

PEOPLE UPLIFTMENT PROGRAMME PROVIDING SKILLS DEVELOPMENT FOR THE DISADVANTAGED

Variation of consent papers in divorce orders – *is this permissible in law?*

Do **protection orders** for domestic violence and harassment work?

Surrogate motherhood and scaremongering: Is South Africa entering an age of post-truth jurisprudence?

Ethics: Time to reassess legal ethics in the changing environment

The battle for Bo-Kaap's identity

Five basic universal principles applicable in the conduct of a candidate attorney

The deductibility of front-end fees

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FEATURES

24 People Upliftment Programme providing skills development for the disadvantaged

In this article, **Stephen Leinberger** states that social and economic disparity in South Africa is a pervasive crisis that will take generations to correct. It is not only a matter of public policy, or government action, that will close the gaps or uplift the disadvantaged, but also a matter of private contribution to the cause for social justice. Hence, a sincere commitment by individuals, law firms and corporate entities to economic transformation should be envisaged by legislative measures created to implement it, rather than the other way around.

26 Variation of consent papers in divorce orders – is this permissible in law?

In this article, **James D Lekhuleni** writes that s 7(1) of the Divorce Act 70 of 1979, provides that a court may incorporate the spouse's settlement agreement into the divorce order if it is in writing. The court has a discretion to incorporate the terms of a consent paper. It is not compelled to do so. It is trite law that once the terms of an agreement between the parties are incorporated into a divorce order, it acquires the status of a judgment. In *PL v YL* 2013 (6) SA 28 (ECG) the court, per Van Zyl ADJP, held that when a consent paper is incorporated in an order of court by agreement between the parties in a matrimonial suit, it becomes part of that order and its relevant contents then forms part of the decision of the court.

28 Surrogate motherhood and scaremongering: Is South Africa entering an age of post-truth jurisprudence?

The matter of *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) was a constitutional challenge to s 294 of the Children's Act 38 of 2005 writes **Dr Donrich Thaldar**. This section requires that – in the context of surrogate motherhood – the gametes of the commissioning parents must be used for the conception of a child. If that is impossible for biological, medical or other valid reasons, the gamete of at least one of the commissioning parents, or, where the commissioning parent is a single person, the gamete of that person, must be used. The consequence is that commissioning parents cannot use donor gametes. Moreover, where both commissioning parents cannot contribute their own gametes for the conception of a child, or where the commissioning parent is a single person who cannot contribute their own gametes for the conception of a child – the commissioning parent(s) cannot use surrogacy.

30 Do protection orders for domestic violence and harassment work?

Both the Domestic Violence Act 116 of 1998 and the Protection from Harassment Act 17 of 2011 were enacted in order to protect vulnerable members of society. In addition, the Acts aim to ensure that constitutionally enshrined rights, such as the right to equality, privacy, dignity, freedom and security of the person are not unreasonably and unjustifiably infringed. **Katherine Butler** writes that both Acts, take up vital legislative space, especially considering the prevalence of violence perpetrated against women and children in South Africa, as well as against the background of the international '#MeToo' movement. Furthermore, the Acts are arguably improvements on the previous Acts, and given the apparent pitfalls, which seem to occur in practice, it is imperative to critically reflect on whether these Acts offer the correct balance between protecting the complainant's rights and safeguarding respondents from vexatious applications.

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A response to the editor on the implementation of the LPA

In the editorial 'Is the profession ready for the implementation of the LPA' 2018 (July) *DR* 3, reference was made to several tasks (before the full enactment of the Legal Practice Act 28 of 2014), which were either completed or near completion. The concluding paragraph stated that 'a lot of work has taken place to ensure a smooth transition from the exiting regulatory bodies to the new LPC [Legal Practice Council]'.

As we reported on the *De Rebus* website (see Mapula Sedutla 'LPC election results announced' www.derebus.org.za), the newly elected LPC was announced on 8 October by the National Forum on the Legal Profession.

The election heralds a new era in the governance of the legal profession. For the first time, after many years of negotiations, members of the profession will be led by the people they have directly elected through a process agreed on by their elected representatives.

The successful manner in which the elections were conducted – despite some noticeable challenges – is significant in many ways, especially in regard to the fact that these were the first elections. It is also significant to note that the elections took place at a time when the country has been celebrating 100 years of the birth of Nelson Mandela (Madiba), the epitome of democracy and social justice.

Addressing the Law Society of the Transvaal on 29 October 1993, Madiba pointedly asked: 'Let us look around us. Is this gathering of lawyers representative of the people of South Africa? ... What of the composition of its council? Like the judiciary, the Bar and most other important institutions in our country, the attorney's profession is dominated by white males. And most dominant of all appear to be the small number of large firms'.

Twenty-five years later, the legal profession has answered Madiba's questions through the ballot in commemoration of his centenary. The election and the subsequent inauguration equally answered the question we posed in the July issue. Indeed, we have moved from despair to hope in our journey to realise the dream of our people for a legal profession that is free from the Apartheid era designed domination.

The dissolution of the provincial law societies decreed on by the Attorneys Act 53 of 1979 represents a welcome development in the demolition of the last standing structure of the Apartheid legal order. As the Constitutional Court observed in *Head of Department; Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 45 and 47: 'Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us.

... In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole.'

In recognition of the Constitutional imperatives, we have through the election of our chosen leaders resoundingly rejected what is old and transformed and embraced what is new and progressive.

As members of the legal profession

and legal sector in our beloved country, we are able to affirm as correct the assertion made by former President Thabo Mbeki in his inaugural address on the 16 June 1999 when he said:

'Our country is in that period of time which the seTswana-speaking people of Southern Africa graphically describe as "*mahube a naka tsa kgomo*" – the dawning of the dawn, when only the tips of the horn of the cattle can be seen etched against the morning sky.

As the sun continues to rise to banish the darkness of the long years of colonialism and Apartheid, what the new light over our land must show is a nation diligently at work to create a better life for itself.

What it must show is a palpable process of the comprehensive renewal of our country – its rebirth – driven by the enormous talents of all our people, both Black and White, and made possible by the knowledge and realization that we share a common destiny, regardless of the shapes of our noses'.

We have indeed moved a step forward in our journey to claim our rightful place among the democratic nations of the world. As Steve Biko said: 'We have set out on a quest for true humanity, and somewhere on the distant horizon, we can see the glittering prize. Let us march forth with courage and determination, drawing strength from our common plight and our brotherhood. In time we shall ... bestow upon South Africa ... a more humane face'.

Maboku Mangena is an Editorial Committee member and a practising attorney, notary and conveyancer in Polokwane.

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LETTERS

TO THE EDITOR

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

Responses to grumpy attorney

I can only agree with the opinion expressed by your 'grumpy' correspondent in 'Ramblings of a grumpy attorney' (2018 (July) DR 52). Having been in practice for more than 60 years, the 'daily grind' gets progressively worse. Issuing a summons in nearly all cases has become a mission to the extent that it is a task that one would preferably not undertake. Like 'ole grumpy' I recently endeavoured to issue a summons in the Bellville Magistrate's Court, which took four months of argument with the court official and finally to succeed I needed to instruct a local attorney to make representations to the chief official in charge before the summons was issued. Much of the delay was caused in this instance by the relevant clerk being unavailable due to absence from work for one reason or another.

Another area of concern relates to the physical location of the Sheriff in Cape Town. Until late last year the four Cape Town Sheriffs – north/south/east and west, were all housed in the Mandatum Building in Barrack Street – close to the magistrate's court and about a kilometre from the Western Cape Division of the High Court. But, things have changed and much for the worse – Cape Town Sheriff

North is now in Killarney Gardens; Cape Town Sheriff East is in Montague Gardens; Cape Town Sheriff West is in Elsies River; and Cape Town Sheriff South is in Wynberg – not one of them being within the 15 kilometre range applicable to practitioners and the courthouse. The immediate effect of this is that whenever an element of urgency relates to a matter, one is compelled to incur additional costs by using a courier or other extraordinary forms of delivery.

In the 'olden days' before the advent of sophisticated office gadgets and machinery it was possible to achieve a far greater element of efficiency and speed.

Another grumpy old sod, Cape Town

This article made me feel like it was written by my own pen or personal computer ('Ramblings of a grumpy attorney' (2018 (July) DR 52)).

I can completely relate to my grumpy colleague.

The Financial Intelligence Centre Act 38 of 2001 (FICA) is one of the biggest reasons for me being grumpy.

I whole heartedly confirm that I have not read of one case where FICA successfully prevented money laundering or that it stopped hackers from hacking an e-mail address to amend banking details, to fraudulently receive money into

a bank account that clearly could not have been FICA compliant.

Our local municipality issues proof of residence over the counter at R 26 per request. You only need to bring your identification document and orally confirm a physical address. There is no physical inspection to confirm the address.

How will FICA prevent the opening of a bank account with this proof of residence?

These systems are failing us.

Piet Van Dyk, attorney, Mbombela

The Hoërskool Overvaal saga

During the first weeks of January, the Gauteng Division of the High Court in Pretoria was approached by the Governing Body of an Afrikaans-medium school, *Hoërskool Overvaal*, after the school was being compelled by the Gauteng Department of Education to admit 55 English-speaking learners. The school had indicated that it lacked the capacity, infrastructure and staff to accommodate the learners, and accordingly refused to carry out the department's instruction (see law reports 'Administrative law' 2018 (July) DR 38 for the report).

Prinsloo J in considering the different



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contentions raised, determined the department's attempt at effectively forcing an Afrikaans-medium school to become double-medium to be futile. The judge noted that the school did not have sufficient capacity to admit these learners, and that it was clear that the learners should rather be accommodated at other schools in the vicinity that had the requisite capacity, infrastructure and staff available. The court expressed that the manner in which the department and its various incumbents disregarded principles and statutes enshrined in South African law was unsatisfactory.

Following the judgment, the department turned to the Constitutional Court (CC) in *Member of the Executive Council: Department of Education, Gauteng and Others v Government Body of Hoërskool Overvaal and Another* (CC) (unreported case no CCT 28/18, 25-7-2018), where it firstly brought an application for condonation and, secondly, leave to appeal the High Court's decision. It also applied for leave to appeal the matter in the High Court itself should the CC refuse to consider the application. This resulted in a rather remarkable turn of events as the CC granted the application for condonation, thereby indicating its willingness to consider the matter. Subsequently, the

CC considered the application for leave to appeal based on the merits of the case. It determined that the department failed to consider schools in the same area that complied with relevant concerns, and refused the application for leave to appeal, which resulted in nullifying any further attempts at appeal.

Lessons for schools

This matter throws into sharp relief the precarious balance existing between minority groups and organs of state. In the present situation, a school was expected to comply with certain demands, without having the necessary institutional capacities in place, in order for apparent political ambitions under transformative pretences, to prevail. The cost of such tactics would result in the provision of inadequate standards of education in all its forms. The question, which can now be posed is: What can schools and governing bodies do to avoid expensive litigious opportunism?

• **Ensure that the school's administrative affairs are in order:** Schools should ensure that their capacity determinations and related administrative affairs are in order and regularly updated. Regulations are to be complied with to the letter.

• **Ensure that policies are in place:** Schools should ensure that they have the various requisite admissions policies in place, in line with general best practice. These policies should be clear, easy to understand and fully compliant with the requirements of the relevant provincial education department.

• **Keep proper records:** Schools are urged to keep proper and detailed records of all correspondence and other administrative interactions with the Department of Education. This will strengthen their position and provide protection from seemingly arbitrary administrative abuses.

• **See to it that the community's needs are met:** Schools are important building blocks in communities and play a vital role in attaining a true constitutional dispensation. Through the adoption of their language policy, therefore, schools must ensure that they attend to the language needs and preferences of the local community. Language policies that seek to maintain historical or cultural preferences are ethically and morally unjustifiable if they are out of kilter with the surrounding community.

Adriaan Knoetze, Federation of Governing Bodies of South African Schools Legal Officer, Bloemfontein



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BRICS Legal Forum – uniting against separatism

The Law Society of South Africa (LSSA) hosted the fifth BRICS Legal Forum in Cape Town in August. Leaders and members of the LSSA, the Brazilian Bar Association, the Association of Lawyers of Russia, the Bar Association of India, the China Law Society, the General Council of the Bar and legal academics and practitioners from each member state attended. The countries (Brazil, Russia, India, China and South Africa (SA)), who represent over 40% of the world's population and over 20% of global Gross Domestic Product (GDP), met to promote practical legal cooperation and the advancement of the rule of law within BRICS.

The conference focused on –

- arbitration;
- contract and company law;
- finance and taxation; and
- BRICS Dispute Resolution Centres.

The leaders of each law society signed the Cape Town Declaration and have committed to –

- promoting the rule of law with integrity and dignity within their member states;
- create a regulatory and legal framework that supports fair and sustainable trade practice; and
- develop fair, efficient and effective dispute resolution centres and procedures to resolve any disputes between member states.

President elect of the Bar Association of India, Prashant Kumar, stated: 'I take BRICS as one of the most fertile places for ideas and experiments in the world. We are very different, but we can either perceive the differences in our systems and laws and the way we conduct our institutions as a handicap or we can be creative and turn them into strengths.'

Chief Justice Mogoeng Mogoeng, as honorary guest and keynote speaker, addressed the need to promote international discourse around trade justice and improve decision-making powers of developing countries in the geopolitical sphere by establishing a fair and equal international order.

Chief Justice Mogoeng encouraged reflection on the moral and ethical compasses of legal practitioners in the 21st century, appealing for collaboration to counterbalance the injustice in global trade and negotiate and create systems, which are not exploitative and do not oppress other nations.



Finance Minister, Tito Mboweni, highlighted the achievements of the New Development Bank and encouraged it to continue changing how investment operates, making finance projects beneficial to both parties and ensuring that the receiving nation truly benefits, without the burden of a liability it will never escape.

Mr Mboweni acknowledged the immense economic challenges faced by SA and Brazil, central to this being poor economic performance, state capture and corruption. Despite the challenges faced by the extremely diverse 'club', Mr Mboweni is optimistic and encouraged the disruption of 'the western power structures' by challenging bodies that monopolise geopolitical decision-making.

BRICS dispute resolution centres

Dispute resolution discussions focused on issues, such as –

- the costs, process and rules of arbitration;
- skills development and selection of arbitrators; and
- the enforceability of arbitral awards.

Emphasis was placed on the democratisation of arbitration within the BRICS nations. Academics and practitioners from member states shared knowledge, experience and ideas on the practical and legal challenges of alternative dispute resolution. Specific needs, requirements and capacity goals have to be

considered in harmonising arbitration principles and procedures of the BRICS nations.

Financial and tax law

Tax laws and tax regulation procedures are becoming more complex, as is doing business. Advancements in technology, financial technology and business structures means that tax laws are not always able to keep up the pace.

Financial and tax law discussions centred on the Mutual Agreement Procedure (MAP) between BRICS nations. The MAP is a procedure that allows and sets out the process for Competent Authorities (tax revenue authorities) or designated representatives of the Competent Authorities from the governments of the contracting states to interact to resolve international tax disputes.

Imposing timelines on resolving tax disputes was discussed, as well as harmonising the tax authorities' approaches to tax regulation and MAP. Creating a separate MAP department within tax authorities, and improving communication, transparency and sharing of information through a central internet-based mechanism, were also discussed.

The 2019 Legal Forum in Brazil will consist of working group meetings and forum discussions on the implementations made. The Legal Forum aims to be recognised by and included in the official BRICS 2019 Summit, with the leaders of each of the five countries in attendance.

- For the full signed Cape Town Declaration, visit www.bricslegalforum2018.org
- For a full report on the BRICS Legal Forum Conference, see p 7.

Claire Kotze is a candidate attorney at Norton Rose Fulbright in Cape Town.

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

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BRICS Legal Forum: An opportunity for legal cooperation through unity and diversity

The Law Society of South Africa (LSSA) hosted the fifth BRICS Legal Forum conference, which was held in August in Cape Town. The conference was a melting pot of ideas from the five BRICS member countries, namely Brazil, Russia, India, China and South Africa (SA). The four themes discussed at the conference were –

- arbitration;
- contracts and company law;
- financial and tax law; and
- lessons to set-up an effective arbitration center: the do's and don'ts.

Co-chairperson of the LSSA, Mvuzo Ntuyesi welcomed delegates to the conference. Mr Ntuyesi noted that the BRICS member states legal fraternity should have legal cooperation through both unity and diversity. He added that although the member states had different legal systems, this was not a barrier to collaboration.

Message from the heads of delegations

Past President of the Federal Council of the Brazilian Bar Association and President of the National Commission of Foreign Affairs of the Brazilian Bar Association,



Co-chairperson of the Law Society of South Africa, Mvuzo Ntuyesi welcomed delegates to the fifth BRICS Legal Forum conference.



BRICS Legal Forum heads of delegations. From left: Past President of the Federal Council of the Brazilian Bar Association and President of the National Commission of Foreign Affairs of the Brazilian Bar Association's Federal Council, Marcus Vinicius Furtado Coêlho; Chief of Staff and Member of the Board of the Association of Lawyers of Russia, Stanislav Alexandrov; President-Elect of the Bar Association of India, Prashant Kumar; Solicitor General of India and Vice President of the Bar Association of India, Pinky Anand; Vice-President of China Law Society, Zhang Mingqi; and Co-chairperson of the LSSA Etienne Barnard.

tion's Federal Council, Marcus Vinicius Furtado Coêlho, said that the next BRICS Legal Forum conference will be held in Brazil. Mr Coêlho added that the lessons learnt from the South African conference will be taken forward to Brazil. He noted that the BRICS countries have a healthy friendship because of the mutual respect the countries have for each other's sovereignty.

Chief of Staff and Member of the Board of the Association of Lawyers of Russia, Stanislav Alexandrov, noted that the BRICS Legal Forum was a great place to build contacts. Mr Alexandrov said that last year in Moscow, the forum established a joint programme for young lawyers. Adding that the aim for the young lawyers programme is to create opportunities for young lawyers and create a mechanism for them to have constant contact with each other.

President-Elect of the Bar Association of India, Prashant Kumar, thanked the LSSA for the effort it made to organise the forum. Mr Kumar noted that it was once said that BRICS would not work be-

cause the member states were a group of countries with nothing in common. He added that the notion has been proven wrong over the past few years.

Vice-President of China Law Society, Zhang Mingqi, said in recent years, the BRICS countries have continued to develop in a positive direction. Mr Mingqi noted that in 2014, the legal circles of the BRICS countries gathered in Brasilia to unite the consensus on the rule of law and jointly initiated the establishment of the BRICS Legal Forum.

Mr Mingqi added: 'After four years, it has successfully held four forums in Brasilia, Shanghai, New Delhi and Moscow. It has conducted in-depth discussions on legal issues that the BRICS countries are facing and are concerned about. The forum has adopted the Brasilia, Shanghai, New Delhi and Moscow Declarations. The forum also established the Forum Steering Committee, the BRICS Legal Talents Training Base, the BRICS National Law Institute, the BRICS Law School Alliance, the BRICS Dispute Resolution Shanghai Centre, the Gold Coordination, and the



Delivering the opening address, Chief Justice Mogoeng Mogoeng said that the invitation he received to speak at the conference stated that the conference was about working out the legal framework that will assist in developing the economies of the BRICS member countries for the social and economic benefit of their people.

New Delhi Centre for International Dispute Resolution in Emerging Economies. This has laid a solid foundation for the BRICS countries to further deepen the rule of law cooperation.'

Legal framework to underpin the BRICS economic initiative

Delivering the opening address, Chief Justice Mogoeng Mogoeng said that the invitation he received to speak at the conference stated that the conference was about working out the legal framework that will assist in developing the economies of the BRICS member countries for the social and economic benefit of their people.

Quoting one of the books he was reading, Chief Justice Mogoeng said: 'Our world needs people of integrity and strong character. The nation needs them in our business and economic set up. We need them to run our judiciary, we need them to be in charge of our politics and governments and every facet of our lives. You can be one of such people and make a real difference.'

Chief Justice Mogoeng noted that on the assumption that the BRICS Legal Forum is set up to work out a regulatory framework that will facilitate economic development, the BRICS member states need to acknowledge that laws or regulatory frameworks do not just exist, they exist with an objective in mind. He added: 'Therefore, regulatory frameworks have to be crafted in such a way as to facilitate the attainment of the objec-

tives sought to be achieved. In my view, fundamental to the existence of the law, is to ensure that amongst other things, peace, stability, freedom, justice and equity, as well as shared prosperity are achieved. That is critical because economic development around the world is not without a history. We, therefore, have to look around us and say around the globe, has there been meaningful economic activity. If the answer is yes as it should, the question should then be: Have we been able through the existing regulatory framework, even as it applies to taxation and applies to the conditionalities for doing business or securing loans for doing business, able to achieve what we set out to achieve? But if we did not, what is it that we must do differently as we craft this legal framework to make sure that we avoid all those things that made it difficult if not impossible for us to get to that point.'

Chief Justice Mogoeng said to be able to speak about the economies of the world he has been advised to read *Neo-Colonialism: The Last Stage of Imperialism* (Panaf 1974) by Kwame Nkrumah and *The New Confessions of an Economic Hit Man* (Berrett-Koehler 2016) by John Perkins. He added: 'Reading these books has helped me to appreciate what dynamics are there that any well-meaning lawyer and economist would have to contend with, so that we do not go back and recycle the errors of the past. So that the necessary critical paradigm shift that must happen for a legal framework to come into being, whose purpose is to ensure that the economies of the member countries of BRICS are developed for the social and economic development of their people does come into place. What we all need to do is to revise or refresh our memories on the challenges seen as far back as 1960 by Kwame Nkrumah. How was business being conducted and why is it that for so many years in Africa, in the developing world we still have no change, on the contrary the situation has become worse.'

Chief Justice Mogoeng asked: 'What regulatory framework was in place that enabled what Nelson Mandela would call, I am putting the converse of it, trade injustice? What was the role of lawyers in facilitating that? In circumstances where developing countries like African countries and the Latin American countries need revenue. How was the regulatory framework crafted to ensure that through taxation we get the revenue we need from those who are using the resources in the different countries to make a fortune?'

Chief Justice Mogoeng noted that Nelson Mandela indicated that trade justice is needed, otherwise poverty will never go away and there will not be any meaningful development of the economies of

the developing economies of the world. 'You need to reflect deeply on how the existing debts of the poor countries of the world are so that they do not get trapped in debt to a point where they would never emerge out of it. You need to reflect on what it will take to ensure that whatever aid you give to any country is of the highest quality. And this of course assumes that we are all men and women of integrity because it is all very well to craft the best legal framework, the best Constitution, the best quality policies but if you lack integrity, if you are dishonest, if you are always looking for how to take advantage of others, whatever you say is nothing but talk.'

Chief Justice Mogoeng added: 'BRICS came into being because there was a sense that there was some trade injustice around the world. To counter balance this, measure had to be found that when we say that there will be development in South Africa as a result of the collaboration with BRICS member states, development does happen. I hope that ten or 20 years down the line we will have no reason to say: What did we put ourselves into? I hope that 60 years down the line, there will be a difference. It will show that there is a new way of doing business with credible lawyers in place who will never mislead society. There will be no inflation of projections in relation to economic growth. There will be a conscious decision to look after our environment and make sure we do not damage it for the sake of profit. Let none of us be in a position where his or her soul is up for sale, willing to do whatever some people or some entities wants



Minister of Justice and Correctional Services, Michael Masutha, said the BRICS member states economic, cultural, social and other relations require lawyers to develop procedures and laws which will regulate and strengthen the countries and its peoples.



Minister of Finance, Tito Mboweni, said the BRICS club of nations is a political architecture and all other things have to fit in this political architecture.

them to do regardless of the harm. Let that regulatory framework not be favorable to some members of BRICS, but let it be favorable to all of us.'

BRICS to raise levels of development

Minister of Justice and Correctional Services, Michael Masutha, said as SA celebrates the centenary of the life of the founding father of its democracy, Nelson Mandela, the country is mindful of its past. Mr Masutha added that in the past, the majority of the people in the country were excluded from mainstream social and economic life of the country. He said: 'This has relegated them to centuries of socio-economic deprivation, including the right to access to land, decent employment and other forms of economic activity. South Africa will only realise its potential if the value of its most valued resource, its people, is realised. This can only be realised in part through ensuring that we become a skilled nation that is able to translate this natural resource into real wealth and high-end skills including the many specialised skills that are brought by this profession that can help unleash and unlock this potential.'

Mr Masutha said the BRICS member states economic, cultural, social and other relations require lawyers to develop procedures and laws, which will regulate and strengthen the countries and its peoples. 'This will ensure that we take full advantage of our combined force as a collective as the members of BRICS to ensure that we raise the levels of development within our respective countries. The themes that you will be discussing during this conference should provide us with a solid legal base to strengthen

already existing statutes of BRICS countries. In doing so, all of us are of course guided by the strong connection to the rule of law and the protection of socio-economic rights of all our peoples in an increasingly globalising and interdependent world which is yet to deliver social justice to all within and between its nations.'

BRICS – a political architecture

Minister of Finance, Tito Mboweni, said the BRICS club of nations is a political architecture and all other things have to fit in this political architecture. Mr Mboweni added: 'The legal work that you are discussing is also meant to be in support of this political architecture. The BRICS arrangement has been to a large extent a response to what may be perceived as the difficulties of the global government system. Starting with the domination of the world by the G7 countries [Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States], with all the arrogance that they can muster. The domination of the G7 in the IMF [International Monetary Fund] and the World Bank system, for example, they have decided amongst themselves that only an American can be a president of the World Bank and only a European can be the managing director of the IMF. The G7 also dominate the UN [United Nation] system. You may not agree with me, but they also dominate the thinking in the International Criminal Court.'

Mr Mboweni said somewhere from 1999 to 2000 a group of Goldman Sachs economists studied the trends in the global economy. 'Of course, they were doing this partly for self interest in that they wanted to provide guidance as to where the market growth in the world was coming from so that the firm could be able to pursue business. They went through the study under the guidance of Jim O'Neill who was the chief global economist at the time. As they studied the economies of the world, they came to the following basic conclusions: That between 2000 and 2005 the economies of Brazil, Russia, India and China contributed 28% of global growth, 55% in purchasing power parity, more than 30% of global demand. And intra-BRICS trade was nearly 8% of their total trade. BRICS held more than 30% of global reserves with China being the dominant one. They had massive current account surpluses and were showing higher rates of economic growth. This led the Goldman Sachs economists to conclude, therefore, that we must come to terms with the fact that the economic power in the world had shifted away from the G7 more into the BRICS countries and what they later referred to as the next 11, which



On the second day of the conference, a panel discussion was held to discuss the recognition of the BRICS Legal Forum by BRICS governments. Legal Practice Council elected member Krish Govender was one of the speakers in the panel.

were Bangladesh, Egypt, Indonesia, Iran, Korea, Mexico, Nigeria, Pakistan, Philippines, Turkey and Vietnam,' Mr Mboweni said.

Mr Mboweni noted that it was important for political policy makers to begin to think through the implications of this dramatic shift in economic power in the world. He added: 'Somewhere in 2003 and 2004 the ministers of finance and governors of central banks of Brazil, Russia, India, China and South Africa began to hold regular meetings during the gatherings and the meetings of the IMF and the World Bank. The primary purpose of those meetings was to forge a common position in the deliberations that would take place in those meetings. I was the Reserve Bank's governor then, we recognised then that we yielded together enormous influence and power, which we should use in those gatherings. Whether it was about voice and representation, whether it was about irritating the G7, whatever the case might have been together we were much stronger. Then we made a political mistake, we began to issue statements after our meetings that caught the attention of the heads of states and governments and they became jealous and they began talking amongst themselves, that resulted in the formation of a more formal structure, which we now know as BRICS.'

- To view presentations on topics discussed, see www.derebus.org.za

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WITH VISION



The Kirstenbosch Centenary Tree Canopy Walkway, also known as *The Boomslang*, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden's Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and rising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country's indigenous flora.

High litigation costs deprive the poor access to justice

Deputy Judge President of the Local Division of the High Court in Johannesburg, Phineas Mojapelo, said the cost of litigation is depriving the poor from access to justice. He was the guest speaker at the Johannesburg Attorneys Association annual general meeting on 12 September in Johannesburg. He said although there are organisations such as Legal Aid South Africa (Legal Aid SA) and ProBono.Org, there is still more that the legal profession needs to do, to make access to justice a reality for the poor.

Deputy Judge President Mojapelo said South Africa (SA) remains one of the most unequal societies in the world with a highly skewed income distribution. He added that the gap between the rich and poor grows each year and it is undeniable that poverty is an epidemic in SA. He pointed out that there cannot be access to justice in the face of poverty, unemployment and inequality. He noted that access to justice is an essential imperative in the country's post-Apartheid era.

Deputy Judge President Mojapelo said the Constitution introduced various measures to enhance access to justice to the most vulnerable. He added that the existence of state funded legal aid and donor funded non-governmental organisations such as ProBono.Org and clinical entities at universities, have gone a long way in addressing economic disparities in accessing legal services. He noted that through these structures and measures a tradition has been created where the poor seek and use formal legal services.

Deputy Judge President Mojapelo said despite the good work done by organisations such as Legal Aid SA and ProBono.Org, there are still gaps. He added that some of the institutions he mentioned prioritise criminal law and focus on social challenges, socio-economic rights and civil matters, damages inflicted on one person by another, etcetera. He pointed out that there are citizens, who according to the means test, are not 'poor enough' to receive assistance from these institutions. This means there is a gap that is being overlooked.

Deputy Judge President Mojapelo pointed out that according to the United Nations Development Programme, access to justice is more than the ability to obtain legal representation and have access to the courts. He said it is the ability to see and obtain the remedy per grievance through an institution, be it formal or informal. 'Access to justice has evolved from an ordinary concept that refers merely to the ability to gain access to legal services and state services such as the courts and tribu-



Deputy Judge President of the Local Division of the High Court in Johannesburg, Phineas Mojapelo, spoke at the annual general meeting of the Johannesburg Attorneys Association on 12 September in Johannesburg.

nals to a wider concept that encompasses social and economic justice,' Deputy Judge President Mojapelo said.

Deputy Judge President Mojapelo noted that the importance for one to access justice cannot be understated. He added that access to justice must be understood as a public good that serves more than private interest. He pointed out that the courts play a significant role in this regard and the court plays a part in the sense that citizens in the country live in an orderly society where they have rights and protection. 'These rights and protections can be made good. If society is governed by the rule of law, the courts provide communities defence against arbitrary government action. They promote social order and facilitate peaceful resolutions,' Deputy Judge President Mojapelo added. He said the courts - in publishing their decisions - communicate and reinforce citizens with values and norms in providing civil justice.

Deputy Judge President Mojapelo pointed out that justice must not only be done, but must also be seen to be done. He added that the preamble to the South African Constitution envisions a society based on democratic values, social challenges and fundamental human rights. Every citizen is equally protected by the law and commits to improve the human dignity, the achievement of equality and advancement of human rights and freedom.

Deputy Judge President Mojapelo said the Constitution additionally imposes a positive duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. He added that s 34 prescribes that everyone has the right to

have any dispute that can be resolved by the application of law, decided by the third public hearing before the court. He noted that access to justice in s 34 has been interpreted by some academics as requiring a legal institutional framework that better serves the whole population and makes good on constitutional promises of genuine socio-economic advancement. 'To other academics, the right to a third civil trial imposes upon legal practitioners and law students, which is to do *pro bono* work. Social justice is, therefore, much broader than what litigants get from the course. Accessing and delivering justice are not tasked to be delivered by government alone, for justice to work the society must be involved,' Deputy Judge President Mojapelo said.

Deputy Judge President Mojapelo added that rendering of *pro bono* services is largely dependent on good will and social scruples of a few well-intentioned legal practitioners. He said over the years the attorney's profession has attempted to change this, he pointed out that the rules of the profession make it compulsory for attorneys to provide *pro bono* work.

Deputy Judge President Mojapelo said there must be an environment where legal practitioners see the law and the legal system as the vehicle through which the lives of citizens are enhanced by way of the protection and provision of rights guaranteed by the Bill of Rights. He added that the modern legal system is not a cow to be milked, but a heritage to be nurtured and preserved as a guaranteed continued existence of civilisation. He pointed out that law is a powerful vehicle to effect positive change in an unequal society, by making legal service accessible.

'I would like to warn legal practitioners on being litigation funders, there is a frame-work of the contingency fee supervision. If you become a litigation funder you could expose yourself to liability for costs in the event of an unsuccessful litigation. I invite the legal profession to rigorously exercise its review powers under the Contingency Fees Act 66 of 1997,' Deputy Judge President Mojapelo said. He added that the intention is not to prevent legal practitioners from earning a living, but to keep the process between acceptable limits, which will serve the poor who cannot afford legal services.

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South Africa needs a tax system that represent taxpayers

The 2018 Tax Indaba was held from 10 to 14 September in Johannesburg. Keynote speaker and former Minister of Finance, Nhlanhla Nene, said tax revenue is critical to the functioning of any democracy. He added that lower tax collections have serious consequences and can impact everyone, whether it be through lower expenditures on education or health, or through an increase in tax rates to make up for a shortfall. He noted that the ability of government to borrow money at reasonable interest rates is also dependent on its ability to collect taxes.

Mr Nene said while deliberating on proposed tax amendments, comment is often made that the country's tax legislation should be more simplistic and easy to understand. He pointed out that while government takes that plea to heart, it would be very easy for the legislature to write simple tax laws if, no one tried to circumvent them. He said passages of the Income Tax Act 58 of 1962 that are more difficult to understand, have contributed significantly to job creation for many tax practitioners. He added that there is greater public debate regarding numerous tax issues lately, from a discussion around the value added tax (VAT) rate increase and zero-rating, to the role of illicit trade and non-compliance. He noted that greater debate and introspection of these tax issues can only improve the understanding of these topics and hopefully lead to more just,

efficient and considered policies and actions. 'Events such as the Tax Indaba play an important part in contributing to those debates,' Mr Nene said.

Mr Nene pointed out that unfortunately much of the debate around tax issues have occurred due to the substantial shortfalls in tax revenue, which amounts to R 30 billion and R 49 billion during the past two fiscal years. 'To make up for these shortfalls, we first increased personal tax rates and taxes on capital gains and dividends, and subsequently raised the value added tax rate,' Mr Nene added. He said revenue shortfalls over the past few years have partly been due to the fact that the economy has been growing slower than what had been projected. However, the potential impact of a reduction in the effectiveness of tax administration cannot be ignored.

Mr Nene pointed out that tax avoidance and tax evasion will be on the rise in any economy that is growing slowly and where taxes have been increased. He said a strong, capable and effective revenue authority must be there to limit those activities and make sure the correct amount of revenue continues to be collected. He noted that some taxpayers began to lose trust in the South African Revenue Service (Sars) because of how they had been treated. He said the importance of an institution, such as, the Tax Ombud cannot be understated, and the public should have confidence in their ability to listen to the concerns and make sure that Sars is treating taxpayers fairly and correctly.

Mr Nene said bad treatment of taxpayer's negatively affects the collection of tax and the country's financial position. Government has an obligation to act ethically and correct any possible failings, but equally so, individuals and corporates have an obligation to act in a responsible manner. 'Many South African professions and professionals are at a crossroad. It so happens that this audience comprises of lawyers, accountants and auditors, professions whose conduct has attracted public scrutiny locally and abroad. The behaviour of a number of corporates have visibly fallen short of the level of ethics that one would expect, especially given the reputations of those firms,' Mr Nene said.

• To view Mr Nene's full speech, visit www.gov.za/speeches

Tax Ombud, Judge Bernard Ngoepe, said taxpayers and tax practitioners can directly approach his office if they iden-



Tax Ombud Judge Bernard Ngoepe said taxpayers and tax practitioners can directly approach the Office of the Tax Ombud if they identify systemic issues. He was speaking at the 2018 Tax Indaba on 11 September in Johannesburg.

tify systemic issues. He was responding to a question asked by the panellist chairperson, Partner in the Tax Practice at Webber Wentzel, Joon Chong, on issues that were in the systemic report the Tax Ombud had compiled. Judge Ngoepe added that the office of the Tax Ombud – in order to make sure that people are aware of the systemic issues – has added the issues to its website. He noted that taxpayers and tax practitioners did not have to first exhaust Sars' internal resources before they approach the office of the Tax Ombud.



University of Johannesburg's Professor, Thabo Legwaila, said South Africa needs a tax system that represents taxpayers.



Technical Executive at the South African Institute of Professional Accountants, Faith Ngwenya, spoke at the 2018 Tax Indaba held in Johannesburg.

Judge Ngoepe said following the report, the office of the Tax Ombud has had regular engagements with Sars. He added that his office is also looking at whether they are receiving more complaints than in previous years with regard to tax refunds. 'We know that not everyone is complaining. There are people who may be faced with these issues but do not lodge a complaint,' Judge Ngoepe said. He pointed out that in order to get a feeling of what is happening, the office of the Tax Ombud conducted a survey among some tax practitioners and taxpayers on their experience with Sars. He said most tax practitioners who took part in the survey indicated that there are still a lot of issues with regards to tax refunds.

University of Johannesburg's Professor Thabo Legwaila said the tax system that represents taxpayers should have more power. He added that taxpayers complain that the taxman uses their tax

money to institute actions against them, and taxpayers have to get more money to defend themselves. He pointed out that there should be a concept of a 'legal aid' at the office of the Tax Ombud for taxpayers.

Mr Legwaila said with regards to the Sars Service Charter, the country cannot have Sars determining what the taxpayer's rights are and what taxpayers should do. He pointed out that what is required of the taxpayer is included in the Income Tax Act.

Technical Executive at the South African Institute of Professional Accountants, Faith Ngwenya, said South Africa is famous for coming up with policy documents and before a policy document is even fully implemented, another policy document has been revised and the implemented one is already on the cards. She added, in hindsight, without anything protecting taxpayers under the legislation, Sars drew up documents that

included both the rights of taxpayers and what is expected of them.

Ms Ngwenya said there will be situations where there is confusion with regard to the taxpayer's Bill of Rights, while there is a Service Charter and pointed out that taxpayers and the tax industry as a whole will be confused. She added that one issue – when looking at the clause – is that a taxpayer should not pay anything more than what they are liable to pay. Ms Ngwenya pointed out that the minute you remove the 'pay now, argue later' clause, you allow for every citizens not to pay their dues, because they would say they are arguing their case. She said there are various methods that can be put in place and one of the methods will be that the taxpayer will have to pay the minimum amount.

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Fraud syndicates use public data to access their victim's details

The Fiduciary Institute of Southern Africa (FISA) held its eighth annual conference themed 'Privacy, protection and disclosure in an online world.' The conference was held in Johannesburg on 20 September. Head of ENSAfrica's Forensics department, Steven Powell, presented on identity theft and abuse of information in fraud and corruption. He said when fraud syndicates want to access one's information, they look for information on a public data platform, such as –

- property details, which they can obtain from a Deeds office;
- company's information, which they can access at the Companies and Intellectual Property Commission (CIPC); and
- credit checks on the individual they are targeting.

Mr Powell pointed out that often fraud syndicates target call centre employees and persuade them to work with them, promising them money and a better life. He added that in 2010 the retail industry was hit hard by card cloning fraud. He said fraud syndicates worked with cashiers during the 2010 FIFA World Cup tournament, which was hosted in South Africa (SA), at various stores to clone credit cards belonging to foreigners. He pointed out that some retail stores lost between R 200 000 and R 300 000 a week during that time.

Mr Powell said another area where



Head of ENSAfrica's Forensics department, Steven Powell, presented on identity theft and abuse of information in fraud and corruption at the Fiduciary Institute of Southern Africa conference held in Johannesburg.

data is mostly exploited are Gmail accounts. He added that syndicates can easily access Gmail accounts and warned that when users send important, sensitive information they should use password protected documents. He said that syndicates also target companies during the tax season. Syndicates create false companies and claim they are directors of that particular company and change

the banking details of that company. They then send a notice to the bank with a letter confirmed by the CIPC to change the banking details and then send another letter to South African Revenue Service (Sars) notifying them about the new banking details. Sars would then pay tax returns into the new account belonging to the fraud syndicate thinking they had paid the correct directors of that particular company.

Mr Powell pointed out that syndicates can access and change information on salary slips, bank statements, death certificates, marriage certificates or identification documents and use it to commit fraud. He warned that people should be careful how they handle important documents and should know how to dispose of garbage that might have any information syndicates can use to access important information.

Dealing with conflicts of interest

Member of the South African Chapter of the Association of Certified Fraud Examiners and part time lecturer at the University of Pretoria, Doctor Janette Minnaar-van Veijeren, said professionals in various industries are held to high standards, with legal implications set for these professionals. She added that there are values and ethical norms for



Member of the South African Chapter of the Association of Certified Fraud Examiners and part time lecturer at the University of Pretoria, Doctor Janette Minnaar-van Veijeren, spoke at the conference.

the manner in which professionals advise their clients. She pointed out that professionals, must be able to consult and protect their clients' confidentiality; manage conflict of interest; and be honest.

Dr Minnaar-van Veijeren said that ethics is the highest standard of compliance, even higher than the law. She referred to the Trust Property Control Act 57 of 1988, where it states that '[a] trustee shall in the performance of [their] duties and the exercise of [their] powers act with the care, diligence and skill which can reasonably be expected from a person who manages the affairs of another.' She continued and said that any provision contained in a trust shall be void insofar as it would have the effect of exempting a trustee from or indemnifying them against liability for breach of trust where they fail to show the degree of care, diligence and skill required.

Dr Minnaar-van Veijeren said the common law practice has always been to take care of the interest of the company with care, skill, diligence and good faith. She added that good faith is when one makes sure that the main duty is to care, have

compassion, be responsible, be honest and having the integrity to keep one's promise.

Developments with electronics

University of the Free State law lecturer, James Faber, noted that for a Will to be valid, a testator must comply with all the statutory formalities as set out in the Wills Act 7 of 1953. He said currently in SA the statutory Will presumes that a document be written, signed and attested. Mr Faber discussed whether a Will, can be in nuncupative (oral) form. He pointed out that SA does not allow for oral Wills, as the country has one law that speaks to Wills.

Mr Faber added that a Will can be drafted electronically, however, it cannot be executed electronically. He said the Wills Act presumes that a Will must be in writing, be signed in different places and on different pages. He pointed out that SA does not allow video or audio Wills. He stressed that a Will must be expressed in writing and suitable for complying with the formal requirements of the Wills.

Regulatory update

Acting Chief Master of the High Court, Theresia Bezuidenhout, said the Master's Office is looking into using an e-filing system. She added that legal practitioners would be able to fill in their clients trust files online and e-mail them to the Masters Office who would deal with them online. She pointed out that in the past they experienced challenges with very old trust files that were obtained by the Master's service provider. However, she said files that are currently in the Master's Office system should not be a challenge when implementing the change.

Ms Bezuidenhout noted that the Master's Office is working on a policy change, but pointed out that presentations are still to be made to the Minister of Justice, with regards to reg 910 of the Attorneys Act 53 of 1979. She said the aim of the regulation was to protect



Chairperson of the FISA board of trustees, advocate Sankie Morata, officially launched the FISA bursary at the organisations eighth annual conference held in September.

work for legal practitioners. She added that the Master's Office has kept reg 910 and that is supposed to indicate who is prohibited from doing estates.

Launch of FISA Bursary Trust

Chairperson of the FISA board of trustees, advocate Sankie Morata, said the fiduciary industry is aging. He added that FISA established the bursary fund with the intention to give back to the community and grow the fiduciary industry by identifying young people who are suitably qualified to study in the field of fiduciary. He pointed out that those who qualify to apply for the bursary can be people who are working or studying, whether post-graduate or undergraduate. He noted that the bursary aims to build skills in the fiduciary industry. He pointed out that investing in the youth of SA will lead to the growth of the SA economy.

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Department of Justice supports Wills Week

The Law Society of South Africa (LSSA) held its annual National Wills Week from 17 to 21 September. Wills Week affords South Africans the opportunity to have an attorney draft a Will for them free of charge.

In support of National Wills Week, the Department of Justice and Constitutional Development (DOJ&CD) hosted community information sessions in various communities to educate the public on the importance of drafting a Will. One of these communities was, Daveyton in Johannesburg.

Kempton Park Cluster Acting Court Manager, Azwindini Nemukula, said the DOJ&CD identified Daveyton as one of the communities in need of an information session about Wills because of the challenges faced within the community. Mr Nemukula said there are many unlawful evictions taking place in Daveyton. He added that the statistics collected from the Daveyton Magistrate's Court revealed that, from April 2017 to March 2018 the Daveyton Magistrate's Court had a total of 184 cases of family house



Acting Chief Master of the High Court of South Africa, Theresia Bezuidenhout, said her office often witness many family disputes when there is no Will left behind by the deceased. She was speaking at an information session on Wills, hosted by the Department of Justice and Constitutional Development in Johannesburg on 17 September during Wills week.

disputes and 1 528 cases of deceased estate disputes.

At the information session hosted by the DOJ&CD. The community of Daveyton was taught about the importance on having a Will and given scenarios of what might happen if no Will is left behind. Legal practitioners from Legal Aid South Africa also assisted community members with drafting Wills.

Acting Chief Master of the High Court of South Africa, Theresia Bezuidenhout, said the purpose of the DOJ&CD being involved in the National Wills Week was to have the opportunity to educate the public about the importance of drafting a Will. She added that the public needed to know about the pros and cons of having a Will. She pointed out that at the Johannesburg Masters Office and service points of estate clerks, they often witness many family disputes, especially if there is a whole family living in one house and a family member passes away and there is no Will left behind.

Kgomotso Ramotsho,
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The Stellenbosch University Law Clinic (SULC) held a conference in July discussing the contemporary challenges facing South African university law clinics. Before the conference began, the SULC hosted a dinner in celebration of its relaunch. The event celebrated SULC's 30th anniversary, since the establishment of its organisational strategy for the period of 2018 to 2022 and the launch of its website (www.sulawclinic.co.za). The relaunch was followed by news of the shortlisting of SULC as specialist law firm of the year at the 2018 African Legal Awards where it was awarded the Corporate Counsel Association of South Africa's Achievement Award. Participants at the conference engaged in discussion on a variety of relevant and contentious issues, including the positioning of clinical legal education within the LLB curriculum, monitoring and evaluation and transformation and decolonisation.

Law clinics place in the LLB curriculum

The first session set the tone for the conference, focusing on the law clinic and clinical legal education's (CLE) place in the faculty and LLB curriculum. The speakers on this panel critically considered the extent to which law clinics and CLEs added value to institutions of tertiary education. A constant theme was the reality that law clinics faced in competing with other programmes for

Contemporary challenges facing law clinics

limited resources, which restricts the integration of CLE into the LLB curriculum. The importance of CLE, as viewed from a pedagogical, institutional and access to justice perspective, was emphasised in light of the proven benefits to students involved in this form of teaching and learning. Some panel members strongly supported the ideal of instituting a mandatory CLE module at all law faculties. The panel members each had different opinions on which level and year the CLE module should be started. Not surprising, the panellists and other attendees were, however, unanimous in their view of the pivotal role that law clinics and CLEs have to play in shaping the professionally skilled, socially conscious legal practitioners of the future.

Data capturing

The second session focused on data capturing at law clinics. The speakers in this session described the context within which law clinics needed to consider data, what useful data consisted of, and how data could be used to align with the strategic focus of the organisation. The composition of the panel in this discussion was unique, in that it not only consisted of clinicians or other legal professionals but included measurement

and evaluation practitioners. The panel agreed that emphasis must be placed on accuracy in data collection, to avoid the obvious perils of relying on inaccurate data. While the panel members had different approaches to the task of data capturing, they agreed that the underlying goal of all data capturing was to advance the objectives of the organisation. The emphasis was, therefore, on the benefits of proper data collection, in that stakeholders, funders, governance and organisations could rely on the data to make informed decisions about revamping strategic processes and eliminating non-crucial activities. Attendees were impressed by the different data capturing methods discussed by the panel, and some indicated that it would be a tool they would look to integrate in their own organisations.

Relationships between attorneys and candidate attorneys

The next session focused on the *sui generis* nature of the attorney/candidate attorney (CA) relationship at law clinics. Speakers on the panel viewed the relationship from both perspectives and considered the obligations and respon-

sibilities of these parties in terms of the Legal Practice Act 28 of 2014 (LPA). Speaking from the perspective of a CA, one panellist described the challenges they faced when it came to their contract of employment. Especially concerning was the 'grey area' with regard to the evaluation period, which many CAs were subjected to as new employees. During the first three months of a CA's articles, they are still under probation as new employees and can, at least in theory, be dismissed quite easily during this period. The panel considered the differences between CAs in law clinics and those in private practice, agreeing that law clinic CAs generally have more responsibilities, because of the quantity and quality of cases assigned to them.

Law clinic's role in impact litigation

Session four focused on the role of law clinics in driving impact, in a wider sense, and impact specifically litigation. Speakers referred to several examples of the work of law clinics in this regard. The panellists were divided in their opinions of whether all law clinics should be involved in impact litigation. However, the majority of attendees agreed that the activities of law clinics in the past have been a driving force in making a positive impact in their communities. Impact litigation does not only affect immediate change, but creates awareness through advocacy to influence policy, which results in a positive impact on indigent and vulnerable people on a wider scale. Despite having limited resources at their disposal, law clinics should be sensitive to issues where they can still employ strategies to achieve law reform. An international perspective from Coventry Law School addressed the use of innovative technology in law clinics and CLE as a tool to push the boundaries and create pedagogical impact. The panel concluded that law clinics play a pivotal role in their communities, because they often change lives, and sometimes even change the law.

Sustainability of law clinics

The difficult question about the sustainability of law clinics was under discussion in session five. Panellists emphasised the value of law clinics in facilitating CLE, as well as the need to understand the contemporary challenges that accompany it. Clinical Legal Education is now regarded as a global phenomenon, with students being central thereto. Law clinics should not only rely on the effects of practising law as a means to obtain funding, but should also seek academic assistance from their respective institutions. Law clinics were originally a student initiative, and students are still invested in the training offered

by law clinics. When universities recognise the impact that clinical training has on students, they will be more willing to assist, as law clinics are ideally placed to support transformative legal education. The value of law clinics is shown through the real impact and effect on individuals, often those most vulnerable. In order to sustain a law clinic, one must consider innovative and creative new avenues of financial support and cut unnecessary costs to manage law clinic expenditure.

Transforming law clinics

The speakers in session six, which was dedicated to the topic of transforming and/or decolonising law clinics, debated the notion of whether law clinics can be considered decolonised spaces. Issues discussed included how they needed to consider, when teaching law to law students, not just the curriculum, but also how lecturers teach and how they assess students. The panellists agreed that the role of history in shaping our legal system could not be ignored. Through engaging in CLE at law clinics, which is often the first exposure LLB students have to legal practice, a student's mindset can be transformed due to the influence of the law clinic's social justice agenda. The demographics and backgrounds of the students involved in the law clinic need to matter, as does the need to develop a professional relationship, encapsulating a human element, between students and law clinic mentors. Speakers also suggested that enforcing a policy, which recognised English as the official language of legal practice in the courts is prejudicial, as English is not the mother tongue of most people in the country. In regions with a dominant indigenous language, that language should be acknowledged and confirmed. Ultimately, panellists and attendees accepted that the legal fraternity faces a new reality and that it should serve its communities in the spirit of *ubuntu*.

Education versus access to justice

The penultimate session focussed on the important 'education versus access to justice debate in law clinics', and the speakers on this panel grappled with the fundamental question of whether clinics should exist primarily to serve indigent clients or to teach enrolled students. Due to the limited resources available to expend on these dual functions, clinicians have to divide their time between professional attorney's work, in other words assisting clients with their cases and court appearances, and their teaching responsibilities. Panellists were divided on where the primary focus should rest, some opining that because university clinics historically had their birth in the provision of access to jus-

tice, this should remain as the overriding mission. In this view, student education should support and facilitate client services, and care should be taken that clients are not treated as training 'instruments'. Others argued that clinical legal education should not be seen as secondary to access to justice. Proponents of this perspective argued that when the focus was on proper mentorship and supervision of students, the necessary result was increased and improved access to justice. Attendees agreed that both of these goals should and could be achieved, albeit to varying degrees. Ultimately, the challenge is to manage this tension effectively and to structure clinical activities in such a way that education mobilises access to justice and clinical legal education remains an effective expression of social justice.

Time management

The speakers on the panel of the closing session considered the life of a clinician, namely: Prioritising and time management. They discussed the options to manage a clinician's time effectively, so as to avoid compromising the quality of their work due to their many diverse responsibilities. Clinicians are multifaceted professionals who frequently work long hours as attorneys, teachers, researchers, managers and members of the staff of the law faculty. Each of these tasks come with its own responsibilities, and it was suggested that clinicians are required to be masters of various skills. Panellists were sceptical about any clinician's ability to attend to all of these tasks, and to do so in a successful manner. One solution might be to identify certain persons in the law clinic who should specialise in more particular tasks, such as research. In this regard, it was suggested that law clinics, such as the Stellenbosch Law Clinic and the Witwatersrand Law Clinic have presented the movement with successful models to emulate. One speaker emphasised the importance of prioritising tasks, suggesting that tasks that could not be eliminated, delegated or automated, should be done immediately.

Closing remarks

The conference laid the platform for continued constructive discussion and debate. It has also undoubtedly assisted in entrenching collaboration between South African university law clinics.

- More information about the conference can be found on the SULC website at www.sulawclinic.co.za.

Stephan van der Merwe is an attorney at the Stellenbosch Law Clinic



Compiled by Barbara Whittle, Communication Manager, Law Society of South Africa
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LSSA calls on practitioners to support the Legal Practice Council

On 8 October, at a press conference in Pretoria, the National Forum on the Legal Profession (NF) announced the results of the first election for council members for the Legal Practice Council (LPC). The ten attorneys elected are –

- Miles Carter;
- Priyesh Daya;
- Krish Govender;
- Nolitha Jali;
- Noxolo Maduba;
- Hlahloleni Kathleen Matolo-Dlepu;
- Janine Myburgh;
- Trudie Nichols;
- Lutendo Sigogo; and
- Jan Stemmet.

The six advocates are –

- Greg Harpur SC;
- Grace Goedhart SC;
- Ismail Jamie SC;
- Harshila Kooverjie SC;
- Vuyani Ngalwana SC; and
- Anthea Platt SC.

The nomination and election process ran throughout September until 3 October. At its Council meeting on 20 September, the Law Society of South Africa (LSSA) discussed the election and expressed concern that the NF's election process only made provision for voting at polling stations. The view was expressed that the polling station system may be suitable for advocates, but attorneys were scattered across the country and would be disadvantaged and prejudiced if a polling station was not easily accessible. The LSSA Council resolved to communicate this to the NF and request it to consider postal, docex and courier votes, as well as an extension of the voting deadline to allow for these types of

votes. Later that day, the NF issued an advisory informing practitioners that the voting process allowed for postal, docex and couriered votes and that the voting deadline had been extended from 28 September to 3 October.

Earlier in September, the LSSA welcomed the announcement of the nomination and election process by the Minister of Justice and Correctional Services, Michael Masutha, and urged all practising legal practitioners to participate fully in the elections. In its press release, the LSSA acknowledged the work and sacrifices made by the legal practitioners and other members who had worked tirelessly on the NF for some three years to guide the profession to the historic moment when a transformed and unified regulatory body would take the legal profession forward.

LSSA Co-chairpersons, Etienne Barnard and Mvuzo Ntyesesi pointed out that, even though the four statutory provincial law societies would fall away once the Legal Practice Act 28 of 2014 (LPA) is fully implemented, the LSSA would continue as the unified, independent, representative voice of the attorneys' profession, acting in the interest of the public and the profession; and defending the rule of law. To this end the LSSA called on attorneys to comment on amendments being made to the LSSA's constitution to allow for changes that would be brought about by the implementation of the LPA.

On 3 October, on the close of the election process, the LSSA issued a statement noting with concern the views expressed by some legal practitioners in the media criticising as unconstitutional

the 'quota system' for the election of LPC Council members.

'We acknowledge that, as this is the first of such elections, it cannot be expected to be perfect nor totally satisfactory. Although the LPA itself does not define the quotas, it does require that the composition of the LPC must, as far as practicable, take into account the racial and gender composition of South Africa – not that of the legal profession,' said Mr Ntyesesi and Mr Barnard.

The LSSA pointed out that the NF – which included representatives of the attorneys' and advocates' professions – had debated and agonised over this issue extensively and painstakingly over many meetings. Similarly, the Justice Portfolio Committee was not comfortable with the concept of quotas. 'We all agree that this is not the ideal way to elect representatives, but we understand that, until such time as the demographics of the legal profession reflect the demographics of our country, this was the reasonable way to ensure demographic representation of black and women Council members on the new Legal Practice Council,' said the Co-chairpersons.

They added: 'This process can apply to the first election only. Once the first Council is elected, it may consult, consider constitutional and statutory imperatives, and decide on the most suitable and democratic way for a transformed legal profession to vote. We urge all South Africans, in particular legal practitioners, to support the efforts which are intended to transform the profession.'

• See also Mapula Sedutla 'LPC election results announced' (www.derebus.org.za).

With the imminent implementation of the Legal Practice Act 28 of 2014, expected to come into operation on 31 October, the four statutory provincial law societies held their last annual general meetings as regulatory bodies for attorneys in their jurisdictions during September and October.

On 1 November the new Legal Practice Council (LPC) will take over the regulation of all legal practitioners, namely, attorneys and advocates, with the dates for election of Provincial Councils to be announced.

LSSA will continue after implementation of Legal Practice Act

The Law Society of South Africa (LSSA) is not a statutory body, but a voluntary association of its six constituent members, the Black Lawyers Association (BLA), the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers (NADEL).

With four of its constituent members (the four law societies) falling away on

31 October, the LSSA is in the process of changing its constitution to make provision for council members who are not affiliated to the BLA or NADEL to replace those nominated by law societies.

The amendments, once approved, will allow the LSSA to continue to exist as a representative body for attorneys. Its constitution and functions are being amended to make provision for this, with full implementation over the next three years.

In October, the Law Society of South Africa (LSSA) commended President Cyril Ramaphosa for setting up a panel of independent legal organisations to identify a suitable, fit and proper candidate for the position of National Director of Public Prosecutions (NDPP) to succeed Shaun Abrahams who was removed from office earlier this year.

President Ramaphosa announced the panel on 14 October and tasked it to complete its work by recommending at least three candidates to enable him to meet the deadline set by the Constitutional Court to appoint a new NDPP within 90 court days of 13 August. The panel will be chaired by Minister Jeff Radebe and includes the chairpersons or their representatives of the General Council of the Bar, the LSSA, the Black Lawyers Association, the National Association of Democratic Lawyers, Advocates for Transformation, the Auditor-General of South Africa and the South African Human Rights Commission.

LSSA welcomes transparent panel process for appointment of NDPP

The panel must identify potential candidates, establish that they meet the required criteria, conduct interviews and recommend three candidates to the President. The presidency pointed out that, while the panel will make recommendations, the Constitution prescribes that it is ultimately only the President who can decide who to appoint as NDPP. This the President will do after consultation with Justice Minister Michael Masutha.

LSSA Co-chairpersons Mvuzo Ntuyesi and Ettienne Barnard said in a press release: 'The LSSA is honoured to form part of the panel and takes this duty very seriously. We regard this as a significant step in what will be a tough journey towards restoring public confidence in the prosecutorial services. In August this

year we called for the process of appointing the new NDPP to be transparent and motivated by the candidate's commitment to the Constitution, the independence of the prosecutorial institution and accountability to the public. We are confident that the transparent panel process introduced by the President will yield a new head for the National Prosecuting Authority who will tackle the instability in the institution head-on and bring independence, impartiality, accountability, stability and good governance to our prosecutorial services, which are at the heart of our criminal justice system and carry the expectations for justice of the victims of crime in our society.'

The LSSA's nominee to the panel is LSSA council member Richard Scott.



People and practices

Compiled by Shireen Mahomed

Hogan Lovells in Johannesburg has two new appointments.



Nkondo Hlatshwayo has been appointed as Chairperson.



Clive Rumsey has been appointed as Deputy Chairperson.



Norton Rose Fulbright in Johannesburg has appointed Marelise van der Westhuizen as the Chief Executive Officer. She is a director in the commercial litigation department and head of the firm's risk advisory practice.

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. Advertise for free in the People and practices column.

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Madhlopa Inc in Parktown North has changed its name to **Madhlopa & Thenga Inc** and has two promotions and five new appointments. Mashudu Thenga continues in the role of Managing Director and head of the corporate and commercial department.

Sello Matsepene has been promoted as a director and is the head of the litigation and dispute resolution department.

Edine Wagenaar has been promoted as a director and is the head of the conveyancing and property department.



From left: Mashudu Thenga, Sello Matsepene, and Edine Wagenaar.



From left: Renita Naicker, Lucky Moenyane, Thembinkosi Mchunu, Vusi Ndlovu, and Thetshelesani Mutengwe.

Renita Naicker has been appointed as an associate in the litigation and dispute resolution department. Lucky Moenyane has been appointed as an associate in the litigation and dispute resolution department. Thembinkosi Mchunu has been appointed as an associate in the commercial litigation and corporate law department. Vusi Ndlovu has been appointed as an associate in the employment and labour law department. Thetshelesani Mutengwe has been appointed as an associate in the litigation and dispute resolution department.



By
Pranith
Mehta

The deductibility of front-end fees

Front-end fees are not defined in the Income Tax Act 58 of 1962 (the Act), however, it is ordinarily construed as a fee payable to the lender or arranger of a loan, in consideration for work done in providing or arranging the loan. At the inception of a loan or other agreement front-end fees are often deducted from the loan amount. Front-end fees are commonly paid by borrowers in connection with the raising of loans, however, it is unclear whether – if used for the purpose of carrying on a trade – it would be deductible in terms of s 11(a) of the Act.

In order for front-end fees to qualify for deduction as interest, it should be evaluated whether such amounts constitute ‘interest’ as envisaged in s 24J of the Act, which reads:

‘interest’ includes the –

‘(a) gross amount of any interest or similar finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement’.

The Act does not define the term ‘similar finance charges’, however, prior to the Taxation Laws Amendment Act 15 of 2016, which was promulgated on 19 January 2017, the provision read ‘interest or related finance charges’. The change was effected in an effort to clarify the policy position and arguably to narrow the application of this provision to finance charges of the same kind. Prior to the amendment, the term ‘related finance charges’ was quite widely interpreted. In the case of *Commissioner, South African Revenue Service v South African Custodial Services (Pty) Ltd* 2012 (1) SA 522 (SCA) the taxpayer entered into various loan agreements in respect of which it was required to pay several fees incurred in connection with these agreements, including –

- guarantee fees;
- introduction fees;
- financial advisory and margin fees; and
- commitment, administration and legal fees.

In this regard, Plasket AJA concluded that ‘the various fees are deductible in terms of s 11(bA) because of their close connection to the obtaining of the loans and the furtherance of SACS’s project, they qualify as “related finance charg-

es” for purposes of the section.’ Section 11(bA) of the Act has since been repealed, however, the court’s findings provide an indication of how front-end fees would be treated.

While South African courts have yet to consider the issue in full, the findings of foreign tax authorities may serve as a point of reference. In the Singaporean case of *GBG v The Comptroller of Income Tax* [2016] SGITBR 2 the taxpayer entered into three facility agreements, all of which were conditional on the payment of front-end or facility fees. The taxpayer then claimed deductions for these fees against their income in terms of s 14(1) of the Singaporean Income Tax Act 1967, which is comparable to s 11(a) of the Act. The relevant section reads as follows:

‘Deductions allowed

14(1) For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as the income), there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of the income, including –

(a) except as provided in this section –

(i) any sum payable by way of interest; and

(ii) any sum payable in *lieu* of interest or for the reduction thereof ..., upon any money borrowed by that person where the Comptroller is satisfied that such sum is payable on capital employed in acquiring the income’.

As the taxpayer in this case did not draw down from the facilities, either for capital or revenue purposes, the Income Tax Board of Review (the Board) concluded that as borrowing did not occur the front-end fees payable on the facility were not a substitute for interest expenditure and were thus not deductible. The Board, however, also came to the following conclusion regarding instances in which such fees will be deductible:

“Any amount payable to the lender ... at the beginning ... of the term of borrowing, which is equivalent to the interest which the borrower would otherwise be required to pay to the lender under the loan agreement”, so if the loan is sub-

sequently drawn down within the same year (thereby meeting the requirement under section 14(1)(a) that the expense is payable “upon any money borrowed”), a deduction should be allowed.’

On the other hand, the Australian tax authorities, under Interpretative Decision ATO [Australian Tax Office] ID 2010/133, have held that upfront commitment fees, or front-end fees, are not interest nor of a similar nature as interest, as these are ‘not payable for the actual use of any sum of money or conversely for keeping another person out of the use of any sum of money’ and could, therefore, not be deducted in terms of their income tax legislation.

It remains to be seen whether, in light of the above decisions, the South African Revenue Service, or a court, would permit the deduction of front-end fees under s 11(a) of the Act. A further consideration to be taken into account is that of s 8FA of the Act, which provides that any amount incurred by a company in respect of ‘hybrid interest’ will be deemed to be a dividend *in specie* and not deductible. The definition of ‘hybrid interest’ includes any amount of interest that is not determined with reference to a specified rate of interest or with reference to the time value of money. It stands to reason that, if front-end fees are structured specifically as being related to interest as contemplated in s 24J of the Act and the front-end fee is not determined with reference to either a specified rate of interest or to the time value of money, then those fees may be taxable as dividends and will in any event not be deductible in terms of s 8FA(2)(a) of the Act.

It is, therefore, imperative that these considerations are taken into account when advising a client on structuring a loan or financing arrangement that includes a front-end fee.

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By
Francois
Terblanche

Five basic universal principles applicable in the conduct of a candidate attorney

There are many different cultures in South Africa (SA) and one cannot simply choose one culture as being the appropriate ‘one-size-necessarily-fits-all’ culture for the attorneys’ profession.

This article attempts to distil universally applicable conduct principles, regardless of culture. These principles apply regardless of whether one is practising in (or articulated to) a Rivonia sole practitioner, a Sandton ‘mega’ firm, the London office of an international law firm or a niche South African firm.

The list is not perfect, and I would welcome colleagues’ comments on these principles.

Principle 1: Treat all of your colleagues with respect, courtesy and consideration

Starting articles of clerkship (or Practical Vocational Training (PVT) under the Legal Practice Act 28 of 2014 (LPA)) is a daunting prospect. That is normal, as you are entering the world of real legal practice. Some CAs deal with this by trying to befriend each and every colleague. That approach is not recommended. You are now working in a legal firm, which is a professional business.

Other CAs deal with this by acting superior to their colleagues with lesser education levels. That approach is counter-

productive. It will probably result in that CA being summoned to the Human Resources (HR) department.

The correct approach is to treat all colleagues (the senior partner, the tea lady, the Chief Executive Officer, the security guard, the head of HR and the receptionist) with respect, courtesy and consideration. ‘Thank you’ and ‘please’ are not difficult words to say. Nor are they time consuming.

The late senior partner of a Sandton firm was well liked by the firm’s support staff, for the simple reason that he took the time to greet each and every employee by name whenever he passed them, regardless of their position in the firm.

The current senior partner of a Sandton firm has set the bar even higher, he will keep the lift doors (and any other doors for that matter) open for everyone else, again regardless of their position in the firm. If those senior partners can do it, there is no reason why the rest of us cannot.

Principle 2: Be honest (which does not simply mean ‘do not lie’)

Trust is a critical element of a successful employment relationship. If an employee discovers that their employer has lied to them, they will inevitably lose trust in the employer and probably look for employment elsewhere. Equally, if an employer discovers that a CA has not been honest in their dealings with them, the same loss of trust will occur. With prejudicial career consequences. The reality is that if an employee cannot be trusted in all respects, they cannot be trusted in any respect.

Honesty means, firstly, ‘do not lie’. Do not lie to a colleague, but also, do not lie about a colleague. Here is an example of the latter: Jenny and Jane are CAs, at different firms. They are also friends. One day over lunch, Jane tells Jenny that she heard through the grapevine that Mike (the partner to whom Jenny reports) said that Jenny is about to lose her job and will become unemployed. Jenny is understandably concerned. She approaches Angela, another partner at her firm, and tells her that ‘Mike said I am about to lose my job’. That is, of course, a lie. At most, what Jenny could have said is ‘I heard from Jane that she heard that Mike said I am about to lose my job’. Stating a rumour as a fact is lying. Actually, Jenny should have gone to Mike first, not to Angela (more about that later). Ask yourself the following questions before you say anything about someone who is not present:

- Do I know as a fact that what I am about to say is true?
- Is it really necessary and appropriate for me to say what I am about to say?
- Am I prepared to say this to the face of the person concerned?

If the answer to any of those three questions is no, you should not say anything at all.

Secondly, honesty also means ‘tell the whole truth’. Making perfectly true statements but withholding critical information, and thus intentionally creating a misleading impression, is still being dishonest. Hence the expression ‘the truth, the whole truth and nothing but the truth.’

Principle 3: Give credit where credit is due

An example will illustrate this principle: You have worked long hours to compile an important discovery bundle. The bundle runs into more than 20 lever arch files. You have ensured that the bundle is correct, complete and neatly organised.



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You, and the associate who you report to, meet with the client. The client is very impressed with the bundle and says to the associate: 'Well done, this is excellent work. I will let the partner that you report to know how pleased I am with your work'. The associate responds: 'Thank you. It was hard work and I spent many a late night on it'.

You are understandably furious. You have worked hard to prepare a good bundle, and the associate has just claimed the credit for your work.

For exactly the same reason you should never claim credit for someone else's work or ideas. Give credit where credit is due. For example, if you have to draft a particular type of agreement and a colleague gives you a very good precedent to use, acknowledge your colleague's contribution if the partner that you report to praises you for producing a good agreement.

Principle 4: Do not go behind someone's back

There is (hopefully) not a CA who is not familiar with the *audi alterem partem* rule. This rule basically says that an employer cannot impose a sanction against an employee without first giving the employee an opportunity to tell their side of the story.

The same is true the other way around: You should never go behind the back of a colleague to someone more senior than that colleague without taking up the matter properly with that colleague first (except in truly exceptional, objectively justifiable circumstances, such as an instance of sexual harassment).

Here is an example: Jenny (a CA) asks her firm to fund her attendance of a maritime law course. Mike (the director who she reports to) advises Jenny that her application was rejected since the firm does not practise maritime law and the requested funding would not be in the firm's interest. Jenny simply says to Mike that she is 'very surprised' by that decision, but she does not say anything further and seems to accept the decision. Two days later Jenny approaches Lebo, the firm's senior partner, ostensibly for advice on another matter of hers. At the end of their meeting Jenny asks Lebo: 'As a matter of interest, did the partners decide not to approve my application for funding of the maritime course?'

If Jenny was unhappy with the decision, she should have first raised it with Mike. She should not have gone behind Mike's back to someone else. If she had raised it properly with Mike and was still aggrieved by the decision, then she was of course fully within her rights to then follow the applicable grievance procedures.

Acting like this is normally career limiting. It leads to a breakdown in the trust component that is so vital to any healthy employment relationship.

Principle 5: Do not use colleagues for your own personal gain

No employee wants to feel exploited by their employer or colleagues.

The converse is also true: No employer, or colleague, wants to feel that an employee has taken unfair advantage of them.

Here is an example: Nigel, a director at a law firm, is a leading finance lawyer. He has unique expertise in very complex finance transactions. Joan, a CA in that firm's corporate department, formally applies to rotate to Nigel's team (CA rotations at that firm are uncommon). Joan tells Nigel that she has a passion for finance, wants to learn as much as possible from him and sees herself as being a member of his team for a long time. Nigel responds that he will only agree to the rotation if Joan assures him that she will not use the rotation as a stepping stone to move to a better position elsewhere once he has taught her everything that he had to learn himself. Joan assures him that she will not do that. Based on that undertaking Nigel agrees to the rotation. Over the next year he spends a lot of time and energy to train and develop Joan into a competent finance lawyer.

When Joan's articles end, Nigel offers her a position in his team. She readily accepts. He continues to train and develop her. During her first post-article performance appraisal Joan tells Nigel that she is very happy in the firm and definitely wants to continue as a finance lawyer in his team.

Six months later, without any warning, Joan resigns in order to take up a more lucrative finance law position elsewhere.

Ultimately, everyone lost in some way:

- Joan secured a more lucrative position, but she lost the respect of Nigel and his colleagues.
- Nigel wasted his time and energy (and inadvertently benefited a competitor).
- Vicariously, Nigel's firm's time and energy have been wasted.
- The most unfortunate consequence is that Nigel, and his firm, may not be quite so prepared to train and develop junior attorneys in the future. Innocent future junior attorneys may find themselves excluded from that skills transfer through no fault of their own.

Act with integrity. Do not take unfair advantage of your employer or a colleague. Let your word be your bond. If your circumstances change so that your undertakings no longer stand, summon up all your courage and be honest and transparent with your employer.

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By
Thomas
Harban

Ethics: Time to reassess legal ethics in the changing environment

The sad truth is becoming more and more apparent; our profession has seen a steady decline by casting aside established traditions and canons of professional ethics that evolved over centuries ... When we speak of the decline in "ethical" standards, we should not use the term "ethics" to mean only compliance with the Ten Commandments or other standards of common, basic morality ... A lawyer can

[adhere to all these requirements] and still fail to meet the standards of a true profession, standards calling for fearless advocacy within established canons of service' (Peter MacFarlane 'The importance of ethics and the application of ethical principles to the legal profession' (2002) 6 *Journal of South Pacific Law* (www.paclii.org, accessed 4-10-2018).

Introduction

Legal practitioners often refer to their

profession as 'honourable' and 'noble'. In order to maintain or retain, the profession as honourable and noble it is necessary to revert to the high ethical standards that underpin, and are at the cornerstones of the practice of law. Kirk-Cohen J in *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 395 stated:

'The attorney is a person from whom the highest standards are expected by the profession and [the] Court. ... The profession itself is not a mere calling

or occupation by which a person earns his living. An attorney is a member of a learned, respected and honourable profession and, by entering it, he pledges himself with total and unquestionable integrity to society at large, to the courts and to the profession ... only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can indeed only function effectively if it inspires the unconditional confidence and trust of the public. The image and standing of the profession are judged by the conduct and reputation of all its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities set out above at all times.'

The ethical rules applied in the legal profession have developed and been upheld by practitioners for a number of years and, in some instances, even centuries. There are wide-ranging similarities with respect to the core substance of ethical standards applied by various regulators in the legal profession across the world, and many of the ethical rules (for example, confidentiality, acting in the best interests of clients and the avoidance of conflicts of interests) have broad universal application across jurisdictions. The principles of legal ethics are part of the lore and the law to which legal practitioners must adhere.

The landscape in which legal practice is conducted has changed considerably – since some of the ethical rules were initially developed – but this has not diminished the core principles. Legal practices, individual practitioners, the form and manner in which legal services are provided and the nature of the environment they operate in, have also undergone certain changes in this time. Allegations of unprofessional conduct on the part of certain legal practitioners negatively affect the public's perception of the profession. There is a perception that there has been a watering down of compliance or a derogation from adherence to the high standards of ethical conduct. While it is dangerous to accept untested allegations as fact or to take conceptions (or even misconceptions) as fact, the image in which the profession is held by the general public and the consumers of legal services, is a matter of importance for all stakeholders in the profession. The legal profession is not the only profession that is under attack. Allegations of unprofessional conduct are also being made against other professions, such as the auditing/accounting and medical professions. It is important to note that the allegations have been levelled against a small proportion of the large pool of practitioners.

It is against this background that I argue that it is time for the legal profes-

sion in South Africa (SA) to reassess the effectiveness of the current ethical rules and to develop measures to increase the awareness of and adherence to the professional ethical rules by practitioners. The suggested reassessment will, by its nature, include an introspection by the individual members of the profession, as well as by the regulators on the effectiveness of the current ethical and professional rules. I submit that the reassessment of the current ethical rules should include an examination of whether or not they are sufficient to meet the current environment, the adherence by individual practitioners to these rules and the effectiveness of the enforcement thereof. The implementation of the new regulatory dispensation under the Legal Practice Act 28 of 2014 (LPA) provides an opportune moment for this reassessment and introspection.

Ethics, morals and the professional duties of practitioners

Ethics form part of the professional duties of practitioners whether or not they are codified and listed in codes of conduct and legislation. Ethics are recognised by the legal profession as part of a 'social system' in which legal practice is carried out and the rules to which members of the profession must adhere. Morals, on the other hand, are a personal standard to which individuals choose to apply in their own individual decisions (see 'Ethics vs. Morals' (www.diffen.com, accessed 4-10-2018); CH van Zyl IV and J Visser, 'Legal Ethics, Rules of Conduct and the Moral Compass-Considerations from a Law Student's perspective' 2016 (19) *PER* (http://dspace.nwu.ac.za, accessed 9-10-2018); and K Gibson 'Ethics in action in the Legal Profession' (www.strausdaly.co.za, accessed 4-10-2018)). (This article does not focus on morals.)

Ethics and professional standards – in order to remain relevant to the practitioners, which they are aimed at regulating – must evolve and with the development of the environment in which they are applied.

The changing regulatory environment

With the full implementation of the LPA imminent, the regulatory environment for the South African legal profession will undergo substantial changes. The changes include the introduction of a code for professional conduct by legal practitioners and candidate legal practitioners (the code). The ethical rules applied in SA were developed before the constitutional dispensation in SA (brought about by the enactment of the Constitution). The Constitution provided for a new legal and administrative envi-

ronment in the country. The Constitution ushered in a new approach to the administration of justice. Members of the legal profession form an integral part of the administration of justice in SA (see the *Matthews* case at p 395).

The purpose of the LPA includes –

- providing for the establishment, powers and functions of a single South African Legal Practice Council (LPC) and Provincial Councils in order to regulate the affairs of legal practitioners and to set *norms and standards* (in the long title);
- to regulate *the professional conduct* of legal practitioners so as to ensure *accountable conduct* (also in the long title);
- to ensure that *the values underpinning the Constitution* are embraced and that *the rule of law is upheld* (in the preamble and s 3(a));
- to ensure the *accountability of the legal profession to the public* (also in the preamble); and
- creating a framework for the development and maintenance of *appropriate professional and ethical norms and standards* for the rendering of legal services by legal practitioners and candidate legal practitioners (s 3(g)) (my italics).

The provisions dealing with the LPC are set out in ch 2 of the LPA and its objects, include –

- facilitating the realisation of the goal of a transformed and restructured profession that is *accountable, efficient and independent* (s 5(a));
- enhancing and maintaining *the status of the legal profession* (s 5(f));
- determining, enhancing and maintaining *appropriate standards of professional practice and ethical conduct* of all legal practitioners and candidate legal practitioners (s 5(g)); and
- *upholding and advancing the rule of law, the administration of justice and the Constitution* (s 5(k)) (my italics).

In order to achieve its objects as set out in s 5 of the LPA, the LPC must 'develop *norms and standards* to guide the conduct of legal practitioners, candidate legal practitioners and the legal profession' (s 6(1)(b)(i), (my italics)). The maintenance of professional standards of persons who provide legal services is one of the factors to be taken into account when constituting the LPC (s 7(2)(e)(vi)) and a member of the LPC must, *inter alia*, be a 'fit and proper person' (s 8(1)(b)). Persons convicted (whether in SA or elsewhere) of an offence involving an element of dishonesty are disqualified from becoming or remaining members of the LPC (s 8(2)(c)(ii)). An LPC member may be removed, *inter alia*, on account of –

- a disciplinary inquiry making a finding of any *serious misconduct*, as set out in the code of conduct for legal practitioners (s 12(1)(a));
- *incapacity or incompetence* (s 12(1)(b); and

- the member becoming *disqualified to remain* as a member of the LPC as contemplated by s 8(2) (s 12 (1)(e)) (my italics).

The requirements for the admission to practice and to be authorised to be enrolled as a legal practitioner, conveyancer or notary includes the requirement that the applicant satisfies the court that they are 'a fit and proper person to be so admitted' (s 24(2)(c)). The purpose of the assessment of a person who has undergone practical vocational training is for the LPC to assess whether the person has attained an adequate level of competence (nothing is said about a test for integrity) for admission and enrolment as a legal practitioner (s 28(1) and (2)). Neither the LPA nor the code defines what 'fit and proper' means or entails. However, I submit that the competence and integrity of the individual concerned should form part of the 'fit and proper' assessment. Over the years the courts have also developed jurisprudence in respect of a 'fit and proper' test (see M Slabbert, 'The requirement of being a "fit and proper" person for the legal profession' 2011 (14) 4 *PER* 209).

The provisions of the LPA applicable to the development of the code are set out in ch 4 of the Act. On 10 February 2018, the National Forum on the Legal Profession published the proposed code 'Code of conduct for legal practitioners candidate legal practitioners and juristic entities' GN81 GG40610/10-2-2017 (the code can be accessed at www.lssa.org.za).

The provisions of the code apply to all legal practitioners, candidate legal practitioners and, where applicable, legal practitioners who are not in private practice (s 2). The provisions of the code include the following –

- the maintenance of the highest standards of *honesty and integrity* (para 3.1);
- *upholding the values of the Constitution* and the principles and values enshrined therein, including the principle and value that the regulated persons and entities shall not, in the course of practice or business activities, discriminate against any person on one of the grounds prohibited in the Constitution;
- the treatment of *the interest of clients as paramount*, subject to *their duty to the court, the interests of justice, the ob-*

servation of law and the maintenance of prescribed ethical standards (para 3.3);

- *honour any lawful undertaking* given in the course of their business or practice (para 3.4);
- *refrain from doing anything prohibited by law or the code of the profession, which could place them in a conflict of interest with their clients* (para 3.5);
- the maintenance, according to law, of *legal professional privilege and confidentiality* regarding the affairs of current and former clients (para 3.6);
- *respecting the freedom of clients to choose* to be represented by a legal practitioner of their choice (para 3.7); and
- *refraining from doing anything that could potentially bring the legal profession into disrepute* (para 3.15) (my italics).

Non-practising attorneys will thus also have to comply with provisions of the code, where applicable. Practitioners will thus have to bring the applicable provisions of the code to certain clients, especially where receiving instructions from a non-practising attorney acting as a General Legal Counsel, legal adviser or in some similar capacity.

Conflicts of interest have long been a concern for the profession. As put by Mjali AJ in *Jordan and Another v Farber* (NCK) (unreported case no 1352/09, 15-12-2009): 'Loyalty is an essential element of the attorney and client relationship' (at para 18) and '[a]n ethical attorney is expected to maintain a measure of detachment from clients' (at para 19). The court also referred to the following passage:

'An attorney should not act for a client whose interests conflict with his or her (the attorney's) interests or those of another client. The attorney must, while holding his position of trust and confidence, prefer the interest of the principal even to his or her own in case of conflict, and to his skill, diligence and zeal must be added good faith' (see 'Conflict of interests' 14(2) *LAWSA*).

Ethics and risk

Slabbert quotes the following: 'Ethics does not in this age, form an essential part of the sword or shield of the majority of legal practices. Ethics is more likely to be slashed by the slick lawyer and trodden upon to get to the loot'.

Compliance to the applicable ethical and professional standards will avoid and/or mitigate the risks of disciplinary action by the LPC, as well that of professional indemnity (PI) claims by clients and other third parties (see Van Zyl and Visser (*op cit*) at p 1 and MacFarlane (*op cit*)). By acting ethically at all times, practitioners can meet the standard of conduct expected of them. Practitioners must also take note of clauses 18 to 21 of the Attorneys Insurance Indemnity Fund NPC PI policy, which deals specifically with claims involving dishonesty and the higher deductible applied for certain types of dishonest conduct (clause 20 read with sch B).

Ethics must form part of the training program in every legal practice and every member of staff in the firm (including, third parties/contractors, where necessary) must be included in such a training program. Compliance to the applicable ethical and professional standards cannot be a 'tick-box' exercise and needs to be internalised by all in the legal profession. It remains to be seen how, if at all, the 'fit and proper' test, which candidate legal practitioners must complete at the beginning of their training will be extended and made more substantial. I submit that I align myself with those who hold the view that ethics should be one of the compulsory courses included in the academic programme for law students in SA.

The relationship between a legal practitioner and a client (and between one legal practitioner and another) is based on trust. It is thus important that all parties are assured that they are dealing with ethical counterparties rather than with unethical ones.

Unless the ethical issues are seriously addressed, some may find the reference by legal practitioners to their colleagues as 'my learned friend' or to the profession as 'noble', 'honourable' or 'respectful' as hollow legal jargon.

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People Upliftment Programme providing skills development for the disadvantaged

By
Stephen
Leinberger

Social and economic disparity in South Africa (SA) is a pervasive crisis that will take generations to correct. It is not only a matter of public policy, or government action, that will close the gaps or uplift the disadvantaged, but also a matter of private contribution to the cause for social justice.

Hence, a sincere commitment by individuals and corporate entities to economic transformation should be envisaged by legislative measures created to implement it, rather than the other way around. It ought not to be viewed as a grudge purchase but may be seen as a meaningful challenge and a concomitant social responsibility. It can also be viewed as an opportunity to engage with civil society to extract true potential and fulfil policy considerations, such as Broad-Based Black Economic Empowerment (B-BBEE) imperatives.

As members of the legal profession, we may at times find ourselves forgetting that we are privileged to have had the resources to generate a career. It is an easy fact to forget, in the hustle and stress of our daily driven lives, owing in part to the fact that on a basal, semi-conscious level we consider ourselves to be earning our keep, because our work is difficult, stressful, and time-consuming, and it often usurps on our valuable personal time.

For the underprivileged, however, a profession is out of the question, and for many members of society a profession is something that has been taken for granted by economically active people as employment itself is simply not possible.

In fact, it cannot readily be gainsaid that as professionals in the upper earning tier of the population, we have a responsibility to promote the upliftment and empowerment of the previously, and currently, disadvantaged members of the population.

An easy solution is to throw money at a problem or hire graduates who fall into a previously disadvantaged demographic, but direct, hands-on contribution is no easy task, at least on the face of it. It is also perceived as expensive and time consuming, garnering little benefit to a company in a highly competitive industry, but this could not be further from the truth.

Consider for a moment, that taking steps to empower the disadvantaged could in certain circumstances be to the advantage of corporate entities in circumstances where the genuine potential of individuals could be extracted to the benefit of all involved. Some organisations exist, whose very *raison d'être* is to tap the potential of previously disadvantaged individuals, for the profit and gain not only of the individuals themselves, but for the companies engaging with them.

Picture source: Gallo Images/Getty

People Upliftment Programme (POPUP) is an organisation that has created a platform for direct empowerment by the public. POPUP seeks to empower people who have given up on life, let alone the prospects of a career, *inter alia*, by partnering with corporate organisations that take in learners on a short-term employment basis with a view to develop skills and, in some exceptional cases, retain learners in full time employment. In some ways, POPUP is a mining platform for the extraction of genuine potential, as a partnership programme in the corporate commercial space, and in line with B-BBEE advantage.

POPUP's motto is 'empowering the disempowered'. This expression of intent goes fundamentally to POPUP's approach to their work and is indicative thereof that the organisation recognises the inherent potential in all human beings, notwithstanding their backgrounds or social status. The organisation's approach is to realise the inherent potential in all human beings.

Originally a shelter for homeless people, POPUP still provides indigent members of the public with certain basic needs, including a meal to those who need one, as well as counselling services. POPUP has, furthermore, partnered with a medical service provider to provide primary health care.

At the turn of the century, POPUP shifted its focus towards empowerment and is now in its 18th year of changing Pretoria one person at a time. The effect of these changes is exponential, because changing the life of one person often results in that person inspiring a multitude of people around them to take a similar positive step.

When people enter the programme, they have more often than not given up hope. Typically, the intake ranges in demographics, and comprises of underprivileged people between the ages of 18 and 45 with no tertiary education and displaying an alarmingly low literacy rate.

Individuals are nurtured in a tough, but compassionate manner through a life skills programme, which forms the basis of a foundation for life and crafting a future. It is by means of addressing this personal crisis and informing values and principles that disempowered people are given the tools to generate a brighter future.

After having completed the foundation for the life skills programme, POPUP advances learners to an Adult Education Training (AET) skills programme, which teaches learners numeracy and English literacy. In order to advance to accredited programmes, learners are expected to reach an AET level four. Skills training follows, with accredited and non-accredited training options being offered, and the learners are registered with the

Department of Higher Education, and various training authorities. At the Salvokop branch, POPUP offers 'soft skills' training, including computer literacy, financial planning and training in administration and marketing. A year-long entrepreneurship course is also offered. At the Soshanguve branch, POPUP offers training in the artisanal arts, such as plumbing and welding.

As such, many people with little to no formal education are given a platform to improve themselves to such a point where they carry a tertiary qualification, can enter the work force in a meaningful way, and become productive members of society, removed from their previous station. Owing in part to the partnerships that have so far been created, the entire process outlined above, from intake to qualification, costs as little as R 450.

In the result, individuals are empowered with workplace readiness. The aim is accordingly to up-skill individuals so that they can enter the workforce and become productive members of society, and not perpetuate patterns of personal disempowerment. The ancillary benefit is that these individuals influence society at large by being an example to people that change can happen. The transformation process thus has a domino effect on society. POPUP calls this the 'X factor'.

Corporate entities are given the opportunity of contributing to the work of POPUP by accepting individuals on a learnership programme. This is an integrated skills development programme, which seeks to give practical effect to the training given to the learners by the organisation. Essentially, what this entails is that learners are accepted as employees into the company on a short-term basis so as to equip them with skills in an office environment, and also to contribute to the company by providing cost effective solutions in areas where the company might be wanting. This includes (in a firm of attorneys in any event) teaching learners skills such as office filing, serving and filing documents at court and other administrative skills. The corporate entities are then given the opportunity to retain the learners after the currency of the programme has expired as full-time employees, the learners often having become members of the corporate family, end up being valuable staff members.

The other practical effect of the learnership programme is that it funds the other development projects provided by POPUP and contributes to the social responsibility imperatives of corporate society.

This initiative is also perfectly aligned to the Youth Employment Service initiative that was published in GN402 GG41546/29-3-2018 and announced by President Cyril Ramaphosa.

From the perspective of the company, the partnership is a cost effective and convenient method by which the company can improve its B-BBEE status, receive tax benefits and attract untapped potential.

After a highly successful first intake it was clear that, not only have the learners benefited from the programme, but an attorney firm's contribution to the programme has generated radical insight into the inherent potential of all individuals, not restricted to the (for the most part) empowered people that we encounter on a day-to-day basis in the context of the legal profession.

Three learners were employed by an attorney firm and considering that these three individuals were people that had previously given up hope for fostering a better future, and in light of the influence that they will have on the people surrounding them, as well as within the corporate environment itself, the impact of this development on their lives is extraordinary.

It is, furthermore, with confidence that we can assert that the learners who were not retained nonetheless left the programme with additional skills to carry them to a productive future.

One step at a time, the learners are positively changing their personal circumstances, and the circumstances of the people surrounding them, with the assistance of POPUP and corporate society. Perhaps in the future these learners could also find themselves contributing to society in the same way that we do, not only in the context of people upliftment, but also, notionally, as legal professionals.


All of the foregoing goes to show that through compassion and acceptance, and by forming strategic alliances with organisations such as POPUP, we can all use our skills and resources as attorneys to contribute to the empowerment of the disempowered in a healing way. In doing so, the profession at large can play a meaningful role in the development of a more productive society in the context of the legal profession, by advocating positive change, while at the same time exposing ourselves to the benefit of the inherent potential of oft-overlooked people.

It is indeed possible to make a difference, one person at a time.

• Legal practitioners who want to be a part of POPUP should visit www.popup.co.za

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Will you
Divorce me?

Picture source: Gallo Images/Getty

By
James D
Lekhuleni

Variation of consent papers in divorce orders – *is this permissible in law?*

Section 7(1) of the Divorce Act 70 of 1979 (the Act), provides that a court may incorporate the spouse's settlement agreement into the divorce order if it is in writing. The court has a discretion to incorporate the terms of a consent paper. It is not compelled to do so. It is trite law that once the terms of an agreement between the parties are incorporated into a divorce order, it acquires the status of a judgment. In *PL v YL* 2013 (6) SA 28 (ECG) the court, per Van Zyl ADJP, held that when a consent paper is incorporated in an order of court by agreement between the parties in a matrimonial suit, it becomes part of that order and its relevant contents then forms part of the decision of the court.

Can a court vary proprietary rights in a consent paper incorporated into a final order of divorce?

The application for variation of divorce orders incorporating consent papers has

been the subject of debate from time immemorial. Our courts have battled with the question whether the terms of a consent paper can be varied on application by an aggrieved party. Section 8(1) of the Act provides that: 'A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of [the] Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor'. It is interesting to note that s 8(1) does not make provision for the variation of patrimonial consequences in a divorce order.

In *Georghiadēs v Janse van Rensburg* 2007 (3) SA 18 (C), per Griesel J, the parties were divorced in terms of an order, which incorporated the terms of a consent paper. In terms of the consent paper, the husband was ordered to pay his wife spousal maintenance of € 200 per week for a period of three years or until her remarriage, whichever event occurred first. Three years after they were

divorced, the wife applied to the court in terms of s 8(1) of the Act for variation of the maintenance clause in the consent paper for the extension of the period for which maintenance was payable by the husband from the period of three years to an indefinite period until her death or remarriage, whichever occurs first. After reviewing a number of cases, the court found that s 8(1) of the Act creates an exception to the general rule that an order of court, once pronounced, is final and immutable. The court noted that it permits the court when there are sufficient reasons to rescind, vary or suspend maintenance orders granted earlier.

Summary of finding

The court eventually found that the applicant had waived her right to claim maintenance from the respondent beyond the period of three years as agreed and dismissed the application. From the above discussion, a court is empowered to rescind an order in terms of limited grounds listed in s 8(1) of the Act. Similarly, patrimonial consequences of a

marriage cannot be varied or rescinded in terms of s 8(1) as no provision is made for it unless it is by consent between the parties.

In *Bond v Bond* [2009] JOL 23915 (C) the applicant applied for the variation of a consent paper, which was entered and incorporated into the final order of divorce. The applicant applied to have the quantum of maintenance in the consent paper increased. In this case, the respondent undertook to maintain the applicant until her death, remarriage or cohabitation in a relationship akin to a marriage. The court focused on the interpretation of one of the clauses dealing with maintenance in the consent paper. The respondent counsel argued that by virtue of the wording of the consent paper, the applicant was contractually precluded from applying for variation of the maintenance order in terms of s 8(1) of the Act. The court held that the basic principles of interpretation is that a court will always first look at the wording of the terms of the agreement that had been agreed on by the parties and, will as far as possible, give the language used by the parties its ordinary grammatical meaning unless it leads to inconsistency, repugnancy or to an outcome contrary to public policy. The court referred to s 8(1) of the Act and found that the only limitation on the court's power to rescind or vary a maintenance order is that sufficient reasons must be shown. The court eventually found that the applicant succeeded in showing sufficient reasons and that she was entitled to apply for the increase.

In *PL v YL*, the two appellants were husband and wife. They were married in community of property. The first appellant (the husband) issued divorce summons against the second appellant (the wife). In his summons, he prayed for an order declaring the parties to be co-holders of parental rights and responsibilities in respect of their minor children and also for forfeiture of benefits against the second appellant arising from their marriage in community of property. On divorce, the two appellants entered into a settlement agreement. The parties agreed that the divorce would proceed on an unopposed basis and that the court would incorporate the settlement agreement of the two appellants.

The agreement dealt with the care and contact, as well as the division of assets of the parties. When the divorce was heard on the unopposed roll, the court refused to incorporate the deed of settlement signed by the parties and granted the orders in terms of the first appellant's particulars of claims. On appeal to the Full Bench of that court, the court among others, investigated the notion of settling disputes by agreement as opposed to litigation and also considered circumstances under which

settlement agreements may be varied. The court stated that s 8(1) of the Act provides for the variation of a maintenance order, but not of an order dealing with a division of assets of the parties. The court went on to say that this means that the court is excluded from ordering a variation of any settlement relating to the assets of the parties and in the absence of an agreement to the contrary to seek such an order. The court found that the court *a quo* was wrong in refusing to incorporate the settlement agreement. The court eventually set aside the decision of the court *a quo* and incorporated the consent paper into the final divorce order. From the above discussion, I submit that the court's power to vary a consent paper incorporated into the final divorce order is limited. A court cannot vary the division of assets in a consent paper through an application for variation by one of the parties. A consent paper is a contract between the parties and it is binding and can only be set aside or rectified to reflect the intention of the parties in terms of the common law principles. As explained above, a consent paper constitutes a final agreement between the parties and for a court to interfere with it would fly in the face of the hallowed principle that the court cannot make contracts for parties. By mutual agreement the parties may apply to vary a consent paper, which was incorporated into the final order of divorce in circumstances where the order through error or oversight does not correctly reflect their agreement. A court may also vary a consent paper in cases of maintenance, care and contact of minor children in terms of s 8(1) of the Act if there are sufficient reasons shown. If the variation involves the care and contact of the minor children, the Family Advocate would have to be involved and their recommendations will be considered by the court.

Variation of divorce order to reflect the correct names of the pension fund

The variation of divorce orders to reflect the correct names of a pension fund of the member spouse are prevalent in our courts. In *GN v JN* 2017 (1) SA 342 (SCA) the Supreme Court of Appeal (SCA) found that the pension interest of a member spouse as at date of divorce is by operation of law part of the joint estate for the purpose of the division of the assets between the parties. In other words, where the court directs that the joint estate is to be equally divided, this automatically includes pension interest of the parties. This suggests that even if there is no pronouncement on pension interest on divorce, the order for the equal division of the assets will automatically include pension interest. However, in terms of s 37D(4)(a)(i)(aa) and (bb) of

the Pension Funds Act 24 of 1956, the pension fund must be named or identifiable on the decree of divorce before a deduction is made in favour of the non-member spouse. The pension fund will not be bound to deduct payment if the final order of divorce does not identify it in terms of s 37D. Unfortunately, the SCA did not consider the provisions of s 37D(4)(a)(i) in the *GN v JN* case.

I, therefore, submit that in those circumstances, a non-member spouse is allowed in law to bring an application for the variation of the order to reflect the correct name of the pension fund. Even in cases where a consent paper was signed, the non-member spouse can have the consent paper corrected or rectified to reflect the correct names of the pension fund as a result of a common mistake between the parties. However, where the parties have agreed on the percentage payable to the non-member spouse, the latter is precluded to approach a court for variation for a higher percentage than the one agreed on unless they were coerced, or the agreement was entered into by fraudulent means.

Conclusion

From the above discussion, it is abundantly clear that our courts have limited power to revisit and vary orders, which they pronounced. Where a consent paper disposes the issues between the parties they raised in the action, it would in most cases constitute a compromise (*transactio*) - see *PL v YL* at para 9. In summary, s 8(1) of the Act sets out the limited grounds under which a court may be approached to vary its order. A consent paper that was signed by the parties when the divorce was granted is binding between the parties and can only be varied in terms of the limited grounds listed in s 8(1) of the Act. Furthermore, a consent paper can also be varied under common law grounds, namely, fraud etcetera. A litigant cannot approach a court to vary the patrimonial consequences incorporated in a consent paper, which was made an order of court at divorce unless it is by mutual consent. However, if the consent paper does not reflect the true intention of the parties, the court may order rectification of the agreement. Where the matter was finalised without a consent paper filed, a party who is not satisfied with the decision of the court can appeal against the decision of the court *a quo* and not apply for variation of the order.

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Surrogate motherhood and scaremongering: *Is South Africa entering an age of post-truth jurisprudence?*



Picture source: Gallo Images/Getty

By
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In world history, 2016 was the year of the Brexit referendum in the United Kingdom and the election of President Donald Trump in the United States. In South African legal history, 2016 was the year of the Constitutional Court's (CC) judgment in *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC). Aptly, the Oxford Dictionary's word of the year for 2016 is 'post-truth' defined as 'relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief' (<https://en.oxforddictionaries.com>, accessed 20-10-2017). This is just as applicable to the political debates around Brexit and the American election, as it is to the *AB* judgment. I explain this observation below.

AB was a constitutional challenge to s 294 of the Children's Act 38 of 2005. This section requires that – in the context of surrogate motherhood – the gametes of the commissioning parents must be used for the conception of a child. If that is impossible for biological, medical or other valid reasons, the gamete of at least one of the commissioning parents, or, where the commissioning parent is a single person, the gamete of that person, must be used. The consequence is that commissioning parents cannot use donor gametes. Moreover, where both commissioning parents cannot contribute their own gametes for the conception of a child, or where the commissioning parent is a single person who cannot contribute their own gametes for the conception of a child – the commissioning parent(s) cannot use surrogacy.

AB, the first applicant, had a compelling personal story. She and her husband wanted to have a child, but were not successful. As such, they tried in vitro fertilisation (IVF). However, after two failed attempts, *AB* was advised that given that she was entering menopause, her eggs were not of sufficient quality. She and her husband then proceeded to make use of donor eggs. Another two IVF cycles later, *AB*'s marriage of 20 years ended in divorce. However, *AB* decided to forge ahead with IVF to have a child now with donor sperm. Her intense longing for a child resulted in 14 more IVF cycles – all ultimately unsuccessful. Eventually, a fertility specialist conducted certain tests that showed that *AB* suffered from a medical condition that would cause her to never be able to carry a pregnancy to term. Still undeterred, *AB* found a woman who was willing to act as *AB*'s surrogate mother. However, given that *AB* could not contribute her own eggs, *AB*'s attorney advised her that s 294 of the Children's Act prohibits her from using surrogacy. According to *AB*'s founding affidavit, she received this advice with a mixture of 'shock, sadness and bafflement'. In 2013, after first obtain-

ing a comprehensive anonymity order – neither the minister, nor the CC justices knew AB's true identity – AB launched a constitutional challenge to s 294 of the Children's Act. She was joined by a non-profit organisation, the Surrogacy Advisory Group.

The applicants argued that s 294 infringes a number of enumerated rights – in particular the right to equality. This was based on the fact that AB, for most of the time that she was still attempting to become pregnant herself, used donor eggs and sperm – not her own eggs. This was completely legal. However, in the context of surrogacy, it was illegal for her to use donor eggs and sperm. If the first situation is legal, why then is the latter situation illegal? Remember that AB did not want to make use of surrogacy as a matter of convenience, but as a last resort – she clearly made a concerted effort to fall pregnant herself, but was eventually diagnosed as infertile. Also keep in mind that the surrogate mother was completely willing to become pregnant with a donor embryo on AB's behalf.

The Minister of Social Development opposed AB's application. The minister's first main argument was that AB should simply adopt a child. There are two weaknesses in this argument that were highlighted by the applicants: First, adoption is not a realistic alternative in SA. AB is a white woman who wants a white child. However, given the scarcity of adoptable white babies, the likelihood of a single woman being selected by an adoption agency to adopt a white baby is close to zero. Second, adoption and surrogacy are two different legal concepts. While the surrogacy process is aimed at creating legal certainty for all parties involved – including the child – even before an attempt is made to implant an embryo in the surrogate mother, the adoption process only commences after the child's birth and does not offer nearly the kind of legal certainty that the surrogacy process does.

However, it was the minister's second main argument that became the focus of the CC hearing, namely that retaining s 294 – and hence ensuring that there is always a parent/child genetic link – is in the best interests of the child. The applicants' position was that the best interests of the child do not require a parent/child genetic link: They pointed out that there are genetic parents who reject and abuse their genetic children, while there are many families without any genetic link, such as foster-care families and adoption families that have exemplary parent/child relationships. One may have one's own private preferences, but should our law be allowed to prefer some kinds of families – families based on genetic links – above others?

Both sides filed expert opinions in

support of their respective positions. The applicants obtained expert opinions from various psychologists, including the world's leading researcher in the field of the psychology of donor-conceived children – who has conducted empirical studies on donor-conceived children. The psychological expert opinions all agreed that a child's psychological wellbeing is not negatively affected by being donor-conceived.

The minister filed an expert opinion by an ethicist, who raised the following concern: If a child does not know their 'genetic origins' – the identity of their egg and sperm donors *qua genetic* parents – the child may experience genetic 'bewilderment'; given that our law currently provides for donor anonymity, a donor-conceived child is destined to never know their genetic origins. This in turn may impact negatively on such a child's self-worth and sense of identity. The problem with this argument, the applicants replied, is that it is pure speculation. Moreover, it is speculation in a specialised field of psychology, which fell beyond the expertise of the minister's ethics expert.

The issue of knowing the identity of one's egg or sperm donor is ethically controversial. In fact, the South African Law Reform Commission has, since the AB judgment, commenced with an investigation into whether a donor-conceived child should be given a 'right' to find out the identity of their donor. This would of course entail the end of the current regime of strict donor anonymity in South Africa. However, would the position of AB's intended child have been any different if AB succeeded to fall pregnant herself, using donor eggs and donor sperm? The answer is clearly no. The intended child would not have had access to the identity of their donors in either of the two scenarios. The issue that was properly before the court was the constitutionality of s 294 – the requirement that a commissioning parent, like AB, must use their own genetic material – and not the issue of donor anonymity.

In their reply, the applicants filed further psychological expert opinions, which focused on the issue of identity and knowing one's genetic origins. These psychological opinions can be summed up as follows: There are many factors in a child's environment that can impact on the process of forming an identity; some factors may complicate this process to a greater or lesser degree, but do not necessarily diminish a child's psychological wellbeing; being a donor-conceived child from anonymous donors can be one such factor. In other words, AB's intended child might have a more complicated identity-forming process, but this will not necessarily cause the child any psychological harm. In fact, there are other factors in a child's environment that can

also complicate the process of forming an identity. What matters most from a child's psychological perspective, is that they have loving and caring parents.

One may agree or disagree with the psychological evidence, but the evidence is the evidence. It is important to note that the minister and the Centre for Child Law (who joined as an *amicus curiae* in support of the minister's position) both failed to place any psychological evidence before the court. Accordingly, the psychological evidence filed by the applicants stood uncontested. While the Gauteng Division of the High Court in Pretoria, which ruled in favour of AB, duly considered the evidence and founded its judgment on the evidence, the same cannot be said of the majority of the CC Bench. The majority of the CC held that it will not rely on any of the evidence properly before it, because in a matter of violation of rights, the CC must do its 'own independent evaluation'. It is an established principle of our law that the court should not just accept experts' conclusions, but rather critically engage with the experts' opinions to evaluate, among others, whether the experts' conclusions flow logically from the reasons provided. In the AB case, these reasons run into hundreds of pages. However, this is not what the majority of the CC did. They simply rejected all of this psychological evidence out of hand, without the slightest critical engagement. Effectively, this means that the CC judges are of opinion that when considering the psychology of donor-conceived children, they, as the judges, cannot possibly be assisted by the opinions of qualified psychologists who have studied the wellbeing of donor-conceived children over many years – both in clinical practice and through numerous empirical, scientifically-designed research studies.

Since Roman times, our system of law is one based on evidence. The rule of law demands that judgments be based on evidence properly before the court. Simply discarding evidence out of hand without even considering it, and then replacing it with the judges' own conceptions, are antithetical to the rule of law – this is the rule of individual judges. Whether or not one agrees with the finding in the AB judgment, the way in which it was reached is deeply disconcerting. The objective facts were placed before the court, but were then unabashedly ignored. This is post-truth jurisprudence.

• See also, DW Thaldar 'Post-truth jurisprudence: The case of AB v Minister of Social Development' (2018) 34 *SAJHR* (www.tandfonline.com).

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Do protection orders for domestic violence and harassment work?

By
Katherine
Butler



Picture source: Gallo Images/Getty

Both the Domestic Violence Act 116 of 1998 (the Act) and the Protection from Harassment Act 17 of 2011 were enacted in order to protect vulnerable members of society. In addition, the Acts aim to ensure that constitutionally enshrined rights, such as the right to equality, privacy, dignity, freedom and security of the person are not unreasonably and unjustifiably infringed. Both Acts, therefore, take up vital legislative space, especially considering the prevalence of violence perpetrated against women and children in South Africa, as well as against the background of the international ‘#Me-Too’ movement, which has been gaining momentum in 2018. Furthermore, the Acts are arguably improvements on the previous Acts, namely the Prevention of Family Violence Act 133 of 1993 and having to apply for an interdict in cases of harassment where no domestic relationship existed. Nevertheless, given the apparent pitfalls, which seem to occur

in practice, it is imperative to critically reflect on whether these Acts offer the correct balance between protecting the complainant’s rights and safeguarding respondents from vexatious applications.

Procedure followed in terms of the Acts

In both instances, the application for a protection order is *ex parte*, namely, it is brought by the complainant without notice being given to the respondent. In addition, both Acts make provision for the application being brought on behalf of the complainant by another person who has a material interest in the well-being of the complainant (s 4(3) of the Act and s 2(3) of the Protection from Harassment Act). The application is on affidavit. The prescribed form can either be completed in full by the complainant, or alternatively by the clerk of the court or an attorney can assist the complainant.

The magistrate will then consider the

application and, if satisfied that there is *prima facie* evidence that the requirements, which are explained below have been met, must issue an interim protection order (s 5(2) of the Act and s 3(2) of the Protection from Harassment Act). This interim order, as well as a copy of the application and a record of any additional evidence, which was considered by the court, must formally be served on the respondent to have effect (s 5(3) and (5) of the Act and s 3(3) and (6) of the Protection from Harassment Act).

Once the clerk receives the return of service in respect of the interim order, confirming that it has been served on the respondent in the prescribed manner, a warrant of arrest, which authorises the arrest of the respondent must be served on, or given to the complainant (s 5(7) of the Act and s 3(7) of the Protection from Harassment Act). The warrant’s execution is suspended, and this suspension is subject to the respondent complying with any prohibition, condition, obligation or order imposed by the

court (s 8(1)(b) of the Act and s 11(1)(b) of the Protection from Harassment Act). Should the respondent contravene the terms of the interim order or a final protection order, the complainant may hand in the warrant of arrest together with an affidavit, detailing the incident relating to the respondent's non-compliance, to a member of the South African Police Service (SAPS) (s 8(4)(a) of the Act and s 11(4)(a) of the Protection from Harassment Act). The SAPS then have the option to either arrest the respondent, if it appears that the complainant may suffer imminent harm as a result of the breach, or deliver in person a written notice to the respondent, calling on the respondent to appear before court on a specified date, on a charge of contravening the terms of the interim order (s 8(4)(b) and (c) of the Act and s 11(4)(b) and (c) of the Protection from Harassment Act). This charge is dealt with as a criminal matter, separate from the civil proceedings held in relation to the protection order.

The interim order only remains valid until the return date, which is typically about three months from the date of the interim order having been issued, on which date the respondent must show cause and establish why a final protection order should not be granted (s 5(3)(a) of the Act and s 3(3)(c) of the Protection from Harassment Act). Although under both Acts the respondent may anticipate the return date on 24 hours' written notice to the complainant and the court, in practice, as explained below, this right of anticipation may be of little actual value.

Powers of the court in respect of protection order

In respect of both the interim and final order, the court has broad powers regarding the contents of the protection order. The respondent may be prohibited from engaging in certain forms of conduct, entering the complainant's residence or work place and additional conditions can be imposed (s 7 of the Act and s 10 of the Protection from Harassment Act).

The court may not refuse to grant a protection order under either the Act or the Protection from Harassment Act merely on the grounds that other legal remedies are available to the complainant (s 6(7) of the Act and s 10(5)(a) of the Protection from Harassment Act). However, there is a caveat in the case of the Protection from Harassment Act, which makes an exception where a complainant has, or is in the process of applying for a protection order under the Act against harassment or stalking as provided in that Act (s 10(5)(a) of the Protection from Harassment Act). Nevertheless, it appears that the court still retains the discretion to grant a protection

order under the Protection from Harassment Act in these circumstances (s 1(2) of the Protection from Harassment Act).

A further significant distinction can be made as to the duration of enforceability for protection orders granted in respect of each Act. A protection order granted under the Act is binding until it is set aside (s 6(7) of the Act), whereas a protection order under the Protection from Harassment Act remains in force for a period of five years, although this period can be extended by the court on good cause shown (s 9(8) of the Protection from Harassment Act).

Comparison between the two Acts and their substantive requirements

Under the Act, the complainant is required to show, firstly, that they are in a domestic relationship with the respondent. A 'domestic relationship' is defined broadly in s 1 of the Act, as meaning a relationship between the complainant and respondent, including being married or having been married; co-habitation or having co-habited; being parents of a child or sharing parental responsibilities for that child; having been in a relationship; and sharing or having recently shared the same residence. Secondly, once the domestic relationship has been established, the complainant must show in terms of ss 5(2)(a) and 6(4) of the Act that domestic violence occurred. 'Domestic violence' is also defined broadly in s 1 of the Act and includes:

- '(a) physical violence;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant's residence without consent ...;
- (j) or any other controlling or abusive behaviour.'

In contrast, the Protection from Harassment Act does not require a relationship between the parties and complainants can even bring an application against someone unknown to them. Furthermore, an act of violence is also not required. 'Harassment' is widely defined in s 1(1) of the Act and is not restricted to physical or verbal abuse. Essentially, conduct causing harm is required. Such conduct includes behaving unreasonably through acts, such as –

- watching, accosting or loitering near the building where the complainant resides, studies or works;
- engaging in verbal, electronic or other communication aimed at the complainant;
- the sending or delivery of written com-

munications via, for example, letters, packages, or e-mail; and

- finally, behaviour amounting to sexual harassment.

'Harm' in s 1(1) of the Act means 'any mental, psychological, physical or economic harm'.

Critique: Finding the balance

As stated above, both these crucially important Acts are aimed at protecting vulnerable members of society and upholding their constitutional rights. However, the Acts are not above criticism, as the current system is open to abuse. In practice, a recurring issue which has emerged, is that a disgruntled former partner or neighbour with a long-standing grudge can approach the court, making false or exaggerated allegations in their affidavits and, based on this, an interim protection order can be granted, without respondents being given notice or having an opportunity to defend themselves. Particularly when parties have legal representatives, court proceedings can be drawn out for months with parties incurring unnecessary legal costs and experiencing heightened frustration. The court may decide not to issue a final protection order only after thorough cross-examination of both the complainant, respondent and any witnesses called on to testify during the trial.

In such a situation, possible recourse for the respondent includes the respondent's right of anticipation, as provided for in s 5(5) of the Act and s 3(5) of the Protection from Harassment Act. In terms of these sections, the return date in respect of the interim protection order may be anticipated by the respondent, provided that the complainant and the court receive prior written notice of at least 24 hours. Although the respondent has the right to anticipate the return date, this is subject to the availability of a magistrate and other court resources. This right is also only in respect of the initial return date and does not apply to subsequent postponements. Particularly, where an interim protection order against harassment has been granted, requests by the complainant for further postponements during trial proceedings can easily amount to an abuse of process.

Moreover, the Acts stipulate that the court may only make a costs order against a party who has acted frivolously, vexatiously or unreasonably (s 15 of the Act and s 16 of the Protection from Harassment Act). In practice, a costs order is seldom made against the complainant.

Another point of contention is that, subsequent to the interim protection order having been issued, the Acts pro-

vide specifically that a complainant who makes materially false statements in their affidavit in respect of having the warrant of arrest authorised is guilty of an offence and is liable on conviction to a fine or imprisonment (s 17(d) of the Act and s 18(1)(b) of the Protection from Harassment Act). This provision, however, fails to deter complainants from making materially false statements in their affidavits when initially bringing the application for an interim protection order.

Conclusion

In the light of the above critique, it is, therefore, argued that the Acts, due to the broad definitions and procedure followed, fail to adequately safeguard re-

spondents from vexatious applications. It is proposed that stricter threshold requirements should be imposed before an *ex parte* application can result in an interim protection order being granted. In addition, the courts should not hesitate to make costs orders against vexatious litigants and to refer complainants for prosecution, when they have made materially false statements in their affidavits for enforcement of a warrant of arrest.

For other articles pertaining to the Domestic Violence Act and the Protection from Harassment Act see:

- Amanda Manyame 'Are your hands tied when it comes to cyber harassment?' 2018 (Sept) *DR* 22.
- Yashin Bridgemohan 'Non-compliance

with the Domestic Violence Act and vicarious liability' 2016 (July) *DR* 40.

• Siyabonga Sibisi 'Understanding certain provisions of the Domestic Violence Act: A practitioner's perspective' 2016 (May) *DR* 22.

• Sheethal Sewsunker 'Inexpensive civil remedy for harassment: The protection from Harassment Act' 2013 (July) *DR* 34.

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THE SA ATTORNEYS' JOURNAL

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THE LAW REPORTS

September 2018 (5) South African Law Reports (pp 1 – 322);
[2018] 3 All South African Law Reports July (pp 1 – 305);
[2018] 3 All South African Law Reports August (pp 307 – 603); 2018 (10)
Butterworths Constitutional Law Reports October (pp 1179 – 1308)

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
ECLD: Eastern Cape Local Circuit Division, East London
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law – PAJA

Commencement of 180-day limitation period: The decision in *PG Group (Pty) Ltd and Others v National Energy Regulator of South Africa and Another* 2018 (5) SA 150 (SCA); [2018] 3 All SA 52 (SCA) concerned the 180-day limitation period under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The National Energy Regulator of South Africa (NERSA) was established by law to regulate energy prices, including the price of piped natural gas. In 2013 NERSA granted an application by Sasol Gas to determine the maximum gas prices it was permitted to charge for piped gas. Since 2005 NERSA has been the designated regulator for piped natural gas under the Gas Act 48 of 2001.

The Gas Act requires NERSA to regulate gas prices 'on a systematic methodology applicable on a consistent and comparable basis' in cases where there is inadequate competition in the industry. Initially NERSA failed to consider this requirement but later it developed a methodology

for determining maximum prices based on a basket of alternative fuel sources (the so-called 'basket approach').

Sasol applied for the determination of gas prices in 2012 and NERSA made a final determination in 2013 based on the basket approach. The prices finally determined by NERSA, were substantially higher than the prices previously charged by Sasol Gas. The mark up on the cost rose from 227% to 398%.

The applicants complained that the increases were unreasonable and irrational. They applied to the GP to review and set aside the decision and order that any new prices determined must be implemented retrospectively.

The court of first instance held that there was an unreasonable delay in bringing the application and dismissed it without considering the substantive merits of the case.

On appeal, Leach JA, held that when dealing with administrative action, which is the result of a process, the administrative action only becomes reviewable when it has a direct external legal effect. In the present case, the determination of the methodology was part of the process, but not the final act having direct external legal effect. This only happened when the maximum gas prices were determined. The applicants brought their application within the 180-day limit under the PAJA.

The SCA held that the decision of the High Court was wrong on this issue. NERSA did not finally determine the

methodology to be used, rather it extended a choice of methodology to the applicant. It was only when this choice was exercised that it became the systematic methodology for determining maximum gas prices.

As a transitional measure NERSA also did not use the applicable methodology consistently but used a revised method to ensure that Sasol Gas suffered no financial loss.

Section 6(2)(f)(ii) of PAJA requires that an administrative decision must be reasonable. An administrative decision is also reviewable if it is a decision that a reasonable decision-maker could not have been reached.

NERSA's task under the Gas Act was to regulate the market in the absence of a competitive market so as to 'replicate competitive market outcomes in approving maximum prices'. Instead of developing a methodology that would lower gas prices, NERSA did the opposite, determining a maximum price that was 300% higher than what the applicants had previously paid. Setting a price that a monopolist would set, was thus illogical and irrational under the circumstances.

NERSA's decision was wholly irrational and unreasonable and was set aside.

Constitutional law
Discrimination against polygamous Muslim marriages unconstitutional: In *Moosa NO and Others v Minister of Justice and Others* 2018 (5) SA 13 (CC); 2018 (10) BCLR 1280

(CC), the court was asked to pronounce on the constitutionality of s 2C(1) of the Wills Act 7 of 1953. The facts were as follows: The deceased had married the second applicant in 1957 and the third applicant in 1964. Both marriages were solemnised in ceremonies conducted under the tenets of Islamic law.

In 1982, the deceased applied for a bank loan to fund the purchase of the current family home. But, because Muslim marriages were not legally recognised, he was advised to formalise his marriage to the second applicant under South African law in order for the bank loan to be approved. He did so, with the consent of the third applicant, and then bought the property with the loan he obtained.

Since then the deceased lived with both his wives and some of their children in their family home until his death in 2014. He prepared a will three years earlier in which he referred to both marriages. Its terms directed that his estate be distributed under Islamic law. The Muslim Judicial Council certified that this required the estate to be divided in 1/16 shares to each of his wives, 7/52 to each of his sons and 7/104 to his daughters.

All the children renounced the benefits due to them under the Will and the executor specified that their shares be divided equally between the two wives, regarding both as surviving spouses for purposes of s 2C(1) of the Wills Act.

The Registrar of Deeds refused to register the spouses' shares in the property, arguing that s 2C(1) must be interpreted strictly, therefore, excluding the second wife.

On application, the High Court upheld the executor's interpretation but also held that s 2C(1) was unconstitutional as it unfairly discriminated against Muslim spouses.

On appeal to the CC, Cachalia AJ confirmed the High Court's declaration of the section's constitutional invalidity. The CC held that the phrase 'surviving spouse' in s 2C(1) dates back to the pre-constitutional era when it plainly contemplated a partner in a common-law monogamous union. It, therefore, cannot be interpreted to include multiple surviving spouses within its ambit.

Section 2C(1) thus differentiates between surviving spouses married in terms of the Marriage Act on who the benefits are conferred, on the one hand, and those married under Islamic Law, who are not recognised as spouses, on the other hand. The section also differentiates between surviving spouses in customary unions and those in polygamous Muslim marriages. African Customary Law marriages fall within the section's remit, but Muslim marriages do not. This differentiation constitutes unfair discrimination because it bears no relation to any legitimate governmental purpose.

The High Court limited the retrospectivity of the declaration of unconstitutionality to existing and future cases, excluding estates that have been finally wound up.

Finally, the CC confirmed the High Court's decision that s 2C(1) has to be amended by adding the words in *italics* for the section to read:

'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. For the purposes of this sub-section, a "surviving spouse" includes every hus-

band and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam'.

The order was accordingly confirmed. The court made no order as to costs.

• See also Fareed Moosa 'Renunciation of benefits from a Will: Who is a "spouse"?' 2018 (Jan/Feb) *DR* 28, for the WCC judgment.

Contract law - lease

Breach of contract: The decision in *Ritz Plaza (Pty) Limited v Ritz Hotel Management Company (Pty) Ltd* [2018] 3 All SA 583 (WCC) straddled a number of legal aspects. Only one of these, namely, breach of contract, will be discussed here.

The facts were as follows: The applicant (the Ritz) was a company, which owned the Ritz Hotel (the hotel) in Cape Town. In October 2016, it concluded a lease agreement with the respondent (the management company) in terms whereof the hotel was leased to the management company for a period of 20 years. By the end of 2016, the management company began defaulting on its monthly rental and other obligations towards the Ritz. The latter consequently elected to cancel the lease. The management company refused to vacate the hotel, necessitating the bringing of an application for its ejectment by the Ritz. The management company averred that the Ritz's cancellation of the lease was invalid in that the rental, which would otherwise have been due and payable to it by the management company, was in fact not due and payable because the Ritz was the cause of the management company's failure to pay. It further argued that when it stepped into the shoes of the previous tenant, the change of tenancy was facilitated by a so-called term-sheet intended to regulate the parties' contractual relationship for an indefinite period. A loan, which the management company had obtained from a bank, was insufficient to cover its refurbishment of the hotel. It alleged that it was a tacit term of the term-sheet, that the Ritz would obtain

an additional loan facility of R 30 million for the management company and make it available by a certain date. It further alleged that the Ritz breached the term sheet by failing to make the R 30 million bank loan available to the management company timeously, and that such breach was causally connected to the latter's failure to pay the rental due.

Gamble J held that a tenant's primary obligation under an agreement of lease is the timeous payment of rental in the agreed commodity to the landlord. Failure to meet that obligation constitutes a fundamental breach and after it has been given contractual notice to remedy its default, the landlord is entitled, without more, to cancel the agreement and seek the ejectment of the tenant.

The management company contended that the failure to pay the rental claimed was not payable due to the Ritz's own conduct. It based its contention on the decision in *Academy of Learning (Pty) Ltd v Hancock and Others* 2001 (1) SA 941 (C) in which the court discussed the defence raised in that case, regarding the extension to breach of contract of the principle that a wrongdoer may not be allowed to profit from his own wrong. The court in the *Academy of Learning* case rejected the wide application of the principle and advanced

three specific categories in which the approach might find application. Those are -

- where the wrongful conduct of the creditor made performance by the debtor impossible;

- where the creditor's wrongful conduct can be ascribed to a deliberate intention on his part to prevent performance by the debtor; and
- where the creditor's conduct complained of by the debtor in itself constituted a breach of an express or implied term of the agreement.

The latter category (point 3) was relied on by the management company in the *Ritz Plaza* case. The court pointed to the provision in the term-sheet, which precluded the incorporation into the agreement of any tacit term. The management company's reliance on the *Academy of Learning* case, therefore, fell at the first hurdle.

In any event, point 3 referred to in the *Academy of Learning* case required that the wrongful conduct complained of on the part of the Ritz had to be in breach of an express or implied (or tacit) term of the lease agreement itself.

The court concluded that no tacit term had been proved, and held that the management company was in default of its obligations to pay the rental due in terms of the lease and the Ritz was entitled to cancel the contract.

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It was ordered that the management company vacate the premises, failing which the Sheriff of the court was authorised to eject it.

Construction law

Payment certificate creates a separate obligation:

The crisp facts in *Averg Grinaker v MEC Department of Human Settlements* [2018] 3 All SA 466 (ECLD) were as follows: The present claim arose pursuant to a construction services bid awarded to Averg (the plaintiff) by the Department of Human Settlements (the defendant) for the rectification of defectively built homes in the Mount Ayliff Municipal area. Mount Ayliff is a small town in the eastern part of the Eastern Cape province of South Africa, near that province's border with KwaZulu-Natal.

The plaintiff brought its claim against the defendant for the payment of a sum of R 3 038 972 reflected in an 'interim payment certificate' issued and authorised by a principal agent, Dennis Taylor, a quantity surveyor, for payment by the defendant.

One of the defences relied on by the defendant related to the authority to sign off payments. The defendant maintained that such authority lay solely with the head of department.

Significantly, so Mageza AJ reasoned, the defendant did not deny in its plea that the payment certificate was issued by the principal agent as the department's representative and authorised agent. The defendant warranted at the outset that the principal agent had the authority to bind the defendant and it, therefore, must have anticipated that the plaintiff would act on that representation.

The court confirmed the role and stature of the principle agent in a building contract. In this regard it held that the principal agent represents the employer and is not a party to the Joint Building Contracts Committee (JBCC) agreement and is a key independent professional role player. Its role contributes to the strength or weakness of the entire building project

and it manages the services of all consultants during project implementation ensuring the best interests also of the employer. The principal agent issues instructions on behalf of the employer (presumably in good faith) and binds the employer.

The authority of the principal agent to authorise payment and bind his principal was not in dispute. The construction agreement provided that the defendant as employer could not dispute or refuse to honour the obligation to pay an interim certificate issued by its principal agent. That obligation resulting from a payment certificate created a separate obligation and cause of action, independent of the contract.

The plaintiff's claim was accordingly upheld, and the defendant was ordered to make payment as claimed.

The defendant was ordered to pay costs on a party and party scale.

Conveyancing

Conveyancing by entity other than conveyancers: In *Proxi Smart Services (Pty) Ltd v Law Society of South Africa and Others* [2018] 3 All SA 567 (GP) the court considered the scope of the statutorily prescribed services reserved for conveyancers.

Proxi Smart Services (Proxi), was a company, intended to set up a computerised system whereby some of the functions currently carried out by conveyancers in the property transfer process would be carried out by Proxi. Only certain services, as prescribed by statute, would be carried out by conveyancers.

The business model of Proxi was based on a list of tasks reserved for conveyancers to be carried out by conveyancers contracted to Proxi, and a list of non-reserved work to be carried out by Proxi. The fees to be charged would be capped to ensure that the combined fee of Proxi and the conveyancer did not exceed the maximum prescribed fees. Proxi would also hold sufficient professional indemnity insurance to protect consumers.

Proxi applied to the High Court for an order that would

declare this business model legal in terms of the relevant legislation, comprising of the Attorneys Act 53 of 1979, the Legal Practice Act 28 of 2014 (the LPA) and the Deeds Registries Act 47 of 1937 and regulations. The application was opposed by the Law Society of South Africa and various other professional bodies.

Matojane J pointed out that s 20 of the Deeds Registries Act provides that deeds of transfer must be prepared in accordance with prescribed forms and must be executed by the owner of the land or by a conveyancer with the necessary power of attorney from the owner. In terms of s 15A of the Deeds Registries Act a conveyancer accepts responsibility for the accuracy of all the facts mentioned in the registration documentation. Similarly, s 83(8)(a)(i) of the Attorneys Act reserves certain work for attorneys only. No other person may prepare such documents for gain.

Under the proposed model, Proxi would manage all com-

munications between the purchaser, seller, estate agents and bond attorneys, including the payment of deposits and requesting financial guarantees from the bond attorneys.

The indemnity insurance by Proxi is entirely unregulated and depends solely on the discretion of Proxi. However, there is no statutory protection under the Fidelity Fund set up under the Attorneys Act to protect consumers against the abuse of trust funds.

Section 33(3) of the LPA provides that no-one may render a service for a fee reserved for an advocate, attorney, conveyancer or notary. The public derives comfort from the fact that property transactions involving large sums of money are controlled by professionals regulated by statute and professional societies.

Proxi's business model will lead to a loss of control of the process by the regulated professionals and strip the process from the statutory controls and assurances. The business model will contra-

vene s 83(8)(a)(i) of the Attorneys Act and para 49.17 of the consolidated Rules for the Attorneys' Profession and would, therefore, be unlawful.

This distinction between reserved and non-reserved work was created by Proxi and is not to be found in any of the relevant statutory instruments.

Finally, the application was also rejected because the relief sought was vague, unenforceable and would not bring finality to what conduct the court sanctioned.

The application was dismissed with costs.

- An application for leave to appeal is being made.

Credit law

Rearrangement of consumer's repayment obligations:

The facts in *Pettenburger-Perwald v Vosloo and Others* 2018 (5) SA 206 (WCC) were as follows: The consumer brought an application to a debt counsellor for debt review in terms of subs 86(1), 86(7)(c) and 86(8)(b), read together with ss 85 and 87 of

the National Credit Act 34 of 2005 (the NCA) and r 55 of the Rules Regulating the Conduct of Proceedings of Magistrates' Courts of South Africa. The debt counsellor (and appellant in the present proceedings: Pettenburger-Perwald) determined in terms of s 86(6) of the NCA that the consumer was over-indebted and proceeded with an application to place the consumer under debt review.

A payment restructuring proposal was sent by the debt counsellor to all the credit providers cited in the present case as the respondents. Some of them accepted the proposed monthly payments. The acceptance letters set out the outstanding amounts, the proposed instalments, the interest rates, monthly fees and the concession terms. The consent letters by the creditors did not only set out the proposed reduced instalment and adjusted concession term, but also amended the interest rate to a lower rate, in many cases as low as

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a 0% interest rate. The matter served before the Cape Town Magistrates' Court, but the court declined to grant the order in the light of the fact that in various earlier decisions it was held that the magistrates' court, being a creature of statute, is not empowered to alter the contractual interest rate, as that effectively changes the terms of the original agreement.

The crucial issue in the present appeal was whether the magistrates' court has the power to make an order rearranging an over-indebted consumer's repayment obligations based on the parties' agreed amended interest rate.

Ndita J pointed out there was earlier case law to the effect that a magistrates' court, when rearranging an over-indebted consumer's credit obligations under a credit agreement, was not permitted to amend the interest rate set out in the credit agreement, as there was nothing in the NCA, which empowered it to do so. In this regard the court referred to s 87(1) read with s 86(7)(c)(ii) of the NCA.

However, so the court reasoned, a purposive interpretation of the NCA, which encouraged the consensual resolution of disputes, led it to the conclusion that, in circumstances where the debt counsellor and credit provider had agreed to an amended interest rate, a magistrates' court had the jurisdiction to make an order re-

arranging the consumer's obligations based on an amended interest rate.

The appeal was upheld. No order as to costs was made.

Customary law

Effect of legislation on customary law: In *Gongqose and Others v Minister of Agriculture and Others* 2018 (5) SA 104 (SCA); [2018] 3 All SA 307 (SCA) the appellants were arrested and charged in September 2010 with attempting to fish in a marine protected area without a permit in contravention of s 43(2)(a) of the Marine Living Resources Act 18 of 1998 (MLRA). Their defence was that they have a customary right to fish and did not act unlawfully.

The appellants were part of the Dwesa-Cwebe communities that have been fishing in the area since the 18th century. It is common cause that the Dwesa-Cwebe communities were dispossessed of their land and that they relied on marine resources for their livelihood. They were denied access to marine resources through various Acts, of which the MLRA was the most recent, until its amendment in 2014.

The appellants were convicted for contravening s 43(2)(a) of the MLRA in the magistrate's court, although the court acknowledged that they were exercising a customary right to fish. The appellants were granted leave to appeal against the conviction.

The High Court upheld the appellants' convictions. It held that the legislature was aware of people exercising their rights in respect of marine resources. The appellants' conduct was unlawful for the reason that they had not applied for an exemption under the MLRA to be granted a permit to fish in the protected area.

The appellants applied for special leave to appeal in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

On appeal Schippers AJA pointed out that the application for leave to appeal raised four issues, namely -

- the status of customary law;
- whether the appellants proved that they were exercising customary law rights of access to and use of marine resources;
- whether the MLRA extinguished such customary law rights; and
- whether the appellants' conduct was lawful.

The SCA held that the Constitution recognises customary law as an independent entity of law. The appellants clearly have a customary right of access to and use of the marine resources in the area. Only the Constitution and legislation specifically dealing with customary law can expressly or by implication amend existing customary law rights. The MLRA does not specifically deal with customary law and does not repeal the existing customary law rights of access to and use of marine resources

by the appellants. The appellants acted lawfully under their customary law rights and their rights had not been repealed by legislation specifically dealing with customary law.

The High Court's contention that the appellants acted unlawfully for not applying for an exemption under the MLRA was dismissed.

Special leave to appeal was accordingly granted and the appellants' convictions and sentences were set aside.

Family law

Whether a 'known sperm donor agreement' is valid in South Africa: The facts in *BR v LS* 2018 (5) SA 308 (KZD) concerned a boy, ES, who was born on 12 March 2015, after having been naturally conceived by the applicant (the father) and the respondent (the mother). The couple, never married, had in June 2014 revived an earlier relationship after the father agreed to the mother's request to impregnate her via natural insemination. By July 2014 the mother was pregnant. The father had, *inter alia*, accompanied her on visits to obstetricians, attended pre-natal classes with her, and had paid certain expenses in respect of the pregnancy. But when the father told her he wanted to take on parental responsibilities, she objected. The relationship remained under strain, and in September 2015 the mother,



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having obtained legal advice, sent the father an e-mail in which she raised the notion of a 'known sperm donor agreement', pointing out that it was more 'appropriate' than the parenting plan suggested by the father. The father did not sign the agreement and in November 2015 he applied for an order granting him scheduled contact and assigning him the full rights and obligations of unmarried fathers set out in s 21(1)(b) of the Children's Act 38 of 2005.

The court granted an interim order and referred the following questions for oral evidence:

- whether the father met the requirements of s 21(1)(b);
- whether the parties had concluded a 'known sperm donor agreement'; and
- whether it was in the best interest of ES for the father to be assigned rights of contact.

While the father stated that the agreement between him and the mother was that he could choose his level of involvement in ES's life, the mother argued that the alleged

'known sperm donor agreement' meant that the usual consequences of biological fatherhood in s 21(1)(b) did not apply. She acknowledged that such agreements were not recognised by the Act and would be novel in South African law, but contended that they were increasingly common and that their recognition would be consistent with mothers' rights to dignity and sexual preference.

Koen J held that the 'known sperm donor agreement' contended for by the mother was an innominate contract, the terms of which she had to establish on a preponderance of probabilities. The recognition of such agreements, which were not necessarily invalid, was a novel issue, which required the benefit of detailed argument. Any such inquiry would have to consider the best interest of the child and whether recognition might be *contra bonos mores*.

The court assumed - without deciding - that a 'known sperm donor agreement' could be validly concluded in South Africa to vary the rights and

responsibilities the Act awarded to biological fathers. In the present case, however, the father had satisfied the level of commitment required by the Act to confer on him the rights and responsibilities mentioned in s 21. The mother's conduct was consistent with the father's view that he could elect to involve himself in ES's life, and the fact that a parenting plan was even considered also pointed in this direction. Since the mother failed to prove, on a balance, the agreement alleged by her or to contradict the father's more probable version that there had been no variation of the normal consequences of biological fatherhood, the father was entitled to an order declaring that he had acquired full parental rights and responsibilities under s 21.

No costs order was made.

- For more articles, similar to this, see also: Opinion 'Appropriate contact and maintenance guidelines for sperm donors' 2017 (Sept) *DR* 51 and Letters to the editor 'Response to appropriate guide-

lines for sperm donors' 2018 (April) *DR* 4.

Procedural law

Separation of issues: The crisp issue in *FirstRand Bank v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA) was whether the provisions of the National Credit Act 34 of 2005 (the NCA) applied to an agreement. This arose as follows: The appellant (FNB), loaned money to the first respondent (Clear Creek), against the security of a mortgage bond. The second respondent (the surety) stood surety for the due performance of the agreement by Clear Creek. FNB sued Clear Creek for breach of the agreement and sought to foreclose on the mortgage bond. It also sued the security under a deed of suretyship. The only defence raised in the plea was that the agreement was unlawful for two reasons, namely -

- certain provisions in the agreement were said to have had the general purpose and

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effect of deceiving Clear Creek and so contravened s 90(2)(a)(ii) of the NCA; and

- it was claimed that FNB had failed to comply with subs 81(2) and (3) of the NCA.

The latter subsections required FNB to properly assess Clear Creek's general understanding and appreciation of the risks and costs of the proposed credit, and of its rights and obligations under the agreement. The nett effect of the plea was that, because the agreement was unlawful for one or both of the above reasons, Clear Creek was relieved of any obligation to perform. The NCA would ordinarily not apply to the agreement. This is made clear in s 4(1) of the NCA.

At the commencement of the trial in the court *a quo*, the parties agreed to deal with the issue of whether the NCA was applicable to their credit agreement as a separate issue in terms of r 33(4) of the Uniform Rules of Court.

After the court *a quo* dealt with the issue, an order was granted to the effect that the Act did apply.

On appeal, Gorven AJA held that r 33(4) refers to a 'question of fact or a question of law' in a pending action; and that this means an issue arising on the pleadings. Apart from being a requirement in the rule, the fashioning of an order sharpened the focus of

the inquiry as to whether the issue specified could conveniently be decided separately, and also assisted in defining the precise ambit of the inquiry to be undertaken.

While it would not always have this result, the procedural failures of the court *a quo* in applying r 33(4) combined to render its approach incorrect in the circumstances of this case. The formulation of the issue as to whether the NCA applied to the agreement, and the simple order that it did, led to anomalies such as passing over sections excluding its application to juristic persons. This gave no clarity on the question whether Clear Creek was entitled to rely on the defence that the agreement constituted reckless credit as contemplated in s 81 of the NCA. Therefore, the issue could not have been properly decided on the basis on which it was dealt with in the court *a quo*.

The appeal was upheld with costs.

Road Accident Fund

Relevance of pre-accident voluntary contributions to retirement fund: The appellant (Bouttell) in *Bouttell v Road Accident Fund* 2018 (5) SA 99 (SCA) was a successful electrical engineer by profession and owned two businesses. He dictated the manner

and form of the monthly salary which he drew. He earned dividends and a salary of R 4 million per year. However, he was not a beneficiary of pension fund contributions by his two businesses. Instead, he voluntarily paid 15% of his earnings into a retirement annuity fund. In 2012 he was injured in a motor-vehicle accident, as a result of the collision, he sustained bodily injuries.

In a claim for compensation by the Road Accident Fund (RAF), he argued that these voluntary contributions had to be taken into account for the purpose of calculating loss of earnings. Whether or not they were counted made a R 3 million difference to his claim. The matter went to the GP, which agreed with the RAF that voluntary contributions to a retirement annuity fund should not be taken into account for purposes of calculating loss of earnings.

On appeal, Hughes AJA agreed with the High Court that 'provisions for the future', such as an investment cannot be taken into account when calculating future loss of earnings for the purpose of provisions of the Road Accidents Fund Act 56 of 1996.

The court rejected Bouttell's argument that this amounted to unfair discrimination, pointing out that an employee whose employer contributed

to a pension fund as part of his remuneration and one whose employer did not do so, were treated equally in the sense that the court considered the employment contract as a whole in order to determine loss of future earnings.

In this regard the court reasoned that while the concepts of equity and discrimination are linked, discrimination concerns treating one person (or groups of persons) differently to another on the basis of inherent characteristics or attributes such as race, gender or the other grounds listed in s 9(3) of the Constitution. The differentiation in treatment on which Bouttell relied, is unrelated to any inherent characteristic or attribute having the potential to impair the dignity of a person.

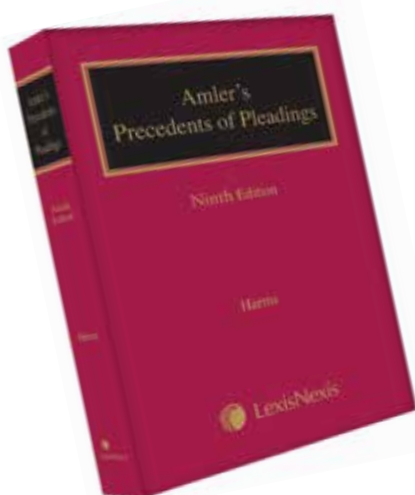
The appeal was dismissed with costs.

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, business rescue, children, civil procedure, competition, constitutionality of legislation, credit law, criminal law, customary law, evidence, labour law, marriage, mining, pension funds, practice, prescription and shipping.



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By
Sejako J
Senatle
SC

Review procedure – extent of record on review

Helen Suzman Foundation v Judicial Service Commission
2018 (4) SA 1 (CC)

In 2012 the Judicial Service Commission (JSC), established in terms of the Judicial Service Commission Act 9 of 1994 (the Act), advised the President to appoint certain aspirant judges, in terms of s 174(6) of the Constitution. This decision was taken after interviews and private deliberations by the JSC had taken place. The Helen Suzman Foundation, the applicant, approached the Western Cape Division of the High Court and sought to have the decision reviewed and set aside.

In terms of r 53(1)(b) of the Uniform Rules of Court, the JSC was required to file the relevant record of the proceedings sought to be reviewed and set aside, together with the reasons. Although the JSC filed other relevant records – the reasons for the decisions made were distilled from the private deliberations – the actual records of the deliberations were not filed. The JSC based its refusal on ‘confidentiality’.

The High Court dismissed the application on the basis that the Helen Suzman Foundation was not entitled to the private deliberations records in terms of r 53. On appeal the Supreme Court of Appeal confirmed the High Court’s decision. The Helen Suzman Foundation further appealed to the Constitutional Court (CC) to determine if it was legally permissible for the JSC’s post-interview deliberations to be excluded from the r 53 record?

The majority judgment per Madlanga J, discussed the importance of r 53. The court held that the filing of the full record furthers an applicant’s right of access to court by ensuring that the court has the relevant information before it and there is equality of arms between the parties. It was an invaluable tool in the review of proceedings. This was, however, subject to certain exceptions. The CC remarked that the fact that the information was confidential does not *per se* in our law render it to be withheld.

The court emphasised that the fact that the deliberations were conducted in private did not detract from their relevance as evidence. The CC held that such information may well provide evidence of reviewable irregularities in the process.

The court found that the JSC’s own practice of distilling reasons for a deci-

sion on the deliberations was enough indication that its deliberations are relevant. The court went on to distinguish r 53 from discovery under r 35 of the Uniform Rules of Court. It held that r 53 was different in that it envisaged the grounds of the review changing later. Whereas, r 35 is a discovery process where information requested is not relevant to the pleaded case. The court emphasised that r 53 advanced an applicant’s right of access to court in terms of ss 34 and 39(2) of the Constitution. It cautioned the risk of denying an applicant this right.

It should be mentioned that the court held that the issue of disclosure of the record had huge constitutional implications. It held that it related to the very ‘make-up’ of an important and constitutionally created arm of state, namely, the judiciary, which is the final referee of constitutional compliance. For the judiciary to carry out its mandate, it is important to continue to enjoy public confidence. The appointment process must be able to attract the best candidates as judges in order to have a strong judiciary.

Madlanga J went on to dismiss the JSC’s argument that the disclosure of the deliberations would compromise the selection process. The court further disagreed with the JSC that not only would the interests of candidates be jeopardised, but that of the members of the JSC. The court, in this regard, described the composition of the JSC and regarded that the argument was without merit. The court also dismissed the JSC’s other argument that this would compromise the candidates’ privacy and dignity. The court held that the embarrassing phase of the process was not the post-interview stage, but in fact during public interviews.

The JSC had also argued that in terms of s 178(6) of the Constitution read with s 38 of the Act and its regulations, there was no disclosure. In this regard, the court held that s 178(6) did not mean that the JSC could determine procedures that were in conflict with the Constitution. This, the court held, would be an infringement of s 2 of the Constitution.

Madlanga J furthermore held that the secrecy the JSC was claiming, could result in negative public perception not only about the JSC itself, but also about

the very senior judiciary in respect of whose appointments it plays an important role. The court held, that generally the only way to test the legality of the exercise of this power completely and thoroughly was to disclose all relevant material to establish if the relevant information was withheld from the applicant. There was always a risk that possible illegalities remain uncovered and escaped scrutiny in the review process. The court held that it is only in exceptional circumstances that complete non-disclosure should be allowed. If non-disclosure is justified, the court may exercise its discretion to allow disclosure. The court went on to say at para 77:

‘The fact that a number of other relevant documents and reasons distilled from the deliberations have been provided does not detract from the unfairness of withholding other relevant information.’

The CC upheld the appeal and the JSC was ordered to deliver the full record of its private deliberations to the applicant.

Sejako J Senatle SC *BJuris LLB (Unibo) LLM (Howard College) LLD (NWU)* is an advocate at the North West Bar Association, as well as the South African Law Reports and the South African Criminal Law Reports reporter in Mahikeng. □

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By
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The battle for Bo-Kaap's identity

Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others (WCC) (unreported case no 7031/17, 17-8-2018) (Le Grange J)

In the recent judgment of *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* (WCC) (unreported case no 7031/17, 17-8-2018) (Le Grange J), the court had to review the decision by the City of Cape Town's (the City's) Municipal Planning Tribunal (MPT) to grant Buitengracht Properties development rights on two sites within the Bo-Kaap area and the decision by the mayor, acting in her capacity as the appeal authority, to uphold consents regarding the developments.

Facts

In July 2016, the City's MPT – where planning experts review and decide on certain planning projects in the city – approved a proposal for the development of a retail and residential property that was estimated to be worth around R 1 billion.

The tribunal approved the development, despite 1 017 objections being lodged during the public participation process. The initial objections were as follows –

- the development proposal did not comply with the City's policies;
- property values would be negatively affected;
- balconies and windows would overlook properties;
- the visual and historic connection between the Bo-Kaap area and the City would be blocked;
- the development would be too high with too many dwelling units;
- the areas historic significance would be undermined;
- social cohesion would be undermined; and
- traffic congestion in the surrounding streets would be increased.

The Bo-Kaap Civic and Ratepayers Association, as well as the 35 on Rose Body Corporate and Fabio Todeschini sought to review and set aside the planning approvals that were granted in terms of the City of Cape Town Municipal Planning By-Law 2015 (the MPBL).

Heritage Western Cape acted as an intervening party and sought a declaratory order that the proposed develop-

ment triggered s 27(18) of the National Heritage Resources Act 25 of 1999 (the Heritage Act) and, therefore, required a permit.

- The issues of the case were whether:
- The decision makers took the relevant factors into account as envisaged under the MPBL.
 - The City's approval decision was rational and/or reasonable in the circumstances.
 - Section 27(18) of the Heritage Act requires a permit for the development of a place that is itself not a heritage site.

Arguments

The applicants' pertinent arguments included that:

- The City failed to have regard to the heritage impact of the development, and in granting the subject approvals, acted irrationally and/or unreasonably, as follows –
 - the developer's heritage statement was not submitted as part of the application and was not furnished to the public as part of the consultation process;
 - the approvals cannot be justified on the basis of the so-called similar development (similar building development projects within the Central Business District (CBD) eg, 117 on Strand Street) argument;
 - the actual scale of the building was not reduced or redesigned, as recommended by the City's Environmental and Heritage Management Department but instead a different calculation methodology was used, which on a generous interpretation of the calculations, merely reduced the building by 520m²; and
 - the developer did not address a number of issues raised by the objectors.
- The City should have required the developer to submit a visual impact assessment.
- The City failed to have proper regard to the impact of traffic.
- The developer's proposal did not comply with various planning policies.

In addition, the applicants' central proposition on the issue of heritage impact was that any large scale development adjacent to a heritage site would have an extremely negative impact on

the site and would seriously damage its heritage significance.

In contrast, the respondents' argued that:

- The developer had taken care with regard to the surrounding heritage elements and its impact mitigated by the set-backs applied to the building.
- The developer followed proper process, considered all objections and complied with all the applicable City's policies.
- The applicants were ignoring the changing and developing nature of the CBD and attempting to impose unsubstantiated limits over one property in favour of another.
- The development would provide employment opportunities and provide a large economic injection into the area.

Judgment

Le Grange J held that, by way of introduction, when the law entrusts a functionary with a discretion it means just that, and the role of the court is no more than to ensure that the decision maker has performed the function with which they were entrusted.

Deference is, therefore, warranted, but that did not mean that a court should rubber stamp a decision, which was unreasonable or irrational simply because of its complexity. In this instance, the complexity pertained to balancing heritage considerations against other equally important competing factors like socio-economic considerations.

Against this backdrop, Le Grange J systematically interrogated the allegations made by the applicants and ultimately held that none of the allegations, viewed individually or collectively justified intervention on the basis that the decisions of the MPT and/or the mayor were so unreasonable that no reasonable person could have exercised the power or performed the function, let alone a finding of irrationality.

Le Grange J held that no error of law was committed, and the decision makers properly applied their minds in the exercise of their discretion. The court held that the decision makers gave due consideration to the substance of the applicable City's policies and engaged with

them in their decision making where necessary and, as such, there was no good reason to interfere with such decision making.

The court was not persuaded by the argument of Heritage Western Cape that the development triggers s 27(18) of the Heritage Act, which requires a permit, and reasoned that when it comes to the interpretation of statutes, it is wrong to ignore the clear language of a statute under the guise of adopting a purposive interpretation, as doing so would be straying into the domain of the legislature.

After meticulously interrogating the allegations by the applicants, Le Grange J was not persuaded that the respondents' approval decision was irrational and/or unreasonable in the circumstances.

Accordingly, the review application, as well as the declaratory order were dismissed with costs.

Conclusion

The judgment speaks volumes to the issue of gentrification within the Cape Town CBD and its surroundings.

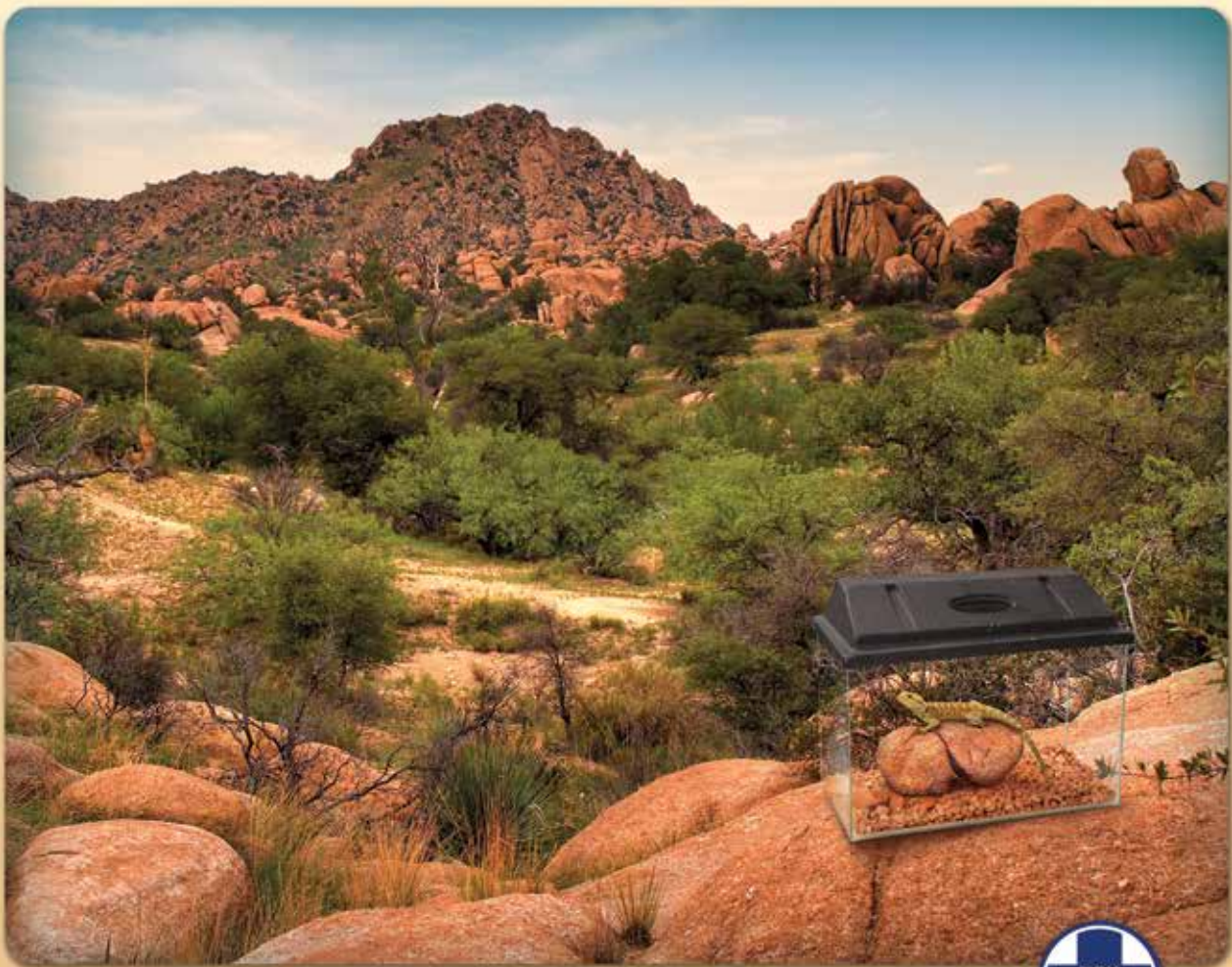
As stated by Le Grange J: 'Gentrification in all its form has become a chilling reality for the ordinary resident of Bo-Kaap. Understandably, the resistance to the gentrification of Bo-Kaap having regard to its historical significance, can never be understated.'

The judgment exposes the common misconception that the Bo-Kaap and the areas over which it extends are all heritage sites and enjoy such protection. Accordingly, it is not enough to 'plead' heritage protection in objection to any proposed building development within the CBD. The majority of the areas demarcated as heritage sites are clearly set out. However, in instances such as

this one, namely, the proverbial 'grey areas', where the proposed development falls partially within the current heritage protection overlay zone, the courts should play an active role to balance the competing interests of the various stakeholders.

The judgment has, however, not deterred the efforts of the Bo-Kaap Civic and Ratepayers Association, which will most likely appeal the decision of the High Court.

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Bills

Restitution of Land Rights Amendment Bill B19A of 2017.
Restitution of Land Rights Amendment Bill B19B of 2017.
Hydrographic Bill B17A of 2018.
Hydrographic Bill B17B of 2018.
Money Bills Amendment Procedure and Related Matters Amendment Bill B28 of 2018.
National Health Amendment Bill B29 of 2018.
National Credit Amendment Bill B30 of 2018.
Electronic Communications Amendment Bill B31 of 2018.

Selected list of delegated legislation

Civil Aviation Act 13 of 2009

Nineteenth Amendment of the Civil Aviation Regulations, 2018. GN R984 GG41915/21-9-2019.

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

Approval of the policy for quality assurance of private colleges for continuing education and training and accreditation of private assessment bodies. GN926 GG41887/7-9-2018.

Health Professions Act 56 of 1974

List of approved facilities for purposes of performing community service by health professionals in 2018. GN1005 GG41936/27-9-2018.

Long-term Insurance Act 52 of 1998

Amendment of regulations made under s 72. GN1015 GG41942/28-9-2018.
Amendment of the Policyholder Protection Rules. GN997 GG41928/28-9-2018.

Magistrates Act 90 of 1993

Amendment of regulations for judicial officers in lower courts, 1993. GN R933 GG41888/7-9-2018 (also available in Afrikaans).

Mine Health and Safety Act 29 of 1996

Regulations relating to explosives. GN R953 GG41904/14-9-2018.

New legislation

Legislation published from
3 – 28 September 2018

Mineral and Petroleum Resources Act 28 of 2002

Mining Charter, 2018. GN1002 GG41934/27-9-2018.

National Environmental Management Act 107 of 1998

Amendment of Financial Provision Regulations, 2015. GN991 GG41921/21-9-2018.

National Environmental Management: Biodiversity Act 10 of 2004

Norms and standards for marking of rhinoceros and rhinoceros horn, and for hunting of rhinoceros for trophy hunting purposes. GN961 GG41913/21-9-2018.

National Environmental Management: Waste Act 59 of 2008

Regulations regarding planning and management of residue stockpiles and residue deposits, 2015. GN990 GG41920/21-9-2018.

National Forests Act 84 of 1998

Protected tree species. GenN536 GG41887/7-9-2018.

Public Protector Act 23 of 1994

Rules relating to investigations by the Public Protector and matters incidental thereto, 2018. GN945 GG41903/14-9-2018.

Short-term Insurance Act 53 of 1998

Amendment of the Policyholder Protection Rules. GN996 GG41928/28-9-2018.

South African National Roads Agency Limited and National Roads Act 7 of 1998

Amendment of the exemption from payment of toll (under the Gauteng Freeway Improvement Project) for certain public transport services and emergency vehicles. GN941 GG41895/7-9-2018.

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Proposed levy on the Piped-Gas and Petroleum Pipeline Industries for 2019/20 in terms of the Gas Regulator Levies Act 75 of 2002 and the Petroleum Pipelines Levies Act 28 of 2004. GN938 GG41890/5-9-2018.

Proposed picketing regulations issued in terms of s 208 of the Labour Relations Act 66 of 1995. GN R943 GG41898/10-9-2018.

Regulations defining the scope of the

profession of psychology in terms of the Health Professions Act 56 of 1974 for comment. BN101 GG41900/12-9-2018.

Draft Employment Equity Regulations, 2018 in terms of the Employment Equity Act 55 of 1998. GN993 GG41923/21-9-2018.

Revised industry waste tyre management plans in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN989 GG41920/21-9-2018.

Proposed amendment of the alien and invasive species list and list of critically endangered, vulnerable and protected species in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GN988 GG41919/21-9-2018.

Proposed amendment of sch 1 and 2 (RPAS licensing) to the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R985 GG41915/21-9-2018.

Draft regulations relating to domestic trade in rhinoceros horn in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GN986 GG41919/21-9-2018.

Draft notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GN987 GG41919/21-9-2018.

Proposed policy and policy directions to ICASA on licensing of unassigned high demand spectrum in terms of the Electronic Communications Act 36 of 2005. GN1003 GG41935/27-9-2018.

Proposed policy directive regarding the introduction of digital sound broadcasts in South Africa in terms of the Electronic Communications Act 36 of 2005. GN995 GG41928/28-9-2018.

Draft Bills

Proposed Employment Equity Amendment Bill, 2018. GN992 GG41922/21-9-2018.





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Racial discrimination in the workplace

In *Shoprite Checkers (Pty) Ltd v Samka and Others* [2018] 9 BLLR 922 (LC), an employee referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of s 60 of the Employment Equity Act 55 of 1998 (EEA) alleging that she was unfairly discriminated against on the basis of race. The basis of her claim was that a customer had made an extremely racist remark to her and the employer did not sufficiently protect her from such conduct. Furthermore, she alleged that the employer's practices were racist towards black cashiers and that she was being harassed, victimised and bullied by other members of staff, because she had raised grievances about the manner in which black cashiers were treated. The CCMA commissioner found that the employee had been bullied by certain individuals but there was no evidence that the reason for the harassment was her race. The commissioner also found that the employer had conducted an investigation into the grievances raised and there was no evidence that the issues related to racial discrimination. The CCMA commissioner did, however, find that the employer should have properly investigated the employee's complaint about the racist remark that was made by a customer. The employer was accordingly held liable and ordered to pay the employee compensation of R 75 000. The CCMA commissioner also found that the employer should have considered steps to prevent such conduct from occurring again such as not allowing the customer to have access to the store in the future.

The employer appealed against the award. The employee also cross-appealed the award on the basis that the commissioner should have found that she was discriminated against by being bullied and harassed by other staff members.

The Labour Court agreed that the racist remarks made by the customer constituted one of the worst racist insults.

The court nevertheless had to consider whether an employer could be liable under the EEA for conduct by a customer. In this regard, Steenkamp J considered s 60 of the EEA, which provides that an employer may be vicariously liable for the conduct of its employees. Steenkamp J found that this vicarious liability only extended to the conduct of other employees where an employer does not take sufficient steps to eliminate racist conduct by its employees. Thus, the employer could not be liable for the conduct of its customers no matter how unacceptable the conduct was. Steenkamp J was, however, satisfied that the employee could rely on other remedies under the common law and other legislation for relief. For example, the employee could institute a delictual claim for damages or institute an unfair discrimination claim under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The appeal was accordingly upheld.

As regards the cross-appeal, the court found that while harassment is a form of unfair discrimination under the EEA, the employee would need to show that the harassment was on the basis of one of the listed grounds or on an arbitrary ground. The employee failed to satisfy the court that she was harassed because of her race and thus the cross-appeal was dismissed.

Employees' duty of good faith towards an employer

In *Massstores (Pty) Limited trading as Makro v Popela and Others* [2018] JOL 40348 (LC), the commissioner in the Commission for Conciliation, Mediation and Arbitration (CCMA) found that the employee's dismissal was substantively unfair and ordered reinstatement. Massstores instituted review proceedings alleging that the arbitration award was not one that a reasonable decision maker could make. The employee had been employed as a Front Returns Clerk and was responsible for receiving and arranging for the repair of faulty or defective goods from customers. The employee was required to obtain a quotation for the estimated cost of repairs and then to communicate this to the customer. If the quotation was accepted the employee would withdraw the money from her till using a supervisor card in a process

known as 'encashing'. The employee was required to obtain approval from the manager and fill in the necessary documentation before doing so. On return of the item, the employee was required to re-bank any additional cash in Massstore's bank account and insert details of the items in the control book.

The employee had been provided with a document setting out these roles and responsibilities. There were also annual discussions with her to clarify her role.

In 2014 an investigation was carried out into irregularities at the Front Returns Department at the store where the employee was employed. A number of irregularities were discovered over a six-month period. There were a number of instances of duplicate claims, money not re-banked and missing documentation. These irregularities resulted in a financial loss of approximately R 30 000. There was also information missing in the control book and the employee tried to alter spreadsheets during the investigation to remedy defects.

Massstores instituted disciplinary proceedings and charged the employee with gross negligence, dishonesty and failing to comply with company procedures. The employee was found guilty of all the charges and dismissed. She then referred an unfair dismissal claim to the CCMA. During the arbitration Massstores argued that the employee was the custodian responsible for ensuring that its rules and policies were complied with. On the other hand, the employee argued that she was not the custodian of the Front Returns Department and that her manager was ultimately responsible. She also said that she did not occupy a supervisory position despite her supervisory card and that the entries she had made were on the instructions of her manager. The commissioner found that Massstores was required to show that the employee was the custodian of its rules, policies and procedures and found that she was not guilty of the allegations against her as Massstores had failed to do this. The commissioner accordingly found that the employee was not responsible for the misconduct and thus the dismissal was substantively unfair.

On review, Massstores alleged that the commissioner committed a gross irregularity in finding that the employee was not under any obligation to perform the duties of a custodian. The Labour Court

(LC) found that the commissioner had no regard to the role clarity document and thus ignored or misunderstood evidence. Furthermore, the commissioner failed to understand the term 'custodian'. According to Coetzer AJ, in the context of employment every employee must be a custodian of the employer's workplace rules and policies as employees have a general duty of good faith towards their employers. He found that this duty of good faith is the cornerstone of an employment relationship and requires the employees to always act in the best inter-

ests of their employers. A breach of this duty would affect the trust relationship and may, therefore, justify dismissal in certain circumstances. Furthermore, the duty of good faith places a responsibility on employees to monitor and report non-compliance by other employees to their employer.

The LC held that the employee was required to comply with all Massstores' policies and procedures notwithstanding that the manager was responsible for the overall management of the Front Returns Department. This was particu-

larly because the employee did not allege that she was not aware of the rules or that the rules were unreasonable or not consistently applied. It was held that the employee was guilty of the allegations against her and that the arbitration award was unreasonable. As regards appropriate sanction, it was held that dismissal was appropriate as the employee had denied responsibility and had not shown any remorse. There had, therefore, been a breakdown in the trust relationship and the employee had exposed Massstores to operational risk.



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Is dismissal the only appropriate sanction for acts of racism?

Duncanmec (Pty) Ltd v Gaylard NO and Others (CC) (unreported case no CCT 284/17, 13-9-2018) (Jafta J, with Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring)

In the context of strike action, does the song, which includes the lyrics 'climb on top of the roof and tell them that my mother is rejoicing when we hit the boer', sung by striking employees; constitute a dismissible offence?

During an unprotected strike nine National Union of Metalworkers South Africa (NUMSA) members, employed by the appellant, sang a struggle song, which included the above words. They were charged with embarking on unprotected strike action and gross misconduct in that they behaved in an inappropriate manner by 'singing racial songs in an offensive manner'.

The chairperson found the employees guilty of both charges. On the first charge, the chairperson saw fit to sanction each employee with a final written warning, while finding dismissal an appropriate sanction in respect of the second charge.

NUMSA challenged the dismissals at the bargaining council and arbitration came before the first respondent arbitrator. While accepting the song was inappropriate within the context of a workplace and could cause hurt in the working environment, the arbitrator found that a distinction should be drawn between singing the song and referring to someone using a racist term. This distinction, according to the arbitrator, was borne out of the fact that the struggle song had a history to it.

Since the unprotected strike was peaceful and lasted only a few hours, together with the fact that the employer had not established that the trust relationship between the parties had been broken; the arbitrator was not convinced dismissal was a justified sanction following which, she awarded the employees reinstatement. To show her disapproval of singing the song, the arbitrator did not reinstate the employees retrospectively but rather limited the employee's compensation to three months each.

On review the Labour Court held:

'An argument that singing the song at the workplace had compromised the continued trust relationship between the employer and the striking employees is unsustainable. An alleged lack of remorse is in itself far-fetched in this Court's view. The employees conceded they sang the song, however they deny that it is wrong to sing it in a work environment and had the potential to cause hurt to other employees particularly white employees, however these employees' denial is understandable considering the history of the song. This denial should not be construed as a sign that the employees were not remorseful of their participation in an unprotected strike.'

It was not unreasonable, in this Court's considered view, of the Commissioner to have found that there was no threat to management and that the strike or protest was relatively peaceful. It is recorded that the strike was a few hours after lunch and the employees returned to work on the next working day.'

The court found the arbitrator's award

was not unreasonable and dismissed the review application.

Having unsuccessfully applied for leave to appeal, as well as a petition to the Labour Appeal Court, the appellant approached the Constitutional Court (CC).

The appellant advanced two arguments before the CC. Firstly, singing the song amounted to hate speech and racism thereby justifying dismissal and secondly, the arbitrator applied her own sense of fairness over the issue of sanction, which was contrary to her statutory duty as an arbitrator.

Addressing the first argument, it was common cause that the term 'boer' was not racially offensive, however, within the context of NUMSA not taking issue with the arbitrator's finding that the song was both inappropriate in the workplace and offensive in the circumstances, the court was willing to approach the matter on the basis that the employees were guilty of a racially offensive conduct. The question thereafter was whether the arbitrator's findings on sanction was unreasonable or not.

The court highlighted the appropriate test on review, which was not to evaluate the reasons provided by an arbitrator to assess whether the court agrees with the arbitrator's findings, but rather to determine whether the arbitrator has put up reasons in support of their finding and if so, whether those reasons are reasonable. Whether a reviewing court agrees with an arbitrator's finding is immaterial to the inquiry.

Adopting this approach, the court deliberated on the argument that dismissal was the only appropriate sanction. The court firstly noted that the arbitrator did not find the song contained racist words, but rather it was inappropriate and could be offensive. However, even if the employees had been guilty of racist behaviour, dismissal was not an automatic sanction. On this the court held:

'There is no principle in our law that requires dismissal to follow automatically in the case of racism. What is required is that arbitrators and courts should deal with racism firmly and yet treat the per-

petrator fairly. Thus in [*South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC)] this Court said:

“None of this should lead to the mistaken belief that the use of very strong derogatory language like k***** would always militate against the reinstatement of an offending employee. [*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* (2002) 23 ILJ 863 (LAC)] does not purport to lay that down or articulate it as an inflexible principle. On the contrary, the Court underlined the particularly crucial role that courts have to play of ensuring that racism or racial abuse is eliminated. And that they must fulfil that duty fairly, fully and firmly. The notion that the use of the word k***** in the workplace will be visited with a dismissal regardless of the circumstances of a particular case, is irrec-

oncilable with fairness. It is conceivable that exceptional circumstances might well demonstrate that the relationship is tolerable.”

In declining the appellant’s invitation to develop the law and prescribe that dismissal is the only appropriate sanction for racially offensive conduct, the court held that such an approach would be inconsistent with the principles of fairness.

The next issue was to determine whether the award was reasonable, put differently, whether the arbitrator’s reasons to justify her findings were reasonable. On this score the court held:

‘It will be recalled that in determining the fairness of the dismissal the arbitrator was applying a “moral or value judgment to established facts and circumstances”. A reading of the award shows that the arbitrator considered the competing interests of Duncanmcc and the

employees. Having weighed them up, she concluded that a final written warning and reinstatement, coupled with a limited compensation was a fair outcome. All of this illustrates rationality in the reasoning leading up to the impugned decision. Therefore, the reasonableness requirement has been met.’

The appeal was dismissed with no order as to costs.



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Abbreviation	Title	Publisher	Volume/issue
<i>Advocate</i>	Advocate	General Council of the Bar of South Africa	(2018) 31.2 August
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa	Juta	(2018) 51.1
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape Faculty of Law	(2018) 22
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) 21 August (2018) 21 September
<i>SACJ</i>	South African Journal of Criminal Justice	Juta	(2018) 31.1
<i>PLD</i>	Property Law Digest	LexisNexis	(2018) 22.3 June (2018) 22.3 September
<i>SAJELP</i>	South African Journal of Environmental Law and Policy	Juta	(2017) 23.1
<i>SAPL</i>	Southern African Public Law	Unisa	(2017) 32.1 and 2

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Brundige, E 'Adjudicating the right to participate in the law-making process: A tribute to retired Chief Justice Ngcobo' (2017) 32.1 and 2 *SAPL*.

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By
Lutendo
Sigogo

Was *De Rebus* used as an electioneering instrument?

It is not an everyday thing that a person will be granted an opportunity to write a guest editorial for a journal. If you are given two such opportunities in successive months your contribution must be extraordinary. This opportunity presented itself to Jan Stemmett who wrote two guest editorials for *De Rebus* ('Is the profession ready for the full implementation of the LPA?' (2018 (Sept) DR 3) and 'Realistic timelines needed for the full implementation of the LPA' (2018 (Oct) DR 3)). In my view the contents of the articles concerned are not of such a nature that qualify them to occupy the editorial space.

The editorial committee of *De Rebus* must convince members of the legal profession that it was a coincidence that Mr Stemmett wrote these editorials on the eve and during the Legal Practice Council (LPC) elections when he was also a contender in such elections. One cannot help but only observe that *De Rebus* was used to promote Mr Stemmett in the LPC elections above all other candidates. Mr Stemmett – as a member of the National Forum on the Legal Profession (NF) – is reasonably expected to have known when the elections were scheduled to take place. The choice of allowing him to write editorials when he could have done an ordinary article or opinion on the Legal Practice Act 28 of 2014 (the LPA) was well-orchestrated. As a former member of the *De Rebus* editorial committee I am aware that the editorial is one of the highly read parts of the journal.

The two articles read together convey one consistent message, that Mr Stemmett's narrative is that the coming into operation of the LPC must be delayed. The September editorial seems to be suggesting that he welcomes the full implementation of the LPA by the 1 November. However, in the conclusion of the September editorial he said the following:

'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.'

It is clear in this conclusion that when he said that, 'the profession is ready for the full implementation of the Act', it was just lip service. He put a condition therein, his conclusion was based on the condition that: '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'. At the time he wrote the guest editorial Parliament was in recess, however, the regulations were to be published in terms of s 109(1) on 31 August, a day before the September guest editorial was published.

Faced with what he did not anticipate in the September guest editorial, the publication of the regulations, in October he sought a second bite of the cherry. In so doing he changed his tune to say the LPC timelines 'imposed' on the NF were not realistic. It is worth noting that these timelines existed when he wrote the September editorial. Maybe he owes an explanation to the readers of *De Rebus* as to when did he realise that the timelines 'imposed' were unrealistic. To justify his new thinking the introduction of the October editorial reads as follows:

'In the September guest editorial ("Is the profession ready for the full implementation of the LPA" (2018 (Sept) DR 3)), I expressed the view that if the first Legal Practice Council (LPC) can be elected before the National Forum on the Legal Profession (NF) ceases to exist on 31 October, the transitional arrangements remaining at that stage, including the election of the Provincial Councils (PCs), can then be finalised by the LPC in cooperation with the law societies, Bar councils and associations. If all role players cooperate, a fairly smooth transfer can be achieved by the end of the year.'

What is obvious in the above paragraph is that Mr Stemmett is shifting the goal post. In September he said that if the regulations can be promulgated timeously and the LPC elected before

the 31 October, the profession would be ready for the full implementation of the Act. In October he added other requirements, such as the election of the Provincial Councils (PCs), and that a fairly smooth transfer by the end of the year could be achieved.

In the October guest editorial he said, '[i]n contrast to this [being his September conclusion] the timelines 'imposed' on the NF by the Department of Justice and Constitutional Development provide for the full implementation of the Legal Practice Act 28 of 2014 (LPA) by 31 October'. This does not make sense because in September he had concluded that the full implementation would occur on 31 October. This is nothing but misrepresentation of facts. Further, there was no need for him to do the second editorial, because between his September editorial and the one of October no changes or developments warranting same had occurred, including the list of tasks he mentioned. These tasks were known when he did the September editorial. It is my understanding that such tasks, being operational, do not prevent the LPC from taking effect and the outstanding tasks, if any, will be dealt with as a work in progress.

Having noted the above, Mr Stemmett's approach presents several practical challenges. For instance, Mr Stemmett is a member of the NF and was responsible for no less than three committees of the NF. One of Mr Stemmett's committees was responsible for drawing up the timelines. The Department of Justice and Constitutional Development when amending the LPA in order to, among others, extend the life of the NF from 1 February to 31 October relied on these said timelines. These are the same timelines which Mr Stemmett preached about at every opportunity he got. The second challenge is that the date of 1 November was agreed on, in terms of the amended s 97(6) of the LPA, by the NF and the four provincial law societies as the date on which the Council would become operational. Mr Stemmett, in the October editorial cannot be correct to suggest that the timelines were 'imposed' on the NF by the Department of Justice and Con-

stitutional Development. Actually, the department only implemented the NF's suggested timelines.

I am convinced that if the full implementation of the LPA was to be entirely left in the hands of Mr Stemmett and those whom he represents when he says '[s]ome members of the NF regard these timelines as unrealistic', the LPC will never see the light of the day. Had the Act not been amended ch 2 would have become operational on 1 February. Mr Stemmett and one of his committees in convincing the Department of Justice and Constitutional Development to amend the LPA indicated that the NF will require a period of six months to complete all of its tasks. The department acceded to their request. Now he propagates for a further extension. This

makes one pause and ponder, was it perhaps not his intention to frustrate the full implementation of the LPA when he took responsibility as the chairperson of the three crucial committees of the NF.

In my view the editorial is not meant to give opinions or subjective views but facts, for facts do not change. Unfortunately, Mr Stemmett was afforded free electioneering airtime exposing himself to the electorates. I cannot help but conclude that this golden opportunity befell him because he was on the list of the non-Black Lawyers Association/National Association of Democratic Lawyers 'preferred candidates' in the elections in question and *De Rebus* was used as an electioneering instrument of Mr Stemmett. Now that it seems Mr Stemmett has become a 'resident' editorial writer,

my question is, will the editorial committee of *De Rebus* give Mr Stemmett another opportunity to write another editorial to develop his thesis against the full implementation of the LPA or to respond to this article?

Lutendo Sigogo BProc LLB (University of Venda) LLM (University of Limpopo) is an attorney at Mathobo Rambau and Sigogo Incorporated in Thohoyandou. He is also the President of the Black Lawyers Association, council member of the Law Society for the Northern Provinces and a member of the recently elected Legal Practice Council. Mr Sigogo writes herein in his personal capacity. □

Response from the *De Rebus* Editorial Committee

Both the editorials referred to in Mr Sigogo's article were written by Jan Stemmett at the request of the *De Rebus* Editorial Committee. The editorials were not in any way shape or form intended to be used as electioneering instruments. The Editorial Committee prides itself with the hard work involved in putting together a prestigious and trusted journal, such as *De Rebus*. That being the case, this means that objectivity and editorial independence are of the utmost impor-

tance to ensure that articles published in the journal do not depict any agenda. The Editorial Committee comprises of five attorneys who represent the constituent members of the Law Society of South Africa to ensure that articles are discussed and approved in a manner that is not skewed to a particular view.

With the looming date of the full implementation of the Legal Practice Act 28 of 2014 (LPA), the Editorial Committee saw it fit to publish an article about the readiness of the profession for the

full implementation of the LPA as a guest editorial as that page is widely read and, therefore, the article would receive the much-needed focus by the profession. Mr Stemmett was chosen as author because of his involvement in the National Forum on the Legal Profession (NF). The hard work he did during his tenure as a member of the NF made him the ideal candidate to write a guest editorial on the readiness of the profession for the full implementation of the LPA. □

Response from Jan Stemmett

Lutendo Sigogo's criticism against me and the *De Rebus* Editorial Committee is both uncalled for and not founded on facts. I never sought to promote myself by agreeing to write the guest editorials, but to inform the readers of crucial issues, including the hurdles, the profession faces in the implementation of the Legal Practice Act 28 of 2014. On reading the guest editorials it is clear that this is all it does.

Criticism is welcomed when it is constructive and it promotes the development of solutions, but it will serve no purpose to respond to Mr Sigogo's article when it is clear that his opinions and conclusion are based on incomplete information.

Mr Sigogo and I served on the National Forum on the Legal Profession before he left to become the President of the Law Society of the Northern Provinces, we enjoyed a good working relationship. I can

only hope that now that we are serving on the new Legal Practice Council, we can again cooperate constructively, in the best interest of the profession and the public.

Jan Stemmett is a member of the recently elected Legal Practice Council. □



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

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RISKALERT

NOVEMBER 2018 NO 5/2018

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RISK MANAGEMENT COLUMN

IS YOUR PRACTICE READY FOR THE LEGAL PRACTICE ACT?

The publication of this edition of the *Bulletin* will coincide with the full implementation of the Legal Practice Act 28 of 2014 ('the Act').

It is trite that the regulatory regime under which the South African legal profession operates will undergo a fundamental change under the Legal Practice Act. Every legal practitioner will be affected by the Act and the new rules for the profession to be introduced under the new legislative and regulatory regime.

Some of the new concepts introduced in the Act and the rules are:

- Aligning the legislative framework of the legal profession with constitutional imperatives;
- Setting norms and standards for legal practitioners;
- Regulating the professional



Thomas Harban,
Editor

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conduct of legal practitioners to ensure accountable conduct;

- Setting new requirements for continuing professional development (CPD); and
- Ensuring the accountability of legal practitioners to the public.

RISK MANAGEMENT COLUMN continued...

It remains to be seen how the concept of ensuring accountability of legal practitioners to the public will affect the legal duty of practitioners and their liability for claims. Compliance with the Act and the rules will require that practitioners study the provisions of the legislation carefully and, where necessary, make changes to the manner in which their practices are structured and legal services are rendered to the public. For example, with regards to fees charged in respect of legal services, the provisions of sections 35(7) to (12) must be complied with and the agreements with clients must be documented in a written document and signed by the parties. The areas covered in the rules include:

- Accounting;
- The need for internal controls;
- Reports to the Legal Practice Council in the event of non-compliance;
- The responsibility for ensuring compliance;
- The reporting requirements;
- Reports of dishonest or irregular conduct; and
- The rules applicable to investment practices.

The rules in general and the accounting and investment rules in particular must be read within the broader legislative compliance environment, including the compliance with the Financial Services and Intermediaries Act 37 of 2002 (the FAIS Act), the Financial Intelligence Centre Act 38 of 2001 and good governance practices.

Practitioners must take account of the changed legislative requirements



in assessing the risk environment in which their practices are conducted. The article by Simthandile Myemane in this *Bulletin* explains the importance of correctly designating investment accounts in the changing regulatory environment.

Effective risk management in a law firm is often said to be a matter of the application of principles of common sense. However, there are common errors made in legal practices which could lead to professional indemnity claims against firms as demonstrated in the contribution by Marius van Staden and Stephen Leinberger. There are a number of important lessons to

be learned from the cases referred to – sometimes the ‘war stories’ from the cases highlighted provide the best lessons.

It is hoped that the new regulatory regime will be positively embraced by the profession and that the dawn of the new regulatory era will usher in a new attitude to risk management in legal practices. All the articles in this edition of the *Bulletin* make reference to the Act.

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PRACTICE MANAGEMENT

THE INCREASED IMPORTANCE OF CORRECTLY DESIGNATING INVESTMENTS ACCOUNTS

Article by:
Simthandile K Myemane
Practitioner Support Manager
of the Attorneys Fidelity Fund

The importance of correctly assigning various trust account investments in a law firm will become more stringent under the Legal Practice Act 28 of 2014 ('the LPA'). The following sections explore the differences in the various investments accounts that legal firms can open, and the reasons why correct assignment of the investments account has become even more important.

In terms of the current Act, the Attorneys Act 53 of 1979, a legal firm can open trust investment accounts, referred to as trust savings or interest bearing accounts, in terms of two sections of the Act, s78(2)(a) and s78(2A). Legal firms will continue to open these types of trust investment accounts under the LPA in terms of s86 (3) and s86 (4), respectively.

Legal firms do from time to time deposit client's monies in investments when they do not provide legal services, have concluded a mandate that was received from the client and/or also invest on behalf of their own staff. These types of investments are not the investments authorised by rules 55 and 56 of the draft rules. These types of investments are subject to different legislation, the Financial Ad-

visory and Intermediary Services Act 37 of 2002 ('the FAIS Act'). Below are a few scenarios to demonstrate such investments:

- A client, ex client or member of staff of a law firm deposits money with the legal firm purely for purposes of investment of the funds, with no legal services rendered to the client or member of staff by the firm. This also applies to clients of a law firm where there are ongoing legal service provided, but monies not intended for the specific legal service being rendered, are deposited for purposes of investment on behalf of the client.
- A legal firm may provide legal services to a client in a matter e.g. litigation, conveyancing. The mandate is concluded by the firm, and the legal firm accounts to the client as re-

quired. The client, for some reason or another, instructs the firm to hold on to the funds until further notice. Such monies that the legal firm continues to hold on behalf of the client, with no ongoing legal services provided, should be invested in terms of the rules, and not in terms of the section to the Act.

The Attorneys Fidelity Fund (the Fund) provides protection for the investments made in terms of the Act (s) in case of theft or misappropriation of funds entrusted to the attorney. However, the Fund does not provide any cover for theft or misappropriation of client money invested in terms of the rules.

On the next double page spread is a comparison of the various investment accounts:



PRACTICE MANAGEMENT_{continued...}

Characteristics	Attorneys Act (current)		Legal
	s78(2)(a) investments	s78(2A) investments	s86(3) investments
Description	Money not for a specific client, funds in the trust account	Money for a specific client for legal services rendered	Money not for a specific client, funds in the trust account
Mandate	No client mandate, at the discretion of the legal firm	Client mandate required prior to investment	No client mandate, at the discretion of the legal firm
Interest earned	Interest earned due to the Fund	Interest earned due to the client – legal firm entitled to a reasonable fee	Interest earned due to the Fund
	Interest may be paid over to the Fund or through its nominee annually, by the end of May	Interest due to client on early termination or completion of mandate	Interest accrued in respect of any period ending on the last day of February in each year shall, on or before the last day of May in that year, be paid to the Fund or its nominee
Protection by the Fund	Theft or misappropriation covered by the Fund	Theft or misappropriation covered by the Fund	Theft or misappropriation covered by the Fund
Other legislation / regulations	Uniform rules	Uniform rules	LPA rules
Accounting to client	No requirement – money not for a specific client	Accounting to client required upon early termination or completion of mandate	No requirement – money not for a specific client
Pooling of investments	Not applicable	No pooling – each client investment to be opened separately and endorsed in terms of the section	Not applicable
Accounting records	Legal firm to maintain accounting records	Legal firm to maintain accounting records	Legal firm to maintain accounting records

PRACTICE MANAGEMENT_{continued...}

Practice Act (future)	Uniform Rules (current)	LPA Rules (future)
s86(4) investments	Rule 36 investments	Rule 55 investments
Money for a specific client for legal services rendered	Money for a specific client, no legal services rendered	Money for a specific client, no legal services rendered
Client mandate required prior to investment	Client mandate required prior to investment or as soon as possible after investing funds for that client	Client mandate required prior to investment or as soon as possible after investing funds for that client
5% of interest earned due to the Fund (s86(4)(b)) - legal firm entitled to a reasonable fee	Interest earned due to the client - legal firm entitled to a reasonable fee	Interest earned due to the client - legal firm entitled to a reasonable fee
5% of interest accrued on money deposited during the course of a calendar month or on maturity shall be paid over to the Fund or its nominee on or before the last day of the next succeeding calendar month	Frequency of interest payment agreed with client	Frequency of interest payment agreed with client
Theft or misappropriation covered by the Fund	Client enjoys no protection for theft or misappropriation - legal firm to inform the client upfront	Client enjoys no protection for theft or misappropriation - legal firm to inform the client upfront
LPA rules	FAIS Act	FAIS Act
Accounting to client required upon early termination or completion of mandate	Accounting to client required at least annually on income earned or other charges made by the legal firm in carrying out the mandate	Accounting to client required at least annually on income earned or other charges made by the legal firm in carrying out the mandate
No pooling - each client investment to be opened separately and endorsed in terms of the section	No pooling - each client investment to be opened separately	No pooling - each client investment to be opened separately
Legal firm to maintain accounting records	Legal firm to maintain separate accounting records	Legal firm to maintain separate accounting records

PRACTICE MANAGEMENT_{continued...}

What could go wrong?

A legal firm can easily assign an investment to an incorrect section, and this has happened. In terms of the current legislation, interest earned on both investments made in terms of s78 (2A) and in terms of the rules is due to the client, with the law firm entitled to a reasonable fee for administering the investment.

However, in terms of the LPA, an investment in terms of the rules may be incorrectly designated as a s86 (4) investment. As already reflected in the comparison table above, 5% of interest earned on a s86(4) investment will be due to the Fund (s86(4)(b)) with theft or misappropriation arising out of these investment enjoying protection by the Fund. On the other hand, no portion of an investment in terms of the rules is due to the Fund, and

theft or misappropriation thereof enjoys no protection by the Fund. With this understanding, incorrectly designated investments made in terms of the rules may result in 5% of interest earned paid over to the Fund or through its nominee.

As already indicated, there is no protection by the Fund for such investments. Should this incorrect designation happen, resulting in a portion of the interest paid over to the Fund, the onus will be on the law firm to correct, and to recover the incorrectly paid interest, which process will involve a lot of administration and expose the firm to potential liability. Legal practitioners are therefore cautioned to ensure proper opening of the accounts, and designation thereof, in order to avoid any mistakes that could result in intensive administrative processes.

Conclusion

Law firms should ensure that staff vested with the responsibility to open and administer the various investments are well empowered in understanding the differences and impact of these investments. Sufficient oversight should also be provided to staff so vested with the responsibility to ensure that mistakes are picked up and corrected in time. The ultimate responsibility for correctness of the transactions lies with the legal practitioners in a firm.

Legal firms involved with investments in terms of the rules should also ensure compliance with all applicable legislation and regulations, including, but not limited to, registering with the Financial Sector Conduct Authority (FSCA) and obtaining a Financial Services Provider (FSP) licence.

OBSERVATIONS OF ATTORNEYS' PRACTICE PITFALLS AND PREVENTION OF PROFESSIONAL NEGLIGENCE CLAIMS

Article by:
By Marius van Staden and
Stephen Leinberger, Savage
Jooste & Adams Inc

Introduction:

Our firm serves on the Attorneys Insurance Indemnity Fund NPC ('the AIIF') panel of attorneys.

This article canvasses risk management considerations, with the benefit

of hindsight, in particular considering certain matters that our office has handled, matters that raised mental alerts and inform risk management measures. While some of the problems are novel, others are common. Naturally, the common problems are the biggest problems, and the most preventable ones.

Attorneys, rightly or wrongly, are often sued for professional negligence. Apart from the obvious disastrous consequences of the attorney's conduct for the client herself, there is the capital exposure to the profession, the

cost exposure to the AIIF for claims that could, in any event, have been avoided, and the negative impact on the reputation of the profession as a whole, that is concerning.

With the introduction of the Legal Practice Act 28 of 2014 attorneys should, now more than ever before, ensure that they render an effective service to the public. The consequences, should they not, impact on the whole profession. With the trade union function of the statutory regulatory bodies disappearing, the attorneys' protagonist voice is being limited and negative profession-

PRACTICE MANAGEMENT^{continued...}

al behaviour and publicity may receive disproportionate publicity.

We as attorneys must ask ourselves what our profession means, what it stands for, and uphold those values. Being an attorney is not merely a process of garnering fees to make a living. It is much more than that. It is serving the public according to a time-honoured set of values. If we do not serve the public, we do so at our peril.

With this in mind, we now turn to a discussion of specific problems, encountered by our office in handling claims, which could have been avoided. In order to protect attorney and client privilege we do not mention the names of the cases or the parties involved. We also emphasise that our comments on the values of the profession do not reflect on any of these cases. We rather regard these cases as a springboard in order to reflect on these values.

What precludes an attorney from issuing summons?

In *Case A*, an instruction was taken over from the insured-defendant before issue of summons against the Road Accident Fund (“the Fund”). Summons was then not issued and the defendant was sued on the basis that he allegedly did not cooperate and provide his file contents, which precluded the plaintiff from issuing summons against the Fund. The court found against the plaintiff, and ordered *de bonis propriis* costs against the plaintiff’s attorney, who also testified in the matter.

The pith of the problem the court found with the plaintiff’s case was this: What exactly precluded the plaintiff’s attorney from issuing summons against the Fund? If an attorney extracts proper instructions in consultation with his or her client, he or she either knows, or is able to determine, when a cause of action arose, where geographically, and who is responsible.

That is usually all that is required for an attorney to issue summons, particularly against the Fund. Furthermore, these are instructions that one can take at the very first consultation with a client.

First and foremost, therefore, an attorney should perform the essentials of his or her mandate, taking instructions, when meeting with his client for the first time. “Taking instructions” means literally that; the attorney is told what happened and asks clarifying questions. Taking instructions does not only mean accepting a client’s mandate.

Under-settlement against best advice:

In some cases, attorneys settle an action on the express instructions of the plaintiff, who indicated that he or she wanted the money immediately. In *Case B*, the attorney advised the plaintiff that he should consult an expert so that the attorney could properly assess the claim, but the plaintiff was insistent that the matter be settled without the conclusion of the expert report, and it was accordingly settled. The attorney’s advice was not reduced to writing and the plaintiff issued summons against the attorney shortly thereafter.

The court *a quo* found that the attorney was negligent. The matter is on appeal, and the appeal court will have to make some decisive findings on the extent of an attorney’s mandate. Had the attorney reduced his advice to writing, it would have assisted the court *a quo*’s task. The oft repeated lesson to be learned is this: reduce your advice to writing. It not only creates certainty, but also serves as part of your testimony.

In *Case C*, the attorney settled on the express instructions of the plaintiff’s mother, who was severely indigent, and required the funds on an urgent

basis. The attorney relied on the mother to sign a disclaimer. Years later the attorney was sued by a *curator ad litem* on behalf of the plaintiff (now an adult), the mother having passed away in the interim.

An attorney must be doubly careful when the client is a minor, and must act in the best interests of the minor, even though instructions emanate from a guardian. An attorney cannot be excused for having taken instructions from the parent, where settlement may not be in the interests of the ultimate client, the minor. If the parent acts contrary to the attorney’s advice, or not in the best interests of the minor, it is best that a *curator ad litem* be appointed.

If a client does not accept an attorney’s advice, an attorney can of course withdraw as attorney of record, but this can have grave consequences for a plaintiff, especially at advanced stages in litigation. See generally *Food & Allied Workers Union v Ngcobo and Another* 2013 (12) BCLR 1343 (CC), which serves as authority for the proposition that mandatories may only withdraw if they do so timeously, so as not to prejudice their mandator.

The lesson from all of this is that, when advising a client, if there are indications that the settlement would not be in the best interest of the client, it is important for an attorney to either refer the client to an expert or, if the client refuses, to create a paper trail reflecting the attorney’s advice not to settle. Even the latter, however, will not protect the attorney against liability if the ultimate client is a minor. Ultimately an attorney must act in the best interests of his client, even at the risk of losing the client.

File audit, instruction taking and proactivity:

In *Case D* the action became dormant and “died a natural death” in the of-

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file of an attorney, for want of instructions. The mortality of the file took its course and the file was ultimately destroyed. Many years later the attorney was sued for allowing the claim to prescribe. The obvious difficulty facing the attorney was establishing the facts surrounding the matter, having closed the file with no available documentation.

Even if the attorney does not hear from the client, and believes the client has lost interest in the matter, he should still go to the trouble of contacting the client, before destroying his file. This may of course not always be possible. However, in such case then the attorney should not destroy the file.

It must be noted that courts take a hard stance against defendant attorneys who allege that they could not obtain instructions from their clients. In this regard see *Mazibuko v Singer* 1979 (3) SA 258 (W) and *Mlenzana v Goodricke & Franklin Inc* 2012 (2) SA 433 (FB). It is of utmost importance that an attorney should confirm instructions and, as previously mentioned, maintain a paper trail. It is, furthermore, of utmost importance that attorneys report to clients on a regular basis.

Attorneys must be proactive, should conduct a proper regular audit of files so as to apprise themselves of developments, or lack of developments, be clear about their instructions, and must report to clients on a regular basis. This will have the effect of taking proper instructions and avoiding prescription. Reviews should be conducted on all files and, where necessary and appropriate, consideration should be given to closing files with the knowledge of the clients.

Protection of funds:

In case E, an attorney settled a claim against the Fund on behalf of a plaintiff who had sustained a severe brain

injury in a motor vehicle accident, which brain injury rendered him incapable of managing his own affairs. Albeit that an expert had informed the attorney that the plaintiff was incapable of managing his own affairs, the attorney failed to act on the expert advice, and failed accordingly to appoint a *curator bonis*.

The result was that the plaintiff squandered his funds, and after the plaintiff's new attorney arranged for the appointment of a *curator bonis*, summons was issued against the erstwhile attorney for professional negligence. The erstwhile attorneys' failure to take the necessary steps to protect the funds paid to the plaintiff amounted to a breach of mandate.

Ultimately, the attorney was liable for the figure which represented the difference between what remained of the plaintiff's funds and what had been squandered by the plaintiff.

Attorneys must be diligent and fastidious, and pay close attention to detail. Attorneys must take all steps necessary to protect their clients' interests according to the highest standards of the profession, which may include protecting their clients against themselves, in circumstances where brain damaged clients may be their own worst enemies.

Late presentation of neuropsychiatric sequelae:

In Case F, the attorney was sued for under settlement. The Fund was conceptually an alternative defendant, on account of the fact that the plaintiff was incapable of managing his own affairs, was incapable of furnishing instructions to the attorney, and the attorney accordingly had no authority to settle the action against the Fund. The claim against the Fund in the original matter accordingly remained "open". The plaintiff accordingly had a choice which defendant to sue, the Fund or

the attorney.

The lesson to be learned is this: If there are any indications whatsoever of cranial injury, and neuropsychiatric *sequelae*, an expert must be briefed long prior to the quantum assessment stage, even perhaps before issuing summons or concluding settlement, to provide a recommendation as to whether the plaintiff is capable of handling his or her own affairs. Obviously, the appointment and report of an appropriate expert could have the effect that it shows that the claim has not become prescribed.

An attorney can only take instructions from a client who has the mental capacity to furnish instructions. When a client does not have that capacity, due to brain injuries incurred in an accident, the attorney is not mandated to act on behalf of the client and reach a valid settlement. A settlement reached under such circumstances can be set aside and summons issued anew against the Fund. Further, by the very serious nature of a brain injury which incapacitates a client, the quantum of the client's claim would be high. Attorneys should be extremely cautious when there is any suggestion of a brain injury, rather consult appropriate experts and have a curator ad litem appointed if the reports show a lack of capacity.

Conclusion:

These are general observations of matter dealt with by us. It is hoped that this article does not serve the purpose of criticising practitioners, but rather alerting them to possible practice pitfalls. Prevention is, after all, better than cure. As professionals we should recommit ourselves to serving the public in accordance with the time-honoured values of the profession.