the notice period.



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<i>ILJ</i>	Industrial Law Journal	Juta	(2018) 39
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) 21 June (2018) 21 July
<i>SAMLJ</i>	South African Mercantile Law Journal	Juta	(2017) 29.3
<i>SLR</i>	Stellenbosch Law Review	Juta	(2018) 29.1
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2018) 3

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