

## REVISITING THE TERM 'COMMUNITY' IN THE SOUTH AFRICAN CONTEXT

The expert witness and the  
art of listening

To prove or not to  
prove? *Novus actus  
intervenians* in  
third-party claims

Is the secondary role of the  
NCA preventing a South  
African financial crisis?

**Citizenship dilemma:**  
Denying identity numbers  
to children of permanent  
residency holders

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The recent Land Claims Court (LCC) matter, *Elambini Community and Others v Minister of Rural Development on Land Reform and Others* (LCC) (unreported case no LCC88/2012, 30-5-2018) (Meer J) makes for interesting reading. This matter was a claim for restitution of rights in land by the Elambini Community. The claim before the LCC for adjudication, was a claim in terms of s 2(1)(d) of the Restitution of Land Rights Act 22 of 1994 – the section which entertains a claim of a community that was dispossessed of rights in land in South Africa (SA). In this article, **Udo Richard Averweg and Professor Marcus Leaning** discuss restitution of rights in land and the term 'community', which are both significant topical discussion points in SA.

### 22 Citizenship dilemma: Denying identity numbers to children of permanent residency holders

**Nokuthula Ndlovu** writes that a 'permanent resident' is a 'person having permanent residence status in terms of the Immigration Act' (South African Citizenship Act 88 of 1995). The Immigration Act 13 of 2002 as amended in 2004 provides in s 25(1): 'The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.' The Identification Act 68 of 1997, provides for the issuing of identity documents is applicable to South African citizens and persons who are lawfully and permanently resident in the Republic in terms of s 3. This means that a permanent resident is actually a citizen of South Africa (SA) as permanent residency is issued in terms of s 25 of the Immigration Act, which also awards the rights and obligations of a citizen to a permanent resident. Then why does the Department of Home Affairs not grant the infants of valid permanent residency holders identity numbers on the basis that permanent residency holders are not South African citizens?

### 24 The expert witness and the art of listening



If one starts to pay closer attention to the default manner of listening, many of us may surprise ourselves in observing how much of the time less listening is taking place, but rather more waiting to reply; formulating the next question; moving on with the assessment process and/or adding a personal view of some kind. Although this is a commonly expressed notion, the practice of changing the habit continues to fall short far too often. **Elise Burns-Hoffman** writes that the avoidance of sliding down the slippery slope of inadequate listening, and into the bowels of the 'frenzy' of the working world, relies on the practice of daily mindfulness.

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# LPA changes: The new normal

2018 was an eventful year, the enactment of more sections of the Legal Practice Act 28 of 2014 (LPA) that will change the landscape of the legal profession for years to come. Legal practitioners will have to grapple with the fact that these changes will have some type of effect on the way they practise. What do all these changes mean for legal practitioners? What changes will you as a legal practitioner have to implement to ensure that your practice is in line with the LPA?

One of the changes that has been brought about by the LPA is that the Attorneys Fidelity Fund is now called the Legal Practitioners Fidelity Fund. In relation to Fidelity Fund Certificates, s 84 of the LPA states:

'(1) Every attorney or any advocate referred to in section 34(2)(b), other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practices or is deemed to practice -

(a) for his or her own account either alone or in partnership; or

(b) as a director of a practice which is a juristic entity, must be in possession of a Fidelity Fund Certificate.

(2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund Certificate.

(3) The provisions of subsections (1) and (2) apply to a deposit taken on account of fees or disbursements in respect of legal services to be rendered.'

Since the provincial law societies no longer exist, their regulatory functions have been taken up by the Legal Practice Council (LPC) and through delegated authority the Provincial Councils. The offices of the former provincial law societies are now operating as regional offices of the LPC, practitioners can contact those offices to obtain Fidelity Fund Certificates. To obtain a Fidelity Fund Certificate, legal practitioners must satisfy the following requirements -

- pay an annual contribution of R 345 (including VAT) to the LPC for issuing of the certificate;
- prove that they have completed the Practice Management Training before applying for the certificate, subject to provisions of r 27.1 of the Legal Practice Act Rules;
- timeously submit trust account audit report/s (in respect of all practices in which the legal practitioner is either sole practitioner/partner/director) approved by the LPC; and

- complete the application, which now also includes the Attorneys Insurance Indemnity Fund risk questionnaire.

In preparation for the application process, legal practitioners must be ready with the following information in respect of all practices that they are linked to as either sole practitioner/partner/director:

Trust account/s balances for the previous four quarters ended (31-12-2017; 31-3-2018; 30-6-2018 and 30-9-2018) for the following accounts -

- s 86(2) - to be reported individually for each s 86(2) account held by the practice per financial institution;
- s 86(3) - to be reported individually for each s 86(3) account held by the practice per financial institution;
- s 86(4) - total balances to be reported per financial institution;
- a breakdown of the reported balances, for example, what portion was for conveyancing/litigation/estates/commercial/etcetera, in terms of values. Please note that this breakdown is compulsory;
- estates - total balances to be reported per financial institution; and
- properties (other entrusted assets) - total balances to be reported.

The LPA has come into operation as follows:

- Chapter 1 - Definitions, application and purpose.
- Chapter 3 - Regulation of legal practitioners: This includes s 35 with the exclusion of subss 35(1), (2), (3) and (7) up to and including (12) which deal with fees for legal services. The Law Society of South Africa (LSSA) wrote to the Justice Minister some time ago requesting the suspension of these subsections

until the investigation by the South African Law Reform Commission (SALRC) has been completed and there has been proper consultation. This means that only subss (4) and (5) of s 35 relating to the SALRC investigation on fees for legal services and s 35 (6) legal fees payable by government, will come into operation.

- Chapter 4 - Professional conduct and discipline, excluding:

- s 37(5)(e)(ii) - lay persons on disciplinary committees (DCs);

- s 40(1)(b)(ii) and (7)(b) and s 41 - right of appeal against DCs' findings

- s 42 - monitoring of disciplinary functions by the Ombud.

- Chapter 6 - Legal Practitioners Fidelity Fund.

- Chapter 7 - Trust money and accounting.

- Chapter 8 - General provisions, excluding s 93(5) - Offences relating to the Ombud.

- Chapter 9 - Regulations and Rules, excluding s 95(2), which deals with the rules relating to the Ombud.

- Chapter 10 - Part 3 - Transitional provisions; and Part 4 - Repeal of laws.

During the next few months many changes will be taking place, practitioners are advised to keep abreast of the developments in the profession. Legal practitioners will have many questions during this time as they navigate their way into their new normal. The LSSA has set up a questions and answers page on their website for practitioners to ask questions pertaining to the LPA and the LPC, see page 14.

Mapula Sedutla - Editor



*The De Rebus Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year.*

*De Rebus will be back in 2019 with its combined January/February edition, which will be sent out at the beginning of February 2018.*

*De Rebus staff, back from left: Kgomotso Ramotsho, Kevin O'Reilly, Shireen Mahomed and Isabel Joubert.*

*Seated from left: Kathleen Kriel and Mapula Sedutla.*

# 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.

### Happenings at the Gauteng Division and Limpopo Division of the High Court

I would like to discuss what happened in the Gauteng Division of the High Court in Pretoria, as well as the Limpopo Division of the High Court in Polokwane and ask for the views of other legal practitioners regarding the current state of our courts.

The judgment (*Nedbank Ltd v Thobejane; Firststrand Bank Ltd v Malatjie and Another; Standard Bank of South Africa v Mpongo; Absa Bank Ltd v Van der Merwe and Another; First Rand Bank Ltd v Mahlangu; Standard Bank of South Africa v Wooditadpersad and Another; Nedbank Ltd v Sonko; Standard Bank of South Africa Ltd v Nkwinika; Firststrand Bank Limited v Langbehn and Another; Standard Bank of South Africa v Lempe; Standard Bank of South Africa v Goeieman and Another; Absa Bank Limited v Igwilo and Another; Absa Bank Ltd v Pillay and Another* (GP) (unreported case no 84041/15; 93088/15; 99562/15; 36/16; 736/16; 1114/16; 1429/16; 3429/16; 6996/16; 16228/16; 29736/1; 30302/16, 26-9-2018) (Tolmay J (Ledwaba DJP and Mothle J concurring)) regarding monetary jurisdiction, which was handed down in September in the Pretoria High Court, is mostly based on the court's issue regarding space and the court being 'clogged up'. How is this based on law or the rule of law? Is it not the court's administration who should attend to the need of finding space for all the files? As it is, legal practitioners are not able to access old files, which are stored at the court's offsite storage due to unpaid fees to the storage company. The storage company is refusing to release those files, as the court staff have advised legal practitioners as to why files cannot be accessed. A judgment has come out in a court with concurrent jurisdiction stating which matters can be heard before the court. What law is this based on? Is the court not supposed to sort out their internal administration issues themselves and not make it the public's problem? The plaintiff has the right to choose out of which

court they want to litigate. On which rule can a judge make the order curbing the plaintiff's right to approach the High Court?

At the Gauteng Division of the High Court there are registrars raising queries, which are self-explanatory, but they still raise these queries, causing a backlog, not only for the plaintiff, but also for the court. For example, a recent query by a registrar was where a plaintiff proceeds with legal action against a juristic entity with sureties, the registrar is of the opinion that the plaintiff may not proceed against the sureties and that those prayers should be removed as the plaintiff is not entitled thereto. Kindly advise on this issue?

The next court with many issues is the Limpopo Division of the High Court in Polokwane. There appears to be a rationale that the court favours the consumer, regardless of the facts before it, namely a consumer's breach of agreement. Before counsel even makes submission, the court has already decided that the 'big bad bank' should be more sympathetic to the consumer. Is this not prejudicial and biased towards the plaintiffs? Is the court not supposed to be objective and hear both sides before deciding in favour of a consumer who has been afforded leniency and opportunities to remedy the issue with the plaintiffs? A legal practitioner will now stand before the court and the court defends the matter, treating an unopposed matter as a summary judgment opposing the matter on behalf of the consumer. How is this objectivity?

There is no uniformity at the Polokwane High Court. Every week matters are being removed and struck off the roll because the court feels that more should be done to assist consumers. Some of these matters have been before the court a few times and have been remanded for a different reason every time. Even when one complies with what the court has requested, the matter is placed before the court again and the court finds a new reason to raise concern. My question is what does the court want? Does the plaintiff not have the right of recourse against defaulting consumers or is the court just there



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for the consumer's protection? This has come to the extent that a judge actually asked a counsel why they were so insensitive, why do they not show sympathy for the consumer? How is this showing objectivity by the court? Is showing sympathy for one or the other party not stating that you do not condone what the other party is doing and thereby choosing a side?

I would like to hear whether other legal practitioners have had similar experiences.

*Anonymous*, Pretoria

## Full Bench judgment by Tolmay J (Ledwaba DJP and Mothle J concurring)

Coming out of the Gauteng Division of the High Court, Pretoria, Tolmay J (Ledwaba DJP and Mothle J concurring) made the following order in *Nedbank Ltd v Thobejane; Firststrand Bank Ltd v Malatjie and Another; Standard Bank of South Africa v Mpongo; Absa Bank Ltd v Van der Merwe and Another; First Rand Bank Ltd v Mahlangu; Standard Bank of South Africa v Wooditadpersad and Another; Nedbank Ltd v Sonko; Standard Bank of South Africa Ltd v Nkwinika; Firststrand Bank Limited v Langbehn and Another; Standard Bank of South Africa v Lempe; Standard Bank of South Africa v Goeieman and Another; Absa Bank Limited v Igwilo and Another; Absa Bank Ltd v Pillay and Another* (GP) (unreported case no 84041/15; 93088/15; 99562/15; 36/16; 736/16; 1114/16; 1429/16; 3429/16; 6996/16; 16228/16; 29736/1; 30302/16, 26-9-2018) (Tolmay J (Ledwaba DJP and Mothle J concurring)):

'To promote access to justice as from ... 2 February 2019 civil actions and/or applications, where the monetary value claimed is within the jurisdiction of the magistrates' courts should be instituted in the magistrate's court having the jurisdiction, unless the High Court has granted leave to hear the matter in the High Court.'

This matter raised two concerns but for the purpose of this letter I will only focus on the court's first concern, which is the ever-increasing tendency by litigants, mainly banks and other commercial institutions, to enrol the High Court in, foreclosure applications with amounts falling within the jurisdiction of the magistrate's court.

The above judgment raises a concern when taking into account that the magistrate's court is a creature of statute. In the case of *Absa Bank Ltd v Mokebe; Absa Bank Ltd v Kobe; Absa Bank Ltd v Vokwani; Standard Bank of South Africa Ltd v Colombick and Another* (GJ) (unreported case no 2018/00612; 2017/48091; 2018/1459; 2017/35579, 12-9-2018) (Tsoka, Pretorius and Wepener JJ) Tsoka J held that in all matters where execution is sought against a primary residence, the entire claim including the monetary judgment, must be adjudicated at the same time.

The monetary judgment is part of the cause of action. Where execution against immovable property is concerned and the issues are connected and must be brought in one proceeding and not piecemeal. Tsoka J outlined that all the facts should be placed before the court to sustain relief.

Against the above background it is important to inquire whether the magistrate's court has the power to adjudicate such matters and grant orders for monetary judgment, that property be declared as executable property and set a reserve price simultaneously.

On 17 November 2017 an amendment to the rules Regulating the Conduct of the Proceedings of the Provincial and Local Divisions of the High Court of South Africa were gazetted under GN R1272 GG41257/17-11-2017.

In terms of the notice, the rule change came into operation on 22 December 2017. The amendment is rather extensive and has a wide-ranging effect on the foreclosure process pertaining to loans secured by bond through financial institutions, as well as the subsequent execution process pertaining thereto.

It is for this reason that I write this letter that the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa does not entertain this aspect, nor does s 66 of the Magistrates' Courts Act 32 of 1944. It is of great importance that the Magistrates' Court Rules should be amended to enable magistrates to deal with foreclosure matters effectively, and subsequently to have the power to adjudicate matters where execution is sought against a primary residence simultaneously with monetary judgment.

*Teboho Lenake*, attorney, Pretoria

## Erratum

A paragraph in article, Brian Agar 'Maintenance of common property in sectional title schemes' (2018 (Oct) DR 19) was published incorrectly.

The paragraph 'The Sectional Titles Schemes Management Act' should read: 'The Sectional Titles Schemes Management Act 8 of 2011 (the Act) took effect on 7 October 2016. This legislation repeated previous laws, which required a body corporate to maintain common property, essentially the land and all improvements other than the owners' sections shown on the sectional plans. At the same time, it introduced a new provision, which required a body corporate to establish a reserve fund in addition to the administrative fund 'to cover the cost of future maintenance and repair of common property' (see s 3(1)(b) of the Act'.

*De Rebus* would like to apologise for the mistake and for any inconvenience caused.



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# The legal profession should tackle the issue of high legal fees

**T**he Law Society of the Northern Provinces (LSNP) held its last annual general meeting (AGM) on 29 September in Johannesburg. Keynote speaker Deputy Judge President of the Gauteng Division of the High Court, Aubrey Ledwaba, said when he looked at the attendees of the LSNP AGM, it gave him great pleasure as he saw many black and white female legal practitioners. He added that one could not have imagined that it could be possible for black and white legal practitioners to meet and share the same profession. He reflected on when he started his articles, he said it was during a difficult time. He pointed out that back then, there were less than 30 black female attorneys.

Deputy Judge President Ledwaba, addressed the AGM on access to justice. He said access to justice is defined in a restricted manner, which means that the accused must be legally represented, especially in criminal matters. He pointed out that the concept incorporates the promotion of equality and social justice, especially for the poor. He noted that this was the era where the Constitution, the state and the courts have a mandate to realise and protect the rights of the people contained in the Bill of Rights, including access to justice.

Deputy Judge President Ledwaba said legal books describe the South African Constitution as one of the best in the world. However, he pointed out that there must be an interrogation into whether an ordinary man or woman is born into a country where the Constitution benefits them. He asked if the ordinary person on the street thinks they have a Constitution that gives them access to the courts, a Constitution, which protects and encourages one to seek protection from courts?

Deputy Judge President Ledwaba said no one can deny that the reason why people do not go to court is because of the high legal fees they are charged by legal practitioners. He added that society is looking for courts that do not have too many formalities, the courts where people will not be intimidated when their cases are being presented. Deputy Judge President Ledwaba added: 'Our people expect to be assisted. We need to look at how can we assist institutions that can assist our people to bring cases to court'.

Deputy Judge President Ledwaba said one of the reasons why South Africans do not access the courts is because they think they will not be properly repre-



*Deputy Judge President of the Gauteng Division of the High Court, Aubrey Ledwaba, said the legal profession needs to address the issue of high legal fees.*

sented by lawyers who are offered by Legal Aid South Africa (Legal Aid SA). He added that he once heard someone saying using Legal Aid SA is like using a public hospital. He pointed out that he did not agree with the remark and said Legal Aid SA plays an important role in ensuring that the rights of those who cannot afford legal fees are protected.

Deputy Judge President Ledwaba, spoke on the cost of legal fees. He pointed out that some people think if they have more money they are assured to get better legal services. He said that there should be equal access to justice and equal justice, the fruits of justice are there for all to enjoy. 'I strongly believe that the Legal Practice Act [28 of 2014] will enhance access to justice by giving effect to transformational s 35(4) of the Legal Practice Act,' Deputy Judge President Ledwaba added.

Deputy Judge President Ledwaba noted that if one looks at s 35(4) of the Legal Practice Act (LPA), which states: 'The South African Law Reform Commission must, within two years after the commencement of Chapter 2 of the LPA, investigate and report back to the Minister of Justice with recommendations on the following:

- (a) the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people;
- (b) legislative and other interventions in order to improve access to justice by the members of the public;
- (c) the desirability of establishing a

mechanism which will be responsible for determining fees and tariffs payable to legal practitioners;

(d) the composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs;

(e) the desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and

(f) the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.'

'I quoted this section to show that in terms of the LPA it is expected of the South African Law Reform Commission to make recommendations to the minister of what I have mentioned,' Deputy Judge President Ledwaba said. He pointed out that high legal fees are a huge stumbling block in the challenge of access to justice. He added that he had come across a bill of costs where a legal practitioner charged the amount of R 30 000 for a matter that lasted 15 minutes and said it is unacceptable. Deputy Judge President Ledwaba said the legal profession should start to look into the issue of legal fees and resolve it. He added that it should be the profession that is going to make recommendations about legal fees to the Minister of Justice.

Deputy Judge President Ledwaba said with the new dispensation both attorneys and advocates will be called legal practitioners the only difference will be that some will be practicing as practitioners and others will be practicing as specialists. Deputy Judge President Ledwaba raised his concern about attorneys who did not want to appear in the High Court even when they have the Right of Appearance. He said these attorneys would still brief advocates about simple matters, such as divorce, or take a matter to the magistrate's court just to avoid appearing in the High Court because they have a phobia of appearing before a judge of the High Court. He added that previously some attorneys were afraid to go to court, because the Bench was dominated by white males, but added that the judiciary is transforming. An approximate 40% of the judges who are sitting on the Bench are from the attorneys' profession, he further mentioned that even the leadership of the High Court are from the attorneys' profession and not solely from the advocates' profession.

## Legal profession must help in land issues

The Executive Chairperson of the Zungu Investments Company, Sandile Zungu, spoke on the issue of land and the role of black people in agriculture. He said that black farmers were still stuck in time, not farming and not moving forward and remained consumers, while white farmers are acquiring the big markets. He added that the issue of agriculture is said to be the centre of the topic when it comes to land. He pointed out that the Broad-Based Black Economic Empowerment Commission and the legal profession needed to look at the issues of land with a magnifying glass and that the country needed to pay attention to the issue of water rights.

## Report by the ADF

Chairperson of the Attorneys Development Fund (ADF), Nomahlubi Khwinana, said the intention of the ADF is to assist newly appointed legal practitioners to enter the profession easily. The idea is to give these legal practitioners strategic business mentorship and technical support to ensure that they have sustainable practices.

Ms Khwinana added that for a legal practitioner to apply for assistance from the ADF, they are required to be an attorney, have practical management training and have a Fidelity Fund Certificate. The legal practitioner will have to provide a cash-flow and a business plan. She pointed out that with regard to the LPA it is on the ADF to accommodate all legal practitioners, which include advocates and attorneys. She noted that at the ADF's next AGM, amendments will be made to accommodate all legal practitioners.

Ms Khwinana added that the board of the ADF saw fit to include all legal practitioners to be able to get funding and not only newly appointed legal practitioners. She pointed out that the ADF does not give out cash to qualifying legal practitioners, instead they buy the resources needed by the legal practitioners so that they can use in their legal practice. She said that the ADF aims to improve the lives of legal practitioners in ensuring that legal practitioners are competitive in practising law and that, not only are they honest, but they are also ethical in their leadership.

## Update on the LPA

Executive member of the Legal Practice Council (LPC) and attorney, Jan Stemmet, gave an update on the LPA. He started by giving the latest demographics of attorneys in the country. He said the legal profession consists of 43% black attorneys. He added that female attorneys amount to 40%, he noted that the percentages have advanced from two



*Chairperson of the Zungu Investments Company, Sandile Zungu, spoke at the Law Society of the Northern Provinces annual general meeting.*

years ago.

Mr Stemmet spoke about s 35 of the LPA, which deals with fees. He said there are concerns about two aspects in this section. The first one is with regard to fee tariffs on which the LPA states that the Law Reform Commission must investigate and report to the Minister of Justice. He added that there is a clause in the LPA that states that until such time as a regulation regarding fees is published, the Rules Board for Courts of Law must furnish maximum fees.

Mr Stemmet, however, said information had emerged that the Rules Board is not going to furnish rules regarding fees, but the Minister of Justice will make recommendations to the President that part of the LPA be implemented and wait for the Law Reform Commission to conclude its investigation. He added that of concern was s 35(7), which states that before a legal practitioner takes instruction from a client, they must give the client a detailed estimation of costs.

Mr Stemmet also spoke about candidate legal practitioners who wanted to know whether they can be admitted with a BProc degree. He said s 112 of the LPA provides that a BProc degree is still recognised. He pointed out that there are two sets of regulations, one of which was gazetted on 31 August, however, another set of regulations is pending approval by Parliament. Mr Stemmet pointed out that the rules were implemented on 20 July and are based on the Rules for the Attorneys' Profession, the Rules of the Advocates Profession and those of the Corporate Lawyers Association of South Africa that deal with non-practising legal practitioners who have also been brought in to be regulated in terms of the LPA.

Mr Stemmet said the nine provincial councils will be placed in each province in the jurisdiction areas of the High Courts. He added that there will be one uniformed structure that will regulate the whole legal profession in the country and for the first time in history the new structure will also include people who are not legal practitioners governing this structure.

Mr Stemmet pointed out that the interests of the legal profession will be taken care of by the Law Society of South Africa. He added that the elections of the provincial councils will still take place in future in terms of r 16, and an invitation for nominations will be sent out to legal practitioners, however, there are no time frames as to how long it will take.

Mr Stemmet said other priorities of the LPC, among others, is to see to it that they -

- accredit practical vocational training service providers;
- confirm examination arrangements;
- acquire a building for the LPC; and
- take over bank accounts of the four statutory provincial law societies from the effective date.

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# Young legal practitioners want to have roles in legal structures

**T**he Cape Law Society (CLS) held its last annual general meeting (AGM) in Cape Town in October. National Association of Democratic Lawyers (NADEL) member and attorney at Z Tshutshane Attorneys, Zuko Tshutshane, who was part of a panel discussing the legal profession through the eyes of young legal practitioners, said there is still some level of gate keeping and red tape that does not allow young legal practitioners – especially from poor backgrounds – into the profession.

Mr Tshutshane said the legal profession is not as accessible as it should be and it is refusing to transform. He said when looking at the demographics of the profession at university level, there are more female law students than male, but when looking at the profession those females have disappeared as there are more male legal practitioners. He added that young legal practitioners are not well represented in the different structures of the legal profession, such as at the recently appointed Legal Practice Council (LPC). He noted that young legal practitioners are needed in various legal structures to add their voices to the discussions and focus on issues that affect them as young legal practitioners.

Former Black Lawyers Association (BLA) Student Chapter President, Luyolo Mahambehhlala, added that when he looks at the legal profession, he sees it through the eyes of a young black legal practitioner. He said the challenges faced by young legal practitioners be-



*Former student chapter president of the Black Lawyers Association, Luyolo Mahambehhlala, spoke about challenges young black legal practitioners face at universities.*

gin when entering the legal profession through legal education. He pointed out that most young black legal practitioners come from rural backgrounds and in rural areas, where subjects are taught in native languages. He said black law students are faced with a challenge when they enter university, as most subjects are offered in English, and Board Examinations are drawn up in English and Afrikaans.

Mr Mahambehhlala said the profession needs to deal with legal education and language policies. He pointed out that the profession needs to tackle transformation and speak about the integration of young legal practitioners. He added that young legal practitioners are frustrated with the fact that challenges affecting them are not discussed in their presence at various structures.

Director at Jason Attorneys Inc, Tarryn Jason, spoke about the journey of starting her own practice as a young legal practitioner. She said through her journey she has gained valuable experience in both her personal and professional life. She added that experience is the key to perspective, which allows one to look at things from a different angle. She noted that through experience and perspective she is able to appreciate life in the legal profession.

Ms Jason said young legal practitioners must always be ready to learn. She pointed out that there is so much more to the legal profession than has been portrayed by the media or by television series. She added that the legal profession provides legal practitioners with a variety of ways

to practice and in areas of expertise one would not realise existed.

Ms Jason said the legal profession has many opportunities and law is not just about litigation and arguing in court, but about the hours of research that goes into it. It is the interpretation of the legislation and how legal practitioners apply it to best suit their clients. She added that it is complex solution finding that legal practitioners do on a daily basis.

Ms Jason said law brings social order. She added that when she decided to leave her pharmaceutical career to study law, she felt like the legal profession was a beacon of hope for anyone aspiring to be something honourable. She pointed out that law gives those who practice it the opportunity to give back to the community and the less fortunate. 'The legal profession is a great school of life, it gives us the ability to help those around us make good choices in life,' Ms Jason said.

## Reflection on the past

Past president and former councillor of the CLS, Daryl Burman, started his presentation by responding to the discussion that was held by young legal practitioners. He said young legal practitioners should not write off the older generation of the profession yet, as the older generation has a lot to offer. Mr Burman added that transformation has been evolving in the legal profession and it shows progress.

Past president and former councillor of the CLS, Sithembile Mgxaji, said the



*National Association of Democratic Lawyers (NADEL) member and attorney at Z Tshutshane Attorneys, Zuko Tshutshane, was part of the panel discussing the legal profession through the eyes of young legal practitioners, at the Cape Law Society annual general meeting.*



*Director at Jason Attorneys Inc, Tarryn Jason, spoke about the journey of starting her own practice as a young legal practitioner.*





**The longest serving member of the Cape Law Society (CLS) council, Peter Horn, reflected on his time as a council member of the CLS. He spoke about three highlights in his career over the years in the profession.**

participation of the BLA and NADEL in the legal profession was intended to make sure that there is transparency in governance of the legal profession. He added that BLA and NADEL started off by tackling an important matter, which is the issue regarding the disciplinary procedures of legal practitioners and how the processes have been handled. He said BLA and NADEL gave new perspective on disciplinary matters.

The longest serving member of the CLS council, Peter Horn, reflected on his time as a council member. He spoke about three highlights in his career over the years. Mr Horn said in the 50s and 60s in what was called the Bantu Divorce Court, he appeared in a divorce matter against the late Oliver Tambo. He said it was a great honour to have been on that matter.

Mr Horn added that in the 90s one of



**Past president and former councillor of the Cape Law Society, Sithembile Mgxaji, spoke about the role of the Black Lawyers Association and the National Association of Democratic Lawyers in the Cape Law Society and the legal profession.**

his proudest moments was the honour of presenting the International Peace Medal to the late President Nelson Mandela. Mr Horn referred to his friendship with the late Robert Sobukwe. He said they became colleagues and friends when they were working in Kimberley. Mr Horn pointed out that in his time at the CLS he served under 14 presidents and six directors. He added that through the years he has found it a rewarding experience serving as a councillor of the CLS.

Mr Horn said the experience he gained, gave him a new perspective of the legal profession. He said he loved serving on the council and will miss gatherings such as AGM's, where friends in the legal profession would gather.

Mr Horn noted that in his personal observations the recent past relationships between constituents has not been a great one. He pointed out that the Legal Practice Act 28 of 2014 (LPA) must address the matter. He added that those representing legal practitioners must move away from self-interest and hidden agendas, but rather work in the interest of legal practitioners and in the interest of the public.

Western Cape Division of the High Court Judge, Taswell Papier, said the legal profession has come a long way. He added that the achievements are very significant and having recognised that, there is still a long way to go. He pointed out that progress has been made and the foundation has been laid.

Judge Papier said the objective of the LPA is an exciting birth for the attorneys Bar. He pointed out that he had refused to refer to the attorney's profession as a side Bar. 'We fought for the equalisation of the profession, we are all legal practitioners,' Judge Papier added. He noted that the myth about advocates being above attorneys should be dispelled.

Judge Papier pointed out that the LPA must be claimed by the legal practitioners and the legal profession and moulded into a document that is to be transformative in its objective and inspiration going forward. He added that the legal profession needed a new generation of legal practitioners who work differently and smarter.

## Discussion on the LPA

The BLA President and Executive member of the LPC, Lutendo Sigogo, said chs 1, 3, 4, 6, 7, 8 and 9 of the LPA became operational on 1 November. Chapter 5 would not come into operation as yet as it deals with the Ombud and the Ombud will only come into existence later. He added that s 35 will not be operational as yet, but only the section that deals with the Law Reform Commission. Provisions dealing with introduction of tariffs and cost estimates will be suspended.

Mr Sigogo pointed out that top of the



**Western Cape Division of the High Court Judge, Taswell Papier, said despite achievements and progress made in the legal profession, there is still more that needs to be done.**

list for the LPC, is the appointment of the disciplinary committee; the governance committee, which will start with policies and transformation; and the finances and life of the committee. He said the LPC will also look at the regulations dealing with elections of the provincial council. He added that r 16 of the LPC rules needed to be re-drafted as it may delay the process of elections for provincial councils.

Member of the LPC, Krish Govender, answered a question posed to him with regard to the dress code of legal practitioners. He said much was said at the National Forum on the Legal Profession about the dress code. He said recommendations were made that the profession have a uniformed system for all legal practitioners.



**BLA President and Executive member of the LPC, Lutendo Sigogo, gave an update on the Legal Practice Act 28 of 2014 and the Legal Practice Council.**

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# Women's contribution to the legal profession is appreciated

**T**he South African Women Lawyers Association (SAWLA) Mpumalanga branch hosted a dinner in Mbombela to celebrate female legal practitioners who passed their Board Examinations and who have opened their own practices. Mpumalanga branch Chairperson of SAWLA, Nomaswazi Shabangu-Mndawe, said SAWLA saw it fit to thank and celebrate female legal practitioners who sat and wrote the difficult Board Examination and passed, as well as those who boldly decided to go out and practice for their own account. Ms Shabangu-Mndawe said when one starts one's own practice it is not an easy task, as there will be obstacles and challenges, however, she added that SAWLA wanted to show their appreciation to these female legal practitioners.

Chairperson of the Attorneys Development Fund (ADF) and SAWLA's national treasurer, Nomahlubi Khwinana, shared her experience of owning a practice. She said as a newly appointed legal practitioner one needs to know what is going to drive you to sustain a practice, whether it is the love of money, the love of the profession or the love for justice. Ms Khwinana said when she went into practice she could never have imagined having everything she now has and added that her reason for going into practice was simply to serve people.

Ms Khwinana pointed out that sometimes it gets difficult and things do not always run smoothly, but one must remember why one chose the legal profession. She added that legal practitioners must also have integrity. Ms Khwinana said when a client goes to a legal prac-



*The Mpumalanga branch Chairperson of the South African Women Lawyers Association (SAWLA), Nomaswazi Shabangu-Mndawe. The SAWLA branch hosted a dinner in celebration of female legal practitioners who passed their Board Examinations and who opened their own practices.*

tioner and tells them that they do not have enough money, but they need legal help, legal practitioners must be able to help those clients *pro bono*. She quoted former Public Protector, Thuli Madonsela, saying, 'I need to listen well so that I hear what is not said.' She added that legal practitioners must listen and apply *ubuntu* by being the best lawyers they can be.

## Motivation

Attorney, Daphne Pick, gave a motivational talk at the dinner. She said female legal practitioners are a force to be reckoned with and are here to stay. She added that the days when the legal profession was dominated by white male legal practitioners are gone. She pointed out that female legal practitioners have so much to offer the legal profession and said she is glad to see that the men in the legal profession are aware and respectful of the contribution of female legal practitioners.

Ms Pick told female legal practitioners to be passionate in what they do. She said a passionate woman is an unstoppable woman and added that a person should be passionate about their profession. She gave advice on how to continue having the best practice and to keep excelling in one's work. Ms Pick said one needs to continuously read, study and ask questions when one does not understand, because no one knows everything.

She pointed out that the minute someone thinks they know everything, they might be at risk of embarrassing themselves.

Ms Pick added that a passionate woman is a dedicated woman. She said one needed to put in extra work, be reliable, not lose ambition, stay positive and always be prepared. Ms Pick said that not all legal practitioners are conveyancers or litigators from the get-go. She stressed that one must not take instructions that one is not comfortable with. 'If you cannot read, study or ask your way through it, stay away from it,' Ms Pick said. She pointed out that good word spreads fast, but bad words spread even faster. She added that female legal practitioners needed to identify their weak points and work on them until they improve. She said female legal practitioners must take advantage of certain work that is said to be reserved for them and turn the work into opportunities.

Judge President of the Mpumalanga Division of the High Court, Frans Legodi, spoke on attributes of excellence. He told female legal practitioners at the SAWLA dinner that they had the ability to excel in their work and in the legal profession. He pointed out that one of the attributes of excelling is passion. He said 'passion is the first step to achievement, passion determines our destination in life. It increases our will power, it changes us, it makes the impossible possible, it fires the soul inside us.'

Judge President Legodi pointed out that passion is a good attribute for excellence, he added that he agreed with the statement: 'A person with good pas-



*Chairperson of the Attorneys Development Fund and SAWLA's national treasurer, Nomahlubi Khwinana, spoke at the SAWLA dinner held in Mbombela.*



*Attorney, Daphne Pick, gave a motivational talk at the SAWLA dinner hosted in honour of female legal practitioners in Mbombela.*





*Judge President of the Mpumalanga Division of the High Court, Frans Legodi, spoke on attributes of excellence. He was invited to give a motivational talk to female legal practitioners who were celebrated at the dinner.*

sion and few skills always performs or outperform a person with great skills and no passion.' He said there are peo-

ple who are seen to be geniuses, who should be capable of doing many things in life, but because of lack of passion they are outplayed by people with less skills, who are not geniuses but have a great amount of passion. Judge President Legodi added that he wants to see passion in female legal practitioners. 'I want to see you shaming your brothers in the legal profession when you appear before us. As you do so supposing I will be sitting on the Bench. I will be singing a self-composed song titled "passion and excellence before money,"' Judge President Legodi said.

Judge President Legodi pointed out that another attribute of excellence is responsibility. He said successful people are driven by excellence and excellence is a great motivator for successful people. He added that people who desire excellence and work hard to achieve it, are almost always responsible people. When they give their all, they live at peace with themselves. He noted that if one wants

to succeed in life, one must produce, and responsibility goes hand in hand with excellence. 'It cannot be right to accept instructions from a client and fail to execute the mandate to the best of your ability. It is almost like being fraudulent,' Judge President Legodi said.

Judge President Legodi added that another attribute of excellence is love for people. He said whatever one does best, it is important that one cares for the people around oneself. He pointed out that one cannot excel as a legal practitioner unless one has the intention to help someone in need. He said legal practitioners must be driven by concern for people and not by personal glory. 'A true successful and excellent legal practitioner is driven by the desire to serve people with excellence,' Judge President Legodi added.

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## The importance of *pro bono* work during the freedom struggle

**P**roBono.Org in collaboration with the Nelson Mandela Foundation hosted a dialogue on 11 October in Johannesburg. The dialogue was hosted to mark the centenary of the birth of the late President Nelson Mandela and dedicated to Mr Mandela the legal practitioner. The dialogue aimed to unpack the values and ethics that characterised the life of Mr Mandela, the legal profession and the relevance of re-shaping the ethical character of the legal profession today.

National Director of ProBono.Org, Michelle Odayan, said ProBono.Org saw fit to collaborate with the Nelson Mandela Foundation to have the dialogue with young legal practitioners, because the legal profession and young legal practitioners have new opportunities in re-defining the legal landscape through the Legal Practice Act 28 of 2014 (LPA). 'We thought it would be really important to have a start of a long-term conversation about some of the values and ethics and all character requirements to re-build or re-shape the profession,' Ms Odayan said.

### Overview on Nelson Mandela the legal practitioner and the impact of *pro bono* work in his time

Senior researcher at the Nelson Mandela Foundation, Sahn Venter, said if



*National Director of ProBono.Org, Michelle Odayan, said ProBono.Org wanted to start a long-term conversation about some of the values and ethics and all character requirements to re-build or re-shape the profession. She was speaking at the dialogue hosted by ProBono.Org in collaboration with the Nelson Mandela Foundation in Johannesburg.*

it was not for *pro bono* work the story of South Africa would be different. She said the role of *pro bono* legal practitioners was critical in political trials, such as the treason trial of Nelson Mandela. She pointed out that Mr Mandela and the

late Oliver Tambo started a law firm in 1952 mainly to assist African clients for petty Apartheid crimes or offences. She added that the journey was short-lived as Messrs Mandela and Tambo were arrested in the 1956 in raids that resulted in the treason trial.

Ms Venter spoke of how important the role of *pro bono* legal practitioners was at that time. She explained how Anglican Bishop, Ambrose Reeves, sought help from Canon John Collins of St Paul's Cathedral. Mr Collins insisted that political trialists needed to be represented by a team of the best and most progressive legal practitioners. He established the International Defence and Aid Fund (IDAF), to be able to defend political activists while they went on trial. Ms Venter said the IDAF, among others, funded the defence of Solomon Mahlangu, the Uppington 14, the Delmas Treason Trial, Steve Biko and many more.

Retired Constitutional Court Judge, Albie Sachs, said Mr Mandela was not a *pro bono* legal practitioner, but a revolutionary and freedom fighter. He added that one of the areas he functioned in best was the area of law. He pointed out that being a legal practitioner was a stepping stone for Mr Mandela in one of many moments in his life. He noted that Mr Mandela was an unusual legal practitioner who broke many laws to fight for his people.

Judge Sachs said at the treason trial Mr Mandela and some of his co-accused de-



cided that they would defend themselves. He pointed out that it was then that the great Mr Mandela emerged as somebody who stood up in court to cross-examine the witnesses. He said there was something special about Mr Mandela, he had a special authority and people just stopped to listen to him. His style and poise and use of language was unique. He said Mr Mandela had a commanding presence, that made him stand out and he used his political style at court.

Judge Sachs said Messrs Mandela and Tambo's aim was to be a part of the freedom struggle and then become legal practitioners that would support the freedom struggle. He pointed out that the pair were different because they started the only practising firm run by Africans. He said they were required to be at work at a certain time, which gave them time to give prime attention to work for the struggle. Judge Sachs said most of Messrs Mandela and Tambo's energy went into the struggle, but to earn a living they took on multiple jobs for people and worked on cases such as divorce.

Judge Sachs said that it is important not to make it seem that the themes of 'Mandela the legal practitioner' and 'Mandela the revolutionary' were competing and fighting against one another. He pointed out that for Mr Mandela, law was the mechanism to get an independent living, but it was also the mechanism that Mr Mandela used to be able to carry on with his revolutionary work. He added that the legal background Mr Mandela had, gave him the confidence to provide guidance to the nation when it came to the drafting of the Constitution.

### Perspective on the current legal environment with reference to the historical context

Senior Associate at ENSafrica, Lwando Xaso, said she started focusing on Mr Mandela's life earlier this year through a museum project she worked on. She pointed out that through research, she picked up three things she admires about Mr Mandela the 'professional'. First was the fact that he was always early, secondly, he always dressed well and the third one was that even when he was chairing a meeting, and someone walked in the room, he would stand up, go to the door and greet the person.

Ms Xaso added that she uses Mr Mandela as inspiration when she experienced various things as a black female legal practitioner. She added that there was a number of things that she picked up on, which was of relevance to her. For example, she said it took Mr Mandela a long time to obtain his law degree and at some point, a professor told Mr Man-

delo that women and black people had no business doing law. She pointed out that many students can relate to that, as some go through similar situations from the community that they come from, where they are told that they will fail and cannot complete their studies. Ms Xaso said the pressure that Mr Mandela had and the pressure some students face today is the reason some even fail, because of the stress they endure trying to prove people wrong.

Ms Xaso added that she was inspired by the speech that Mr Mandela made about being a 'black man in a white man's court.' She said the speech resonated with her because it can be substituted by black people in a white's man's company. She noted that young people dress in a smart way when going to interviews, because they are desperate and want a job and when they get the job they are expected to look, dress and behave a certain way. Young people then end up adopting the culture of that workplace, and in the process, they lose their culture. She noted that Mr Mandela said at court during a trial that he was not at ease. Ms Xaso said it made her think of how many people can actually say they are at ease in the workplace?

Ms Xaso added that people often think of transformation policies, but do not think about it in a meaningful way in terms of getting to know the people they are bringing into their spaces. She said that from the time Mr Mandela was a legal practitioner and in the current law profession some things have changed, but equally some are still unchanged.

### Comments from the floor

Legal practitioners and candidate legal practitioners who attended the dialogue expressed how the marginalised people in the country are still left behind with



*Senior Associate at ENSafrica, Lwando Xaso, spoke at the ProBono.Org and the Nelson Mandela Foundation dialogue on 11 October in Johannesburg.*



*Senior researcher at the Nelson Mandela Foundation, Sahn Venter, said if it was not for pro bono work the story of South Africa would be different.*

regards to their position in the law. One attendee pointed out, in a community she came from, people did not even know about the Constitutional Court. Another speaker added that the legal profession is an honourable profession and to be in it, one needs to put the interest of others before oneself. The speaker encouraged legal practitioners to give back to the community by means of educating them about the law. Ms Odayan said that the notion that legal practitioners who contribute their services towards enabling more people to have access to justice are seen as poor and unstylish must be dispelled.

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# LSSA adopts amended constitution; remains to serve attorneys

**O**n 29 October, before the dissolution of the four statutory provincial law societies, the Council of the Law Society of South Africa (LSSA) adopted the first amendment to its constitution, replacing the four provincial law societies with nine provincial attorneys' associations as its constituent members. The Black Lawyers Association (BLA) and National Association of Democratic Lawyers (NADEL) remain constituent members of the LSSA.

In terms of its amended constitution, the LSSA will continue in its current form to convert its functions to a membership organisation with full implementation over the next three years. Its objectives can be found in its constitution, but generally, the LSSA will –

- speak for its members (attorneys) nationally;
- propose amendments to legislation;
- liaise with the state in all matters relating to the profession;
- propose, contribute and influence the development and implementation of policy relating to the profession;
- coordinate and organise practical vocational training for candidate legal practitioners and post professional development training and other training;
- represent and assist members (attorneys) in disciplinary matters before the Legal Practice Council (LPC) and with alternative dispute resolution; and
- cooperate with and support the LPC in the public interest.

Responding to confusion in the media about its continued existence, LSSA Co-chairpersons Ettienne Barnard and Mvuzo Notyesi issued a press release confirming that the LSSA continues into the Legal Practice Act 28 of 2014 dispensation as a voluntary, representative, professional interest body for attorneys.

They said: 'The LSSA is concerned at the confusion created by reports that the new Legal Practice Council has replaced the LSSA. These reports are factually incorrect as the LSSA continues to exist as an independent body to represent, support, assist and train attorneys.'



*Signing the first amendment to the LSSA constitution on 29 October. Back, from left: On behalf of Gauteng, North-West, Mpumalanga and Limpopo attorneys, Anthony Millar; on behalf of Western, Eastern and Northern Cape attorneys, Co-chairperson of the Law Society of South Africa (LSSA), Ettienne Barnard.*

*Front, from left: On behalf of the Black Lawyers Association, Lutendo Sigogo; on behalf of KwaZulu-Natal attorneys, Lunga Peter; and on behalf of the National Association of Democratic Lawyers, Co-chairperson of the LSSA Mvuzo Notyesi.*

*Vuyo Morobane signed later on behalf of Free State attorneys.*

The Co-chairpersons explained: 'In the dispensation preceding 1 November 2018, the four provincial law societies – the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State and the Law Society of the Northern Provinces – were the only statutory regulatory bodies for attorneys in terms of the Attorneys Act [53 of] 1979. These four law societies, together with the Black Lawyers Association and the National Association of Democratic Lawyers (the latter two being voluntary associations), were the six constituent members of the

LSSA, a voluntary association of those six bodies. The LSSA was never a statutory body. The Legal Practice Council is the new statutory regulatory body for legal practitioners (attorneys and advocates) in terms of the Legal Practice Act, which came into operation on 1 November 2018. The four statutory provincial law societies are now regional offices of the Legal Practice Council and are no longer constituent members of the LSSA.'

# Legal Practice Council takes office

The Legal Practice Council (LPC) took over the regulation of legal practitioners (attorneys and advocates) on 1 November. The four former statutory provincial law societies are now regional offices of the LPC. Practitioners and members of the public may approach any of the LPC's offices nearest to them irrespective of the province they are located. The LPC contact details are as follows:

• **Gauteng, Limpopo, Mpumalanga, North West:** ProcForum Building, 123 Paul Kruger Street, Pretoria.

Tel: (012) 338 5800;  
e-mail: [directorgp@lpc.org.za](mailto:directorgp@lpc.org.za)

• **Eastern Cape, Northern Cape, Western Cape:** 29th Floor, ABSA Centre, 2

Riebeeck Street, Cape Town.

Tel: (021) 443 6700;

e-mail: [cls@capelawsoc.law.za](mailto:cls@capelawsoc.law.za)

• **KwaZulu-Natal:** 200 Hoosen Haffeejee Street, Pietermaritzburg.

Tel: (033) 345 1304;

e-mail: [pearl@lawsoc.co.za](mailto:pearl@lawsoc.co.za)

• **Free State:** 139 Zastron Street, Bloemfontein.

Tel: (051) 447 3237;

e-mail: [director@fs-law.co.za](mailto:director@fs-law.co.za)

Elections for the Provincial Councils of the LPC will be held in January 2019.

## Questions and answers on the LPA and LPC

The Law Society of South Africa (LSSA)

has answered questions it has received on the Legal Practice Act 28 of 2014 and the Legal Practice Council (LPC) on its website. See Frequently Asked Questions under the 'Legal Practice Act' tab on the LSSA website at [www.LSSA.org.za](http://www.LSSA.org.za)

Readers who may have questions requiring responses, can submit these to one of the regional offices of the LPC at the above contact details. Alternatively, questions can be sent to the LSSA at [LSSA@LSSA.org.za](mailto:LSSA@LSSA.org.za) and we will endeavour to answer them and also post the questions and answers on our website.

# LSSA sets up whistle-blower channels for examination leaks

Following the leak of the August Attorneys Admission Examination papers, the Law Society of South Africa (LSSA) appointed an independent law firm to investigate the leaks.

An independent whistle-blowing line, e-mail and sms facility have also been created for the reporting of any information relating to the leak of the Au-

gust exam papers. Any person who has information relating to the leak, should report this information using the contact details below.

It is stressed that all disclosures made will be treated with strict anonymity. The names and contact details of individuals making disclosures will not be provided to the LSSA or the firm investigating the leak unless permission has been granted by the caller.

Reports can be made to any of the following channels:

• **Unique free call 0800 number:** 0800 61 12 09.

• **SMS short code:** 33490.

• **Toll free facsimile:** 0800 212 689.

• **Online reporting:** [www.whistleblowing.co.za](http://www.whistleblowing.co.za)

• **E-mail:** [information@whistleblowing.co.za](mailto:information@whistleblowing.co.za)



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The Co-Chairpersons, Mvuzo Notyesi and Ettienne Barnard,  
as well as the Council and staff of the Law Society of South Africa,  
wish all legal practitioners and candidate legal practitioners  
a peaceful Festive Season and a happy and prosperous New Year.



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# Is the secondary role of the NCA preventing a South African financial crisis?

By  
Munozovepi  
Gwata

In 2008 the world was shocked by what was considered by many, as the worst economic crisis since the Great Depression. The 2008 economic crisis was detrimental to several economies and had a global impact even though the origins for the crisis was established in the United States (US). Several factors contributed towards the financial crisis, and fortunately South Africa (SA) was not affected too badly by the 2008 global financial crisis in comparison to other emerging markets, nor has SA experienced a financial crisis that is comparable to the 2008 crisis. There are several reasons for this, but much of the success can be attributed to the National Credit Act 34 of 2005 (NCA).

## A brief overview of the 2008 financial crisis

There were several factors that led to the financial crisis of 2008. The financial crisis was heavily induced by strong deregulation in the US markets. This deregulation gave opportunity to the banks and other financial institutions to invest heavily in financial instruments called derivatives. These derivatives were considered very low risk and extremely profitable endeavours. The keen interest to invest in the derivative market, placed a demand on mortgages, which were the real asset that were correlated to derivatives. With a high demand for derivatives the banks started to venture into the subprime market to find new clients to issue with mortgages. The subprime market was a considerably high-risk market, because it was made of households that had limited credit history and low-income, which made them economically vulnerable. Through entering this market, the banks ended up issuing loans to many US citizens who could not actually afford the mortgages. As a result, many of these debtors ended up defaulting on their loans and this devalued the derivative market and created detrimental losses for financial institutions. It has been reported that the US economy lost an approximate US\$ 22 trillion in 2008 (Eleazar David Melendez 'Financial Crisis Cost Tops \$22 Trillion, GAO Says' (www.

huffingtonpost.com, accessed 7-11-2018)). There were several factors that contributed to the financial crisis of 2008, but one of the factors that played a critical role in creating the financial crisis, was the high volume of reckless lending.

## The role of the NCA in containing the impact and influence of the financial crisis

The NCA's primary role is to protect the consumer. In order to achieve this the NCA takes measures to prevent and offer relief for reckless lending and for over indebtedness. Usanda Gqwaru ('Is the National Credit Act accidentally a step towards curtailing financial system fragility as described by Minsky's Financial Instability Hypothesis?' (<https://2017.essa.org.za>, accessed 5-11-2018)) argues that this preventative role of the NCA, also has the dual effect of creating a cautionary guard against a financial crisis.

Section 81 of the NCA sets out an assessment that needs to be made before credit can be issued. It outlines three different scenarios that constitute reckless credit. Furthermore, reg 23A sets out the methods in which a credit provider can validate gross income. Gqwaru (*op cit*) states that these provisions in the NCA prevent SA from entering what is called the 'ponzi phase'. The ponzi phase in the context of Hyman Minsky's financial instability hypothesis is the critical phase that occurs before a financial crisis.

According to Minsky there are three critical phases that lead to a financial crisis, namely:

- The hedge phase, which is the loaning money phase. At this stage the money is still lent with caution and precautionary measures are put in place.
- The speculative phase. This is the phase, which is categorised with economic prosperity and optimism, which leads the banks to be more lenient and flexible on their lending. This is the phase in which loans are issued to debtors that under the hedging phase may not have qualified for credit.
- The ponzi phase, is the last stage and during this period creditors who are al-

ready burdened with debt, are issued with even more debt by the banks, under the pretence that the economy will turn around. This is the catalyst that creates the financial crisis.

What is argued by scholars such as Gqwaru (*op cit*) is that the NCA, prevents the South African economy from ever entering the ponzi phase, because credit cannot be issued in terms of the NCA to debtors who cannot afford the credit. This argument can be extended to say that the provisions of the NCA also acts as a buffer against the speculative phase, because the NCA sets out fixed assessment criteria, which is not amended to adapt to different economic environments. Therefore, even during periods of economic bliss the assessment criteria for credit remains the same. In SA reckless credit is strictly regulated and prevented by the NCA. On the other hand in the US, legislation such as the Community Reinvestment Act and institutions such as Fannie Mae (Federal National Mortgage Association) and Freddie Mac (Federal Home Loan Mortgage Corporation) were directing banks to increase their exposure in the subprime market.

## The possible threat that can compromise the effect of the NCA

There are several ingredients that resulted in the financial crisis, but great emphasis is placed on the reckless lending carried out by creditors. Other than the profitable pursuit for derivatives, US banks could justify increasing access in the subprime market through legislation, such as the Community Reinvestment Act. The Community Reinvestment Act was created to address the discrimination in the US credit market. A financial institution could justify questionable issuing of loans through the veil of the Community Reinvestment Act. I am concerned that in light of recent case law a new veil has been introduced into the South African credit market.

The recent case of *Truworthe's Ltd and Others v Minister of Trade and Industry and Another* 2018 (3) SA 558 (WCC) has further contextualised, or perhaps I



should say, limited the role of the NCA. In the judgment the court accepted that reg 23A(4) of the NCA should be reviewed and set aside in light of the facts of the case. The argument that was presented before the court was that the provisions of reg 23A(4) resulted in discrimination against self-employed and informal employees who do not have bank accounts and/or pay slips. They further argued that this prohibits certain groups from access to credit. It was then argued that eliminating certain groups of people from the prospect of getting credit was not the function of reg 23A. Rather the function of reg 23A is to prevent reckless lending, therefore, eliminating credit to a certain group of people lacks rationality, and fails to be in accordance with the principle of legality. The court accepted that reg 23A(4) should be set aside and reviewed.

The possible effect and outcome of this judgment is that new methods of assessing income may be enacted to cater to people who are self-employed or informally employed. These new methods may not be concerned with payslips, or bank statements because, as mentioned in the facts of the case, some people do not have bank accounts. The consequence of this is that unless strict meas-

ures are set in place there will be no way to determine who is truly unemployed, employed or self-employed. Therefore, if there is no verification to confirm the status of employment (informal, formal, self-employed) then it will be very hard to detect matters of fraud. For example, an employed person could deceive the credit provider and declare themselves to be self-employed or informally employed to evade a stringent income assessment. Even though the debtor will still be required to prove how they can repay the debt, the burden of proof will remain unequal between different categories of employment. Using an affidavit, for example, to demonstrate the financials of the debtor as opposed to bank statements and pay slips may result in an increase in fraud, which will undermine the credibility of affidavits being used as financial statements.

The other possible risk that can emerge is that there would be the existence of dual assessment systems, which undermine and compromise each other. It can also lead to uncertainty pertaining to how gross income should be assessed. Alternatively, one criterion of the assessment methods may remain, but the methods of assessment made are broader and more flexible to accommodate

the different categories of employment. This could give opportunity and lead to reckless lending by credit providers. The intention of the court was to remove barriers to credit, but in doing so they have also indirectly removed the safeguards of the South African credit market.

## Conclusion

The NCA plays a dual role. The primary role of the NCA is to protect the consumer from credit providers, the secondary role is to act as a buffer that protects the South African economy from the effects of an internal or external debt crisis. The risk posed by the recent *Truworths* case is that the intent to create more inclusionary methods of income assessment, may unintentionally compromise the credit market. It may incentivise greedy credit providers to issue riskier loans, which could jeopardise and trap the consumer and furthermore undermine the protective role of the NCA.

Munozovepi Gwata BA (Law) is a third year LLB student at the University of Pretoria.



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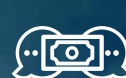
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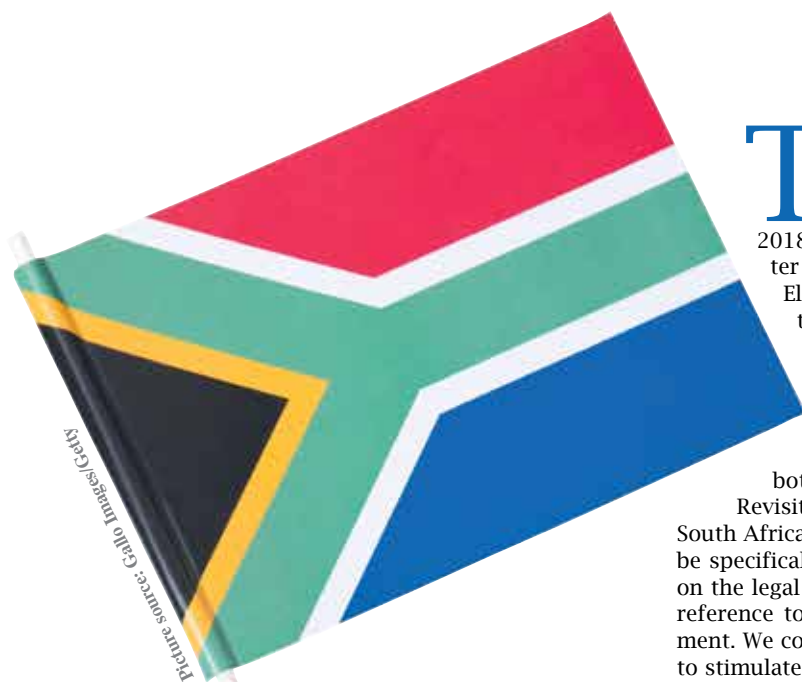
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# Revisiting the term 'community' in the South African context



Picture source: Gallo Images/Getty

By  
Udo Richard  
Averweg and  
Professor  
Marcus Leaning

The recent Land Claims Court (LCC) matter, *Elambini Community and Others v Minister of Rural Development on Land Reform and Others* (LCC) (unreported case no LCC88/2012, 30-5-2018) (Meer J) makes for interesting reading. This matter was a claim for restitution of rights in land by the Elambini Community (the plaintiff). The claim before the LCC for adjudication, was a claim in terms of s 2(1)(d) of the Restitution of Land Rights Act 22 of 1994 (the Act) – the section which entertains a claim of a community that was dispossessed of rights in land in South Africa (SA). Restitution of rights in land and the term 'community' are both significant topical discussion points in SA.

Revisiting and discussing the term community in the South African context is the objective of this article. It should be specifically noted that the authors do not express opinion on the legal judgment delivered. In this article, we only make reference to the term community as it appears in the judgment. We contend that such discussion of the term may serve to stimulate further debate to advance a better understanding of the actual meaning and conception of the term as used and applied in different contexts in SA. After all, conceptions of community are varied and an 'open space for a debate about normative visions of community' (G Midgley and AE Ochoa-Arias 'Visions of community for community OR' (1999) 27(2) *Omega* 259).

## Background

No researcher has yet been able to present a formal methodology for the scientific study of the community. While we (UR Averweg and M Leaning 'Visions of community: Community Informatics and the contested nature of a polysemic term for a progressive discipline' (2011) 7(2) *Information Technologies & International Development* 17) have previously critically examined one of the primary terms of reference – the community – in the emerging field of community informatics, we contend that the term community has become used in an unspecific and general manner, and that this may dilute and divert the attention of practitioners in that field. In making this argument, we offered an account of the term community in Western society and argued that the term is almost always used in a positive sense.

While that research had a Western focus, we noted that there may also be a need to explore and review interpretations of community in developing countries – such as those found in Southern Africa. We subsequently did so during 2015 in UR Averweg and M Leaning 'The Use of "Community" in South Africa's 2011 Local Government Elections' (2015) 50(2) *Africa Spectrum* 101 (<http://journals.sub.uni-hamburg.de>, accessed 2-10-2015). We now continue with the discussion of the term community. Such discourse not only serves to illuminate a better understanding of the term, but also alerts practitioners to some of the problems of its use in different contexts.

### Western concept of the term community

It is useful to chart, historically, some interpretations of the term. The term community arrived in its current use, via Old French and Middle English, from the Latin words *communitas*, meaning fellowship and *communis*, meaning common, public or shared (D Harper *Online Etymological Dictionary* ([www.etymonline.com](http://www.etymonline.com), accessed 1-8-2006)). It is no linguistic accident that 'community' and 'communication' share the Latin root *communis* (MM Webber 'The urban place and the nonplace urban realm' in MM Webber, JW Dyckman, DL Foley, AZ Guttenberg, WLC Wheaton and CB Wurster (eds) *Explorations into Urban Structure* (University of Pennsylvania Press 1964) at 108). Communities comprise of people with common interests who communicate with each other. Williams notes that community is always a positive form of association and is categorically different from other forms of collectivity (R Williams *Keywords: A Vocabulary of Culture and Society* (London: Fontana 1976)).

The distinction of community from other terms may be argued to be an inheritance from the emergent philosophical and social scientific discourse of the (especially German) enlightenment and 'modern' *weltanschauung* (worldview). Georg Hegel's differentiation of *staat* (state) and *gesellschaft* (society) fundamentally influences much European, and particularly embryonic social scientific, thought of the 19th and early 20th centuries (J Freund 'German Sociology in the Time of Max Weber' in TB Bottomore and RA Nisbet (eds) *A History of Sociological Analysis* (London: Heinemann 1978) at 150). Moreover, it draws on a romantic strand of enlightenment thought in which the 'primordial nature of the communal bond was the widely held premise' (I Schulte-Tenckhoff 'The Concept of Community in the Social Sciences and its Juridical Relevance' (2001) Law Commission of Canada at 16 (<https://dalspace.library.dal.ca>, accessed

3-11-2018)). Perhaps the most influential early thinker on the topic was Ferdinand Tönnies. Tönnies' most significant work on this area, *Gemeinschaft und Gesellschaft* (Community and Society) continues Hegel's concept of distinguishing between different forms of association. Tönnies works from the first premise that there are two 'types' of 'will': The *wesenwille* – the natural or essential will – that which is an instinctive, organic or underlying energy; and the *kürwille* – the reasoned or arbitrary will – that which is instrumental, deliberative, purposive and goal-oriented. Tönnies implicitly values the associations formed around essential 'will', *gemeinschaft* (or community) above those formed around arbitrary will society seeking some instrumental goal *gesellschaft* (or society), asserting community meets the requirements of 'real and organic life' while society serves 'artificial and mechanical representation' (F Tönnies (trans Charles P Loomis) *Community and Association* (London: Routledge and Kegan Paul 1955 at 33). *Gemeinschaft* (community) should be understood as a living organism, *Gesellschaft* (society) as a mechanical aggregate and artefact.

Three distinct points need to be made with regard to the general use of the term community. Firstly, the term is currently in political fashion (including in SA). The term community has distinct political overtones in contemporary Western social discourse. The ascendancy of the term, like any term, in the discourse of social policy and political science is tied to, and implicit in, the emergence and dominance of a particular political ideology (N Fairclough *New Labour, New Language?* (London: Routledge 2000)). Secondly, the term indicates particular forms of social interaction, however, exactly what forms of association can be regarded as a community is a contentious issue. The use of the term shifts between the descriptive and the prescriptive, between the empirical analytic and idealist use of the term. A number of authors have argued that several different forms of association can be inferred by community (GP Crow and G Allan 'Community Types, Community Typologies and Community Time' (1995) 4(2) *Time & Society* 21 and P Willmott *Community Initiatives: Patterns and Prospects* (London: Policy Studies Institute 1989)).

Thirdly, it is a value-laden concept applied to these forms of interaction (D Miller, J Coleman, W Connolly and A Ryan *The Blackwell Encyclopedia of Political Thought* (Cambridge: Blackwell 1991) at 88) or even a value itself (E Frazer *The Problems of Communitarian Politics: Unity and Conflict* (Oxford: Oxford University Press 1999) at 77). Community is often used to indicate a closeness, a beneficial or a 'good' side of social interaction. It

has a wealth of positive connotations. A community is 'an area of social living marked by some degree of social coherence' (RM MacIver and CH Page *Society: An Introductory Analysis* (MacMillan Co 1961) at 9). Community implies familiarity and closeness, and nearly always in a positive sense.

### The term 'community' in the South African context

In SA, the term community was originally used as a euphemism for race (TE Bosch *Radio, community and identity in South Africa: A rhizomatic study of Bush Radio in Cape Town* (PhD dissertation, Athens, OH, Ohio University, 2003) at 108). However, its meaning has become increasingly vague with its rhetorical use in current politics.

In post-Apartheid SA, communities occupy a 'legitimate' space in the regulatory framework of the State. Bosch (*op cit*) at 110 notes that: 'It is "communities" that can make claims for land restitution and land distribution'. The term 'formerly disadvantaged community' refers to racial groups dispossessed of land, an entity on whose behalf a struggle was waged. There is, therefore, a need for explicit practitioner reflection on the different possible meanings of the term community – especially in the South African context. We (Averweg and Leaning (*op cit*) (2011)) contend that, contrary to what seems to be popular practice, the term community should be used carefully and specifically.

A concern lies with the manner whereby, in the literature on SA, the concept of community remains unproblematised and unmindful of the history of the term. Critical engagement and analysis of the term and its implications are therefore required. One analysis of the use of the term community by Averweg and Leaning (2015) (*op cit*) was during the South African 2011 Local Government elections. In that research we noted at p 108 that:

'[I]n the study of political communication within a South African setting, "community" [can] be recognised not as a universal good but as a locally contingent position in possibly much wider debates taking place in society. Invoking "community" in the practice of a particular activity will situate that activity in opposition to activities that are not "community"-orientated. This positioning is often locally and politically determined – to be pro community is not an absolute value but one tied to a position in a conflict or debate'.

Community, then, is a term used to positively locate a group or formation in political opposition to a larger and less appealing formation. It serves to portray ones' interests as the underdog opposed to the dominant forces and as such

serves as a powerful rhetorical device. However, such understanding of the term is contrasted with how the term is understood in particular legal contexts.

We now focus our attention on the term community as it appears in the context of South African law with specific focus on the Act. The term community is defined in this Act as:

‘[A]ny group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group’.

The *Elambini* judgment cites this definition. While this matter was being heard by the LCC, there was contention by the Elambini Community that ‘their constituting a community focused on their farming, social, cultural and religious interactions’, however, the LCC found that it did not subscribe to ‘shared rules regulating access to land’ (para 146). Thus, even with a constant refrain (by the plaintiff) of living as a community, intermarrying, performing rituals and visiting family graves, the LCC found that this did not constitute a community as defined in the Act. While it is possible that a social community may previously have been formed, it was not viewed as a community in terms of the Act.

The court also cites at para 137 that:

‘[T]here must be a community in existence at the time of the [land] claim’, and cites context to the definition of community at para 139 with:

‘There is no justification in seeking to limit the meaning of the word “community” in s 2(1)(d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy ... what must be kept in mind is that the legislation has set a low threshold as to what constitutes a “community” or any “part of a community”. It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community’.

This means that the idea of community deployed in the Act seems to draw on the idea that community is a prior existing formation. Community is formulated in the sense that it refers to an existing group or shared collectivity drawing from their historic possession of and access to land. As such, it is a different interpretation from a community one joins with or ascribes to by choice – as a group with shared interests and conscious articulation of such interests.

Accordingly, the use of the term community in the South African legal context draws heavily on a conception that community refers to a bounded group determined by historical links.

## Concluding remarks

Such interpretation is certainly more precise than that often found in more popular parlance. However, in being precise it draws on and reiterates a particular interpretation of what constitutes legitimate forms of association (or at least those forms deemed legitimate enough to be ascribed land rights). As such, while the particularity of the legal definition assists in the arbitration of legal cases, it also serves to embed particular impactful understandings in both legal processes and popular understanding. By using and enacting legal decisions with this interpretation of community, other interpretations of community are reduced and accordingly the social lives of those who live within these unrecognised communities are diminished.

**Udo Richard Averweg** *M.IT (cum laude) MSc MCom (UKZN)* is an IT Project Manager at eThekweni Municipality in Durban and Professor Marcus Leaning *PhD (Media Sociology) (University of Bedfordshire)* is a Professor of Digital Media Education at the University of Winchester in the United Kingdom. □

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By  
Nokuthula  
Ndlovu

## Citizenship dilemma: Denying identity numbers to children of permanent residency holders

A 'permanent resident' is a 'person having permanent residence status in terms of the Immigration Act' (South African Citizenship Act 88 of 1995). The Immigration Act 13 of 2002 as amended in 2004 provides in s 25(1): 'The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.' The Identification Act 68 of 1997, provides for the issuing of identity documents is applicable to South African citizens and persons who are lawfully and permanently resident in the Republic in terms of s 3. According to the Regulations on the Registration of Births and Deaths, 2014 GN R128 GG37373/26-2-2014 (the Regulations) a non-South African citizen is a 'person who holds a valid temporary residence visa contemplated in sections 11 to 23 of the Immigration Act, and includes an asylum seeker or refugee issued with a permit in terms of section 22 or 24 of the Refugees Act [130 of 1998]'. This means that a permanent resident is

actually a citizen of South Africa (SA) as permanent residency is issued in terms of s 25 of the Immigration Act, which also awards the rights and obligations of a citizen to a permanent resident.

Section 7(2) of the Regulations provides that: 'Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate with an identity number for holders of a valid -

(a) permanent residence permit issued in terms of the Immigration Act, on a Form DHA - 19 illustrated in Annexure 24, as contemplated in terms of section 7(2)(b) of the Identification Act'.

Regardless of the above and the provisions of s 7(2) of the Regulations, the situation on the ground is that the Department of Home Affairs does not grant the infants of valid permanent residency holders identity numbers, on the basis that permanent residency holders are not South African citizens. A notice of birth is issued and so the births of such children are registered in terms of the Births and Deaths Registration Act 51 of 1992, but when it comes to the issuing of a valid South African identity document and birth certificate, hand-written

records of their birth are issued without a valid identity number. The parents of these children are then compelled as a result to obtain citizenship for their children from the country of decent.

The Department of Home Affairs may defend its practices by alleging compliance with s 8(5) of the same Regulations, which provides that: 'Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate without an identity number' in respect of children born of parents who are non-South African citizens. However, as clarified already, permanent residence holders do not fall under non-South African citizens based on the legislative definitions highlighted above. A non-South African citizen does not include a permanent residency holder in terms of the definition provided by the same Births and Deaths Registrations Act.

The Births and Deaths Registrations Act also makes a further separate provision for permanent resident holders and non-South African citizens, which emphasises that the one is not the same as the other in respect of rights and obligations. The fact that the Identification



Act is applicable to South African citizens and permanently resident persons within the Republic (s 3 of the Identification Act states: 'This Act shall apply to all persons who are South African citizens and persons who are lawfully and permanently resident in the Republic') indicates the intention to duly issue permanently resident persons with valid identity numbers. It goes without saying that the offspring of such people will also reside with the parents, unless otherwise indicated by the parents and they also should be issued with valid identity documents. Section 8 of the Identification Act emphasises this by adding that the persons mentioned in s 3 of the Identification Act, to whom the Act applies, must be assigned with an identity number. The registration of births in SA is in terms of the Births and Deaths Registration Act. The content regarding permanent residence holders does not support the Department of Home Affairs' practices where children born to permanent residence holders are denied identity numbers.

In an attempt to search for justification in the Department of Home Affairs practices, consideration is also given to the South African Citizenship Act. Citizenship can be obtained by birth so the infant of a permanent residency holder can be South African by birth before merits are looked into. Section 2(2) provides that any person born in the Republic who is not a citizen by virtue of provisions of subs (1) shall be a South African citizen by birth if –

'(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992.'

The births of permanent residents' infants born in SA are recorded 'in accordance with the Births and Deaths Registration Act.' However, the Department of Home Affairs compels permanent residency holders to obtain citizenship for their children born in SA elsewhere by mandating and maintaining that per-

manent residence holders are not South African citizens despite the definition of a non-South African citizen and also the provisions of the Births and Deaths Registration Act. The mandate is on the face of it, manipulation to justify the Department of Home Affairs refusal to grant such children valid identity numbers and, alternatively, citizenship. The practice of the Department of Home Affairs denying children of permanent residency holders identity numbers is, therefore, inconsistent with the Births and Deaths Registration Act. It is also a violation of choice wherein the permanent residency holders have a right to independently choose to exercise their rights of citizenship in another country. This right is taken away from them and decided on by the Department of Home Affairs. In essence the children of permanent residency holders cannot claim their South African citizenship by birth because they have been forced to obtain citizenship or nationality from another country in respect of which they have a claimable right to citizenship by descent.

The practice of the Department of Home Affairs denying children of permanent residency holders identity numbers and ultimately citizenship also compromises the principle of the best interests of the child. The parents of the infant are unable – in some cases – to immediately lodge school applications because they do not have an identity number. If such a child were to travel out of the country, they would not be able to return with their parents until such a time as a passport and visitor's visa can be processed, alternatively they would have to wait for a residency application to be processed. The infant is, therefore, placed at risk of being separated from the parents besides the experience of being denied an identity document despite the law.

There is also the issue of costs involved in processing these unnecessary applications and in some cases the parents have to travel with their infants in order to access the relevant consul. The hand-written birth record posing as a birth certificate contains a number that is unidentifiable as a South African

identity number and or passport from another country possibly just reducing the birth of the infant to a mere statistic. Notwithstanding the contents of the birth record such children are in terms of s 7(2) of the Regulations supposed to be issued with identity numbers and, therefore, citizenship. It is an unnecessary inconvenience that permanent residency holders are forced to register the births of their children in the country of decent and, thereafter, apply for a passport before proceeding with further applications for residency on behalf of a child that must in terms of the Births and Registrations Act be granted an identity document and, therefore, citizenship.

Without speculating the reasons for the Department of Home Affairs' current practices on the ground, the law is clear on its position of permanent residence. It is a status that grants or leads to citizenship by firstly awarding the holder rights due to a citizen. Understandably those rights are limited but that does not take away from the status of being a citizen. Section 3 of the Constitution provides that there is common South African citizenship emphasising on equality. Being a permanent resident is a preliminary stage of being a citizen for people who are eventually naturalised as South African citizens. Section 20 of the Constitution provides that: 'No citizen may be deprived of citizenship' and yet the Department of Home Affairs deprives infants of permanent residence citizenship by forcing them to obtain citizenship elsewhere. Every child born in South Africa and registered in terms of the Births and Deaths Registration Act has a right to a name and nationality as is provided in s 28 of the Constitution. The Department of Home Affairs' practices are, therefore, inconsistent with legislation and it is unconstitutional.

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

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By  
Elise  
Burns-  
Hoffman

Picture source: Gallo Images/Getty

## The expert witness and the art of listening

There is a striking moment during the café scene in the movie *Before Sunset* ([www.youtube.com](http://www.youtube.com), accessed 1-11-2018) in which the leading actress Julie Delpy, playing the role of Céline, describes how her brain was 'free from the consuming frenzy' while living in the foreign and bland city of Warsaw – allowing her greater clarity of thought and a sense of peace. What she is describing is the insight into the reality of how we succumb so easily to the distraction and demand of various kinds of 'noise' in day-to-day life.

While it is perhaps possible to achieve a similar insight momentarily when on holiday or taking time out in nature, one seldom manages to maintain and practise such wisdom consistently when deep in the trenches of professional consulting; working to meet client expecta-

tions; adhering to deadlines and generally trying to juggle the various pressures created by the world of work.

Céline's words resonated the moment I first heard them over a decade ago, due to the parallels that can be drawn with that which has the ability to interfere with the art of listening in expert professional consultation.

If one starts to pay closer attention to the default manner of listening, many of us may surprise ourselves in observing how much of the time less listening is taking place, but rather more waiting to reply; formulating the next question; moving on with the assessment process and/or adding a personal view of some kind. Although this is a commonly expressed notion, the practice of changing the habit continues to fall short far too often.

The avoidance of sliding down the

slippery slope of inadequate listening, and into the bowels of the 'frenzy' of the working world, relies on the practice of daily mindfulness.

The work of an expert – in my case that of the incapacity; disability and skills transferability specialist – requires various types of listening in order to deliver the factual information gathered and provide a professional opinion in such manner as to stand the test of further discussion, debate and/or interrogation robustly. These include listening with one's head; heart; eyes and soul – namely, a holistic approach.

Expert work also requires an intimate understanding and practice of communication, which constitutes the application of a great deal more skill than simply speaking to somebody, while documenting their response. Communication is a mutually receptive and appreciative pro-

cess during which mindful engagement is required to ensure that what has been said is what is being heard and understood.

When we become consciously aware of our personal and professional filters, in addition to being able to identify when the tendency towards impatience; desensitisation; temptation to miss the subtleties of non-verbal communication, the underlying narrative and/or the importance of detailed factual accuracy, we are able to listen more constructively and positively and communicate more effectively.

The pace of today's working world, in which instant messaging, 24/7 channels of (often poor) communication, copying others on superfluous e-mails, making use of sound bites instead of conversation, limited tolerance for that which requires more time than is comfortable etcetera, runs the risk of negative interference in the expert assessment process.

I have lost count of how many times over the past 30 years the individual presenting for an assessment has made the observation that it was the first time anybody had taken time to truly listen to their full story. Whether their comment regarding it being the first time someone took time to listen is accurate is not important. Instead what is important is the vital role listening and communication has played in ensuring that the individual feels properly heard, and their human dignity honoured.

Of further importance is the perception of the individual of those who have referred them to the expert concerned. Irrespective of how specialised the professional may be, unless the assessment process has been positive, and left the individual's unique sense of humanity feeling intact, the referring party could be tarred with the same negative experiential brush as the expert.

Just as I have lost count of the number of times I have received feedback regarding the upside of being heard, I have also lost count of those who have shared their experience of the downside of having not been. This never bodes well for the referring party.

Although experts are aware of their independent, objective and unbiased role, as they relate to the referring party, the person being assessed does not necessarily experience the referral in the same way and experts are often seen as an 'extension' of the organisation via which it was made.

A few basic rules in the expert rule book ought to include the following:

- Make sure the environment in which the assessment takes place is as comfortable, pleasant, accommodating and as free of distractions as possible. This may require seeing the individual in

their home environment, rather than the rooms of the professional, something some experts decline to offer and in so doing may influence the accuracy of the opinion provided.

- Give your full attention to and focus 100% on the person being assessed for the entire duration of the assessment. The availability of time is required, including the need to limit one's booking schedule accordingly.
- Be mindful towards the understanding of the answers provided and be sure to obtain clarity by summarising and asking for more information when indicated. The need for further information can sometimes extend to making further telephonic contact with the individual or others following the assessment.
- Be aware of one's presentation; the verbal and non-verbal language used, along with tone of voice and the responses given. There ought to be no limitation on empathic listening simply because the assessment process is objective and once off in nature.
- Keep your mind clear of the temptation of preconceived ideas; personal and professional filters, as well as picking up on cues that indicate the need to adjust the assessment process when necessary.
- Complete the expert report within a reasonable time frame following the assessment in order to ensure that no observation; factual information and/or subtleties noted become 'lost in translation' due to substantial time having passed.

As simplistic and obvious as the above basic rules might appear, it takes conscious listening; clarity of thought; avoidance of distractions and sustained focus to ensure that one hears each individual's story and personal journey with a fullness of presence, every time. A clear brain, as noted by Céline, is the tool of choice.

When experts fail to listen with conscious intention they fail the individual concerned; the referring client and the court.

### How the legal profession can cultivate enhanced listening skills

While the above-mentioned basic rules apply as much to the referring lawyer as they do to the expert being briefed, a few extra listening tips that may be helpful to those in the legal profession are as follows:

- Adhere to the appointment time; turn off your mobile telephone; avoid the temptation to look at the time; demonstrate receptive body language and make regular eye contact throughout the consultation. These are all signs that illustrate respect for the client and enhance their sense that you are listening.

- It is helpful to remain mindful of the fact that the issue under discussion is about the client and not you. What the client wants is for you to hear and understand their story and to feel that you care. Your legal knowledge, experience and expertise are taken as given; there is no need to impress the client with your history in this regard.

- Although the client has approached you to assist with the provision of a solution to their legal problem, providing answers too soon into the discussion can create the impression that you are not listening and are rushing to the finish line. It is only when the client feels that you have fully embraced their situation that they feel ready for the suggested way forward.

- In spite of the truth that clients may not always 'like' what they hear in your considered response to their issue, honesty – as always – is the best policy. What is required is to have engaged on a sufficiently human and empathetic level to have determined how best to deliver information that may be disappointing to the client. Prefacing your response with an acknowledgement of what you have heard and recognition of their expressed feelings is recommended.

- Just as the author, Gary Chapman, described the importance of couples being aware of their partner's love language in his book *The Five Love Languages – How to Express Heartfelt Commitment to your Mate* (North Field Publishing 1995), so too must the preferred method of communication and on-going contact be discussed with your client. The reality of the slowness of the wheel that turns in the legal profession seldom marries well with the reality of the sense of urgency to reach resolution experienced by your client. Regular contact with the client is required in a suitable manner that ensures their ability to relate on a cognitive and emotional level to these realities.

- Perhaps the easiest way in which to enhance your listening skills as a lawyer is to live by the rule from the *Holy Bible* in Luke 6:31: 'And as you wish that others would do to you, do so to them' – remembering that the lawyer/client relationship is no different to any other insofar as we all seek and need connectedness, recognition and reassurance that our lives matter.

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# THE LAW REPORTS

October 2018 (5) South African Law Reports (pp 323 – 660);  
 September [2018] 3 All South African Law Reports (pp 409 – 743);  
 2018 (8) Butterworths Constitutional Law Reports – August (pp 881 – 1027);  
 2018 (9) Butterworths Constitutional Law Reports – September (pp 1029 – 1178);  
 2018 (11) Butterworths Constitutional Law Reports – November (pp 1309 – 1449)

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

## Abbreviations:

CC: Constitutional Court  
 ECB: Eastern Cape Local Division, Bisho  
 ECG: Eastern Cape Division, Grahamstown  
 GP: Gauteng Division, Pretoria  
 LAC: Labour Appeal Court  
 LC: Labour Court  
 SCA: Supreme Court of Appeal  
 WCC: Western Cape Division, Cape Town

## Advocates

**Whether an advocate is a fit and proper person to remain on the roll of advocates:** The case of *Jiba and Another v General Council of the Bar of South Africa*; *Mrwebi v General Council of the Bar of South Africa* [2018] 3 All SA 622 (SCA) dealt with the removal, from the roll of advocates, of three persons who were employed in the public service, namely the Deputy National Director of Public Prosecutions (DNDPP) Nomgcobo Jiba; the Special Director of Public Prosecutions and head of Specialised Commercial Crime Unit, Lawrence Sithembiso Mrwebi; as well as the Director of Public Prosecutions in North Gauteng (Pretoria), Sibongile Mzinyathi. The GP per Legodi and Hughes JJ held that Jiba and Mrwebi were not fit and proper persons to continue to practise as advocates and ordered removal of the names from the roll of advocates. The case against Mzinyathi was dismissed with costs. As a result, Jiba and Mrwebi appealed to the SCA

against the High Court order, while the respondent General Council of the Bar (GCB) cross-appealed against the costs order only in the *Mzinyathi* matter.

The main reason for removal of the names of the three from the roll of advocates, alternatively their suspension from practising as advocates, stemmed from the way in which they handled the case of the head of Crime Intelligence within the South African Police Service, Lieutenant-General Richard Mdluli, who was charged with fraud, corruption and related charges, as well as with murder and attempted murder. Fraud and corruption charges against Mdluli were withdrawn by Jiba and Mrwebi with Mzinyathi also allegedly involved. Murder and attempted murder charges were withdrawn by one Chauke, the Director of Public Prosecutions, South Gauteng (Johannesburg) who was not involved in the present matter. In the case of Jiba the other allegations of note were that she failed to file a record of decision in terms of r 53 of the Uniform Rules of Court in another matter while she also failed to file an answering affidavit by a specified date in the present matter as directed by the Deputy Judge President of the GP.

The majority of the SCA per Shongwe ADP (Seriti and Mocumie JJA concurring) upheld the appeals of both Jiba and Mrwebi with no order as

to costs. In the case of Mrwebi the High Court order was changed to suspension from practice as an advocate for a period of six months, backdated to the date of the granting of the High Court order in September 2016. The GCB's cross-appeal was dismissed with costs.

It was held, as Jiba explained in her answering affidavit, that fraud and corruption charges against Mdluli were withdrawn for purposes of further investigation and that the intention was to reinstate them if further incriminating evidence came to hand, the difference of opinion with the view of counsel, including senior counsel, could not fairly be considered sufficient to conclude that she was not a fit and proper person to remain on the roll of advocates. At best one could infer some form of incompetence with regard to her duties, which could be grounds to remove her from being the DNDPP but not sufficient to remove her from the roll of advocates. It followed that the GCB failed to establish any misconduct against her. Therefore, the first jurisdictional requirement in removal cases was lacking.

In the case of Mrwebi it was held that he sought to mislead the court by stating that he took a decision to withdraw the charges against Mdluli 'in consultation' with Mzinyathi but that was not the case. What weighed heavily against him were answers and

explanations to allegations he faced. He received representations from Mdluli and decided to withdraw the charges and discontinue the prosecution of the latter before discussion or 'in consultation' with Mzinyathi as required by the National Prosecuting Authority Act 32 of 1998. In his case the alleged offending misconduct had been established with the result that he was not a fit and proper person to practise as an advocate. However, the High Court misdirected itself regarding the appropriate sanction to be imposed. He should have been suspended from practising as an advocate, more especially as he did not personally benefit from his misconduct or prejudice any client.

In a minority judgment Van der Merwe JA (Leach JA concurring) held that the appeal of both Jiba and Mrwebi had to be dismissed with costs while the cross-appeal of the GCB had to be upheld with costs. In the South African system of justice, the courts should be able to rely absolutely on the word of practitioners and for that reason there was a serious objection to allowing a practitioner who was untruthful and deceived or attempted to deceive a court, to continue practising. In the case of Jiba, she gave untruthful evidence under oath, which displayed dishonesty and a lack of integrity. In the case of Mrwebi, he lied about consultation with Mzinyathi and abused his senior posi-



tion in the prosecutorial service to advantage Mdluli and ensure that he should not be prosecuted.

- See also law reports 'Advocates' 2017 (Jan/Feb) DR 40 for the GP case.

- The GCB is appealing the SCA order to the Constitutional Court.

## Civil procedure

**Employer is not party to emoluments attachment dispute:** In *African Development Bank v Nseera; In re: Nseera v Nseera* [2018] 3 All SA 646 (GP) the respondent Nseera was granted a maintenance order against her husband pending finalisation of divorce proceedings. Alleviating the husband's failure to pay the required maintenance, she approached a magistrate's court, which granted her an emoluments attachment order that was duly served on his employer, the appellant African Development Bank. In response the appellant approached the magistrate's court in terms of s 28 of the Maintenance Act 99 of 1998 (the Act) for review and setting aside of the attachment order. Although a number of grounds were raised in the review application, the main one was that the appellant, as employer of the respondent's husband, had not been given notice of the application for the attachment order which, had it been done, would have been opposed. The review application having failed the appellant appealed to the GP. The appeal was dismissed with costs.

Kollapen J held that s 28 of the Act not only provided the remedy of rescission, but also provided the details of how that remedy was to be invoked. That pointed in the direction that the section did not render it peremptory to give the employer notice of emoluments attachment in advance. If that were the case or the reasonable interpretation to be afforded to the section it would hardly make sense that the legislature would have devoted so much attention in creating both the remedy and procedure for an aggrieved employer to invoke if the intention was to give

notice to the employer before the making of the order.

The employer was not party to the dispute between the original parties who had a direct interest in the maintenance order. The employer was required at best to enforce the order of maintenance and could, therefore, be seen as a party from that limited perspective. Nevertheless, that did not preclude the employer from having a voice with regard to the attachment order made, and in the instant case the employer's involvement was structured as a post-order intervention in the form of a rescission, suspension or variation application which gave substance to the rights of the employer.

The section supported the granting of an order *ex parte*, which did not offend the right to be heard as expressly provided for in s 28(2) and, which, would largely be confined to questions around practicability of the order or the legal ground advanced as to why the order was not competent. The rescission application, which was grounded in s 28(2), could not become an avenue through which the employer sought to litigate on behalf of a party who was not before the court. The interest of the employer related to the practicability and enforceability of the emoluments attachment order. It would be undesirable for an employer to purport to enter the principal dispute between the parties as the appellant sought to do.

## Constitutional law

**Invalidity of regulations prescribing minimum uniform norms and standards for school infrastructure:** Section 5A of the South African Schools Act 84 of 1996 (SASA) provides for the making of regulations by the Minister of Basic Education prescribing minimum uniform norms and standard for school infrastructure. In keeping with the section in *Equal Education v Minister of Basic Education* [2018] 3 All SA 705 (ECB) the respondent minister made the regulations in question in November 2013 by way of Regulations Relating to Minimum Uniform Norms and Standards for

Public School Infrastructure, 2013 (GN R920 GG3708/29-11-2013). However, the regulations were cast in broad terms and did not have time-frames by which the required infrastructure would have been provided. Moreover, reg 4(5) (a) made the implementation of the norms and standard referred to in the regulations subject to the resources and cooperation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure, such as Treasury, the Department of Public Works and Provincial Departments of Education. The applicant, Equal Education, a non-profit organisation, approached the High Court for an order declaring reg 4(5)(a) and other regulations as being inconsistent with the Constitution and SASA in varying ways. In the case of reg 4(5)(a) in particular the applicant saw it as a means to excuse the minister to escape the obligation to provide adequate school infrastructure in order to fulfil the right to basic education.

Msizi AJ held that reg 4(5) (a) was inconsistent with the Constitution, SASA and earlier order of the same court, which required the minister to consult all relevant stakeholders prior to promulgation of the regulations. The regulation was accordingly declared unlawful and invalid. Many other regulations, as

specified in the court order, were also declared unlawful and invalid. The minister was ordered to pay costs.

It was held that unlike other socio-economic rights, such as access to adequate housing, health care services and the like, which contained internal qualifiers stating that the state had to take reasonable legislative and other measures within its available resources to achieve progressive realisation thereof, the right to basic education was immediately deliverable. Given the nature of the right to basic education, and the crisis involved, there was no reason for the minister not to develop a plan and allocate resources in accordance with her obligation.

The natural consequence flowing from the stance assumed by the minister was that she could not make any commitment regarding the basic norms and standard for infrastructure in public schools. That was unacceptable. The courts had always rejected reliance on budget constraints as a justification for failure to provide essentials.

**Unconstitutionality of government policy on the appointment of insolvency practitioners and liquidators:** The facts in *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099

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(CC) were that in seeking to bring about transformation in the insolvency practitioners industry and appointment of liquidators, in February 2014, the appellant Minister of Justice and Constitutional Development introduced a policy to be applied. Clause 7 of the policy, dealing with appointment of trustees of insolvent estates, required the Master of the High Court to appoint insolvency practitioners in the ratio A4:B3:C2:D1. Category A represented African, coloured, Indian and Chinese females who became South African citizens before 27 April 1994. Category B represented males belonging to the same group as in Category A. Category C represented white females who became South African citizens before 27 April 1994. Category D included white males and African, coloured, Indian or Chinese persons who became a South African citizen on or after 27 April 1994. The numbers 4:3:2:1 represented the number of insolvency practitioners who had to be appointed from a category before the next category could be considered. Effectively the categorisation meant a white female (Category C) would be appointed only after satisfaction of the first two categories, while a white male would in all probability never be appointed as he competed with everybody else save that appointments were made in alphabetical order and that the profession was made almost entirely of white males.

The applicants, being a number of associations representing the interests of insolvency practitioners, as well as other groups, approached the WCC for an order declaring the policy unconstitutional. The High Court held that the policy was irrational and imposed impermissible quotas and accordingly declared it invalid. An appeal to the SCA failed, the court holding that the policy was irrational because it was arbitrary and capricious. Furthermore, it breached the principle of legality in that it failed to promote the interest of creditors in line with the Insolvency Act 24 of 1936.

In a further appeal the CC granted leave to appeal and

dismissed the appeal with costs. Delivering the majority judgment Jafta J held that the facts placed on record by the applicants for leave to appeal did not show that the policy was likely to achieve equality. If action was taken for no reason or no justifiable reason it was arbitrary. In the absence of reasons justifying it, the unequal operation of the policy was arbitrary and led to impermissible differentiation. Failure to prove that the policy was reasonably likely to achieve equality meant that there was no proof of a rational link between the policy and the purpose sought to be achieved. The impugned policy was, therefore, also irrational.

In a minority judgment Madlanga J (Froneman J and Kollapen AJ concurring) held that the policy met the requirements of s 9(2) of the Constitution dealing with taking legislative and other measures to protect or advance persons or categories of persons disadvantaged by unfair discrimination (affirmative action) and promoted the achievement of equality. Furthermore, it was neither irrational nor arbitrary.

• See law reports 'Insolvency' 2017 (May) *DR* 45 for the SCA judgment and 'Insolvency law' 2015 (June) *DR* 34.

**Unconstitutionality of regulations made in terms of Births and Deaths Registration Act 51 of 1992:** In the case of *Naki and Others v Director General: Department of Home Affairs and Another* [2018] 3 All SA 802 (ECG) the first applicant Naki was a South African citizen and a member of the South African National Defence Force. While on a peacekeeping mission in the Democratic Republic of Congo he fell in love with the second applicant and as a result of which, the two concluded a customary marriage according to Congolese law, which did not make provision for registration of customary marriages. After the first applicant returned to South Africa (SA) the second applicant joined him using a Congolese passport and a visitor's visa. At the time of the birth of the child NN in

South Africa the second applicant's visa had expired. For that reason officers in the respondent Department of Home Affairs refused to register the birth of NN on the ground that the Regulations on the Registration of Births and Deaths, 2014 prevented registration of the birth as the child's mother did not have valid papers to be in SA. The first and second applicants instituted High Court proceedings for orders declaring ss 9 and 10 of the Births and Deaths Registration Act 51 of 1992 (BDRA) and some of the 2014 Regulations invalid for being inconsistent with the Constitution.

Bodlani AJ held that ss 9 and 10 of the BDRA were consistent with the Constitution and, therefore, valid. Some of the regulations were found to be inconsistent with the Constitution. To save them the court followed the 'reading-in' approach with the result that in their new form they became compliant with the Constitution. Those regulations which could not be saved by the 'reading-in' approach were declared unconstitutional and invalid. The first respondent, Director General in the Department of Home Affairs and the second respondent Minister were ordered to pay costs.

The court held that ss 9 and 10 of the BDRA did not forbid unmarried fathers from registering the births of their children in the absence of mothers who gave birth to such children. The requirement was that such children should have been born alive, in which event any one of the parents, regardless of their marital status, would be able to give notice of birth. The ordinary interpretation of the words used in ss 9 and 10 left the statute constitutionally compliant.

Regarding the regulations, the registration of NN's birth was prohibited as her mother, the second applicant, could not produce a valid visa or permit, it was held that registration of NN's birth would not be in compliance with those regulations and could not, therefore, proceed. The result of the implementation of the regulations concerned

was that they inhibited access to the rights contained in s 28 of the Constitution (children's rights). For that reason, the regulations were inconsistent with the Constitution and had to be declared invalid.

• See also p 22 of this issue.

## Family law

**Division of assets on termination of permanent life partnership:** The facts in the case of *Booyesen v Stander* [2018] 3 All SA 662 (WCC) were that for some 17 years the parties lived together as life partners in a permanent relationship. When the relationship terminated the plaintiff Booyesen sought termination of joint ownership of the parties' immovable property, repayment of a loan made to the defendant Stander and return of a motor vehicle registered in her name, which the defendant had in her possession, basing her claim on the *actio communi dividendo*. In a counter-claim the defendant sought an order declaring that there was a universal partnership between the parties, the termination of that partnership and equal division of the joint estate.

Andrews AJ held that there was a universal partnership between the parties and terminated their co-ownership of the immovable property concerned. The defendant's registered share in the property was to be transferred and registered in the plaintiff's name against payment to the defendant of a specified sum of money. The defendant was allowed to keep the motor vehicle as her sole and exclusive property. Each party was allowed to retain as her sole property the assets and other property in their possession. Furthermore, each party was to pay their own costs.

It was held that the manner in which the parties conducted their affairs was consistent with the concept of universal partnership which described a state of affairs between the parties who met the requirements of a partnership. Consequently, a universal partnership came into existence between the parties. Such a partnership was similar to a marriage in community of

property. The relief which parties could claim when married in community of property was either an order for division of a joint estate or an order for forfeiture of the benefits of the marriage. It was trite that each spouse automatically shared in the assets that were accumulated during the subsistence of the marriage. The moment spouses entered into a marriage in community of property, they became co-owners of everything that either of them owned prior to the marriage.

The above fundamental legal principles reinforced the view that the plaintiff's claim based on the *actio communi dividendo* could not be sustained as it was near impossible to untangle the threads of interwoven narratives of life partners which had layered complexities akin thereto in the advancement of a joint household. In order to achieve fairness to both parties, the end result had to incorporate a hybrid of both the *actio communi dividendo* and a universal partnership as there were obvious overlaps in the overarching legal principles, which further extended to the principles analogous to a marriage in community of property. Accordingly, a division of the joint estate had to follow.

## Fundamental rights

**Access to information – political party funding:** In *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC), the applicant, My Vote Counts NPC, a non-profit organisation that brought an application in the WCC in which it sought an order declaring the unconstitutionality of the Promotion of Access to Information Act 2 of 2000 (PAIA) to the extent that it failed to make provision for political parties to disclose their private funding. That was after the applicant sought such information from political parties, some of whom took cover under the provisions of s 50(1) and ss 63 to 65 of PAIA to avoid disclosing that information. The applicant further sought

a declaratory order for the 'continuous and systematic' recordal and disclosure of information on private funding for political parties. The High Court granted an order declaring PAIA invalid to the extent of its failure to provide for access to information on private funding of political parties and independent candidates. The declaration of invalidity was suspended for a period of 18 months to allow Parliament an opportunity to remedy the defect. However, the court declined the request for a declaratory order for 'continuous and systematic' recordal and disclosure of information on private funding of political parties, holding that doing so would impermissibly encroach on Parliament's exclusive domain by prescribing to it how to execute its constitutional mandate.

The CC granted an order confirming invalidity of PAIA to the extent that it did not make provision for access to information on the private funding of political parties and independent candidates. The court granted the applicant leave to appeal against the High Court order declining the request for 'continuous and systematic' recordal and disclosure of information on private funding of political parties and independent candidates, but the appeal itself was dismissed. Suspension of the period of invalidity was changed to an order directing Parliament to cure the deficiency within a period of 18 months. The minister was ordered to pay costs.

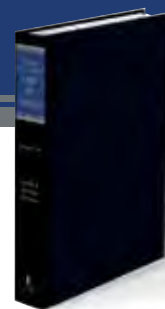
Reading the main judgment Mogoeng CJ held that all information necessary to enlighten the electorate about the capabilities and dependability or otherwise of those seeking public office should not only be compulsorily captured and preserved but should also be made reasonably accessible. Lack of transparency on private funding provided fertile and well-watered ground for corruption or deception of voters. To the extent that PAIA excluded the disclosure of information on the private funding of independent candidates that was required for the exercise or protection of the right to

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vote or impart information or ideas, it was constitutionally defective. It was an absolute necessity that all, not some, political parties be required to record, preserve and disclose information on their private funding. For that reason, to the extent that PAIA did not cover those political parties that were not juristic persons, it was constitutionally deficient.

In brief, PAIA was deficient because it did not provide that –

- information on private funding of political parties and independent candidates be recorded and preserved;
- such information be made reasonably accessible to the public; and
- independent candidates and all political parties were subject to its provisions.

On the issue of ‘continuous and systematic’ recordal, preservation and disclosure of private funding of political parties and independent candidates, it was held that it did not fall within the remit of the court to prescribe to Parliament whether the recordal, preservation and disclosure of all the information relating to private funding had to be regulated in terms of PAIA or PAIA and another legislation or PAIA and other measures. That was a decision to be taken by Parliament itself.

On the question of suspension of the declaration of invalidity it was held that the overriding consideration should always be whether the nature of the defect was such that the enjoyment of benefits provided by the invalidated provision would cease to flow if the order of invalidity was not suspended. Absent harm or prejudice to the public or any interest no suspension would be necessary. The order of suspension was not without purpose nor was it an automatic consequence of a declaration of invalidity but was triggered by negative or undesirable consequences that would otherwise flow from a failure to suspend. In the present case there was no purpose that would be served by suspending the declaration of invalidity.

In a separate judgment Froneman J (Cachalia AJ concurring) agreed with the main

judgment for slightly different reasons.

## Labour law

**Placed (temporary) workers earning less than prescribed amount deemed, after three months, to be employees of company they are placed with:** Section 198A(3)(b) of the Labour Relations Act 66 of 1995 (the LRA), which was introduced by the 2014 Amendments to the LRA, provides among others that an employee who earns less than the stipulated threshold (currently being R 205 000 per year) and is contracted through a temporary employment service (TES – a labour broker) to a client for more than three months is deemed to be employed by that client. The meaning of the section was the issue in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others* 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC), where the applicant, Assign Services (a TES), contended that the section created a dual-employment relationship with the result that the employee was employed by both the TES and a client (Krost in the instant case). The respondent trade union, the National Union of Metal Workers of South Africa (NUMSA), on the other hand, contended that the section created a sole-employment relationship between the employee and the client. The dispute between the parties was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) by way of a stated case. The CCMA held that the section created a sole-employment relationship. The applicant took the CCMA arbitration award to the LC for review and setting aside, which was done. The LC held that the section created a dual-employment relationship. On appeal to the LAC it was held that the section created a sole-employment relationship. In the present case the applicant applied to the CC for leave to appeal against the order of the LAC. Leave to appeal was granted but the appeal itself was dismissed with costs.

Reading the main judgment Dlodlo AJ held that the purpose of the s 198A amendments was clear. They existed to fill a gap in accountability between client companies and employees who were placed with them. That meant that placed (temporary) employees were fully integrated into the workplace as employees of the client after the three-month period. The contractual relationship between the client and the placed employee did not come into existence through negotiated agreement or through the normal recruitment processes used by the client. The employee automatically became employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that followed. The language used by the legislature in s 198A(3)(b) was plain. When interpreted in context, it supported the sole-employer interpretation and was in line with the purpose of the 2014 Amendments, the primary object of the LRA and the right to favour labour practices in s 23 of the Constitution.

In a dissenting judgment Cachalia AJ held that what s 198A(3)(b) did was to recognise that the TES was ordinarily the employer as stipulated in s 198(2) but that the client was regarded as the employer after the three-month period had elapsed. The deeming provision contained in the section created a statutory employment relationship between the employee and the client in addition to the existing employment relationship between the employee and the TES and not in substitution thereof. Therefore, the dual-employer interpretation was the correct one, while the sole-employer interpretation was clearly wrong.

- See also Moksha Naidoo ‘Employment law update – The Constitutional Court brings finality on the interpretation of an amendment to the LRA’ 2018 (Oct) *DR* 52.

## Local government

**Failure to compile supplementary valuation roll ren-**

**ders municipal property rates invalid:** Section 49(1) of the Local Government: Municipal Property Rates Act 6 of 2004 (the MPRA) requires the municipal valuer to submit the certified valuation roll to the municipal manager who must then publish a notice stating that the roll is open for inspection for a period stated in the notice and inviting any person who wishes to lodge an objection to do so in the prescribed manner and within a stated period. A municipality is required to cause a supplementary valuation roll to be prepared in respect of any rateable property, which has come to be included in the municipality after the last general valuation.

In *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others* [2018] 3 All SA 605 (SCA) the respondents Lombardy Development and others were property owners situated in the Kungwini Local Municipality where their properties were categorised ‘residential’. However, the municipality was disestablished and absorbed into the appellant City of Tshwane Municipality with effect from July 2011. For a year or more levies were charged on the properties as ‘residential’ but thereafter their category was changed to ‘vacant’ property followed by massive increases in liability for municipal rates. The appellant could not explain how the change came about and the respondents were not given the opportunity to object to new categorisation and rates. No supplementary valuation roll had been prepared as required by s 49(1) of MPRA.

The GP per Tuchten J held that the new municipal rates based on land categorised as ‘vacant’ were invalid and accordingly set them aside. An appeal to the SCA was dismissed with costs.

Ponnan JA (Majiedt, Seriti JJA, Pillay and Makgoka AJJA concurring) held that understood contextually, the High Court order required the appellant to undertake a valid process of re-categorisation of the Kungwini ‘vacant’ properties, thereby complying with MPRA. Put another

way, if the appellant wished to apply its 'vacant' land rate to those properties it had to first properly re-categorise them as 'vacant'. That did not require the retrospective compilation of a valuation roll. Rather, it was for the appellant to issue, following the procedures prescribed in the MPRA, a general or supplementary valuation roll that validly re-categorised Kungwini properties as 'vacant'. Once that was done the appellant would be free to apply the 'vacant' land rate to those properties. The respondents

did not challenge the validity of rates applicable to 'vacant' land and it was plain that the High Court did not mean by its order that the appellant had to reconsider that rate or that the rate had been declared invalid. In other words, in order to validly apply the 'vacant' land rate to the affected properties, same had to be validly re-categorised by moving them from the 'residential' to the 'vacant' category thereby complying with the requirements of the MPRA for effecting a valid re-categorisation.

### Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Access to information held by a public body, application of 'no risk' clause in contracts, cessation of membership of a political party, cost of credit in a consumer credit agreement, elements of offence of corruption, litigation on behalf of a traditional community, marriage out of community of property subject to ac-

crual system, prohibition of doing conveyancing work by non-attorneys, protection of heritage resources, publication of invitation to tender, reinstatement of consumer credit agreement, review of classification of film by Film and Publication Tribunal, service of administrative action proceedings on all affected parties, setting aside arbitration award, validity of regulations governing petroleum exploration and production and whether decision of arbitration tribunal constitutes administrative action. □



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By  
Tshepo  
Mashile

# To prove or not to prove? *Novus actus interveniens* in third-party claims

*Van der Merwe v RAF* (GP) (unreported case no  
42358/15, 16-3-2018) (Ranchod J)

**N***ovus actus interveniens* is a Latin legal phrase, which describes an important principle in criminal and civil procedure in as far as causation and liability is concerned. Loosely translated it means 'new intervening act'.

Ranchod J, in the Gauteng Division, Pretoria had occasion to deal with this principle in a third-party claim in this matter.

## The facts in brief

The plaintiff, Amore van der Merwe was injured in a motor vehicle accident on 27 October 2012 in Modimolle, Limpopo Province. She was a passenger in a motor vehicle, which slid backwards on an embankment, capsized and rolled over her. She was on holiday in South Africa when she was injured in the accident.

Liability was admitted by the Road Accident Fund (RAF) and the only triable issue was the issue of the quantum of the plaintiff's damages.

The RAF admitted the correctness of the medico-legal reports from the various experts of the plaintiff. Only the evidentiary value of the reports was challenged.

The plaintiff was 19-years-old at the time of the accident and 24-years-old at the time of the trial. Her legal representatives were of the view that it was not necessary for her to testify at the trial as the trial related to the quantum of damages only. The defendant was, however, of the view that she should be available to testify. It was agreed by both parties and arranged that she testify via Skype as she was in New Zealand.

It was her testimony that her hip was causing her great discomfort and that she had been unemployed due to the injuries she sustained in the accident. She stated that she would like to study and work in the future, but was not able to do so due to the injuries.

An educational psychologist and an occupational therapist testified after her. There was no cross-examination of the plaintiff or the two experts by defendant's counsel and the plaintiff closed

her case. The defendant did not lead any evidence and closed its case as well and both parties presented their arguments.

## Discussion

The thrust of the defendant's argument was that the plaintiff had suffered further injuries on 8 October 2015 when she fell from some stairs and sustained injuries to her right knee and lower back. This, argued counsel for the defendant, constituted a *novus actus interveniens* for which the defendant could not be held liable as far as the injuries the plaintiff sustained in the fall were concerned. The fall and the injuries sustained were revealed for the first time in the medico-legal report of the plaintiff's industrial psychologists dated 1 March 2017.

All the plaintiffs' medico-legal reports were obtained after 8 October 2015, namely between 3 November 2015 and 1 March 2017. The defendant argued that the plaintiff's experts did not differentiate between the injuries sustained in the motor vehicle accident and those that she sustained as a result of the fall.

The defendant's counsel submitted that the plaintiff had the option of asking for a postponement with a tender for costs in order to allow her experts to rewrite their reports and exclude the later injuries. Alternatively, that the court should grant absolution from the instance.

Firstly, the plaintiffs' counsel submitted that the defendant's entire argument on this score stemmed from one passage in the industrial psychologist's medico-legal report. Secondly, the argument went, the defendant's counsel had failed to cross-examine the plaintiff and her two experts hence the defendant could not raise the issue of a *novus actus interveniens*. Thirdly, the defendant had not raised a substantive defence of *novus actus interveniens* and had not adduced any evidence in that regard. Finally, the onus of proving a *novus actus* rested on the defendant.

In the court's view the above submissions could not be sustained. The fact that the plaintiff sustained further injuries almost three years after the motor vehicle accident was peculiarly within

her knowledge. It appeared that she had been to an orthopaedic surgeon on 13 November 2015 about three weeks after she fell on 8 October 2015, yet no mention was made of the fall to him. One can only assume that she did not mention it to the orthopaedic surgeon. The same can be said about her visits to the other experts. She consulted the industrial psychologist on 4 November 2015; a neurosurgeon on 3 November 2015; a plastic surgeon on 13 November 2015; an occupational therapist on 14 November 2015; a neuropsychologist on 3 June 2016 and the educational psychologist on 22 February 2017. None of them, except the industrial psychologist, indicated that the plaintiff had told them about the fall on 8 October 2015.

The result was that all the plaintiff's experts took the injuries she sustained in the fall from the stairs into account when compiling their reports and forming their opinions. The defendant could not have been expected to do anything about that.

The onus was on the plaintiff to prove causation, which, in the court's view – given that it was peculiarly within the plaintiff's knowledge that she fell and sustained injuries – also meant to exclude any interruption of causation.

The plaintiff carries the burden to prove causation and where the plaintiff has sustained further injuries after the accident there is a secondary burden on the plaintiff to prove that the causation of such injuries does not interrupt the causation of all the injuries that the plaintiff presents with. By failing to disclose that there are injuries which she sustained when she fell down the stairs (a fact which was always within her knowledge) the plaintiff gave the experts the impression that all the injuries she presented with were caused by the accident and they, therefore, treated all injuries as such. The experts should have, therefore, been briefed of the fact that the plaintiff had fallen down the stairs in order to enable them to exclude these injuries from their opinions.

The aforesaid reasoning is so because the experts should be able to say that the plaintiff fell because of the injuries sus-

tained in the accident. In this way, the injuries would not be regarded as a new intervening act. But by presenting all the injuries as if they are caused by the accident, the plaintiff was misleading the experts and, therefore, her claim cannot be said to have been properly quantified because she has failed to show that all the injuries are accident related.

## Causation

Causation includes two distinct inquiries – factual and legal. Factual causation relates to the question whether the defendant's wrongful act was a cause of the plaintiff's loss, and is generally referred to as the *sine qua non* ('but-for' test), namely, what probably would have happened but for the wrongful conduct of the defendant. However, even if it was shown that the wrongful act was the *sine qua non* of the loss, it does not necessarily result in legal liability. The second inquiry must then take place, namely, whether the wrongful act was sufficiently closely or directly related to the loss for legal liability to arise or whether the loss is too remote. This is called 'legal causation' (see *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)

at 700E – G, 700H – 701D and *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E – 35A, 43E – 44B).

In considering legal causation, a factor, among others, that is taken into account is the absence of a *novus actus interveniens*. In this case, the plaintiff herself told the industrial psychologist about the fall and the injuries she sustained. This fact had become part of the factual matrix the court had to consider in determining the plaintiff's quantum of damages.

There was no onus on the defendant to prove the extent of the plaintiff's injuries and their sequelae with regard to the fall. The plaintiff proved all the orthopaedic injuries contained in the expert reports, including the two injuries constituting the *novus actus* by confirming them in her testimony at the trial and the admission of such evidence by the defendant when it admitted the content of the expert reports. The defendant does not attract an onus to prove the *novus actus* as a substantial defence in these circumstances.

There was no primary fact evidence presented by the plaintiff to link the two injuries constituting the *novus actus* to the motor vehicle accident. It is for the

plaintiff to prove her loss without taking the *novus actus* into account.

It was also contended by her counsel that her fall was foreseeable and an inherent risk in the post-accident condition. The onus was on the plaintiff to prove these two allegations.

## Conclusion

Much store was put on the defendant's failure to cross-examine the plaintiff and her two witnesses. The defendant did not have to because it was accepted that two sets of orthopaedic injuries existed, those sustained in the motor vehicle accident and those sustained in the fall. The defendant did not have to call any witnesses to prove the *novus actus* – the plaintiff had to do so.

The court was unable to determine the plaintiff's quantum in respect of the injuries sustained in the motor vehicle accident on 27 October 2012 and ordered an absolution from the instance of the plaintiff's claim with costs.

**Tshepo Mashile LLB (UL) is an attorney at Mkhonto and Ngwenya Inc in Pretoria.**



By  
Nadia  
Froneman

# 'Mlungu' vs 'Boer' – context is everything

*National Union of Metalworkers of South Africa obo Simons and Others v National Glass Distributors* [2015] 11 BALR 1137 (MEIBC) and *Duncanmec (Pty) Ltd v Gaylard NO and Others* (CC) (unreported case no CCT 284/17, 13-9-2018) (Jafta J (Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring))

**I**n the case of *National Union of Metalworkers of South Africa obo Simons and Others v National Glass Distributors* [2015] 11 BALR 1137 (MEIBC), the Metal and Engineering Industries Bargaining Council was tasked with determining the substantive fairness, or otherwise, of the dismissal of four striking employees who chanted '*F\*\* of Mlungu*' while picketing.

The applicants were dismissed for the unauthorised use of company property; making defamatory, inciting, offending accusations and/or statements; and the

intimidation and threatening behaviour towards members of management. The video footage was presented as evidence in the arbitration, which was supported by the following facts: One, Fourie was the acting factory manager at the time of the strike. An approximate 60 striking employees were not granted permission to picket on the company's premises. The striking employees, however, moved onto the company's premises and picketed in the carport area. Fourie, and others, tried to push the crowd back to shut the 'roller shutter door' on them, but when they shut the door the striking em-

ployees began banging on the door. Fourie went out the pedestrian door to try and address the striking employees and tell them to get off the company's premises, that is when the striking employees began singing '*F\*\* of Mlungu*' repeatedly and continued to move towards Fourie, pointing at him as they sang. Fourie began filming the striking employees, he closed and locked the gate of the factory.

The striking employees were carrying *knop kieries* and sticks, Fourie was the only white man present at the time of the incident.

Fourie testified that he felt intimidat-

ed by the striking employees' behaviour and that he believed that the song was compiled for him.

The applicants argued that the song they sang was not racist and that they sang the song at other companies that have black managers. They testified that the song was not directed at any particular person. In their minds, they testified, the song meant 'loop, loop baas ons is moeg van julle', 'go boss' and later 'go white man'.

The arbitrator held: 'A direct translation of *Mlungu* is "white man". The word *Mlungu* can clearly be used in a different context and will not be offensive. What must be considered in this instance is the context and circumstances in which this word was used. In the matter before the word "f\*\* of" was used with *Mlungu*. Translated into English it means "f\*\*\* off white man". The evidence also established that these offensive words were directed at Mr Fourie who was the acting factory manager at the time.'

In the circumstances, the arbitrator held that dismissal of the striking employees was substantively fair.

The arbitrator went further and held that the striking employees' conduct amounted to harassment and intimidation and that a single instance where racial swear words or expletives are used constitutes harassment and is dismissible. In this regard, the arbitrator stated that racially abusive language used by an employee and directed at either another employee or third party justifies dismissal. In this particular case, the arbitrator was satisfied that the striking employees had directed their song at Fourie. The evidence in this regard, including the video footage, was overwhelming.

Similarly, in the case of *Duncanmec (Pty) Ltd v Gaylard NO and Others* (CC) (unreported case no CCT 284/17, 13-9-2018) (Jafta J (Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring)), the Constitutional Court (CC) was recently tasked with determining two critical issues, namely:

- whether the conduct of striking employees who sang the isiZulu struggle song, the lyrics of which translated are 'Climb

on top of the roof and tell them that my mother is rejoicing when we hit the *boer*' constituted racism; and

- whether the award rendered by the arbitrator, in terms of which the employees were reinstated and awarded three months' compensation, was vitiated by unreasonableness.

In determining the first issue, the CC held that the word '*Boer*', which (depending on the context) may mean 'farmer' or 'white person', is not an offensive term in and of itself. The CC highlighted that the arbitrator concluded that the song was inappropriate and that 'it can be offensive and cause hurt to those who hear it' but that she also drew the distinction between 'singing the song and referring to someone with a racist term'.

The National Union of Metalworkers South Africa (NUMSA), acting on behalf of the dismissed employees, did not take issue with the finding that the singing of the song at the workplace was inappropriate and offensive in the circumstances. The CC was, therefore, willing to approach the matter on the footing that the employees were guilty of a racially offensive conduct.

According to the CC, the answer to the first issue is yes, the conduct of the striking employees was racist.

In determining the second issue, the CC held that an 'unreasonable' arbitration award is one which could not be made by a reasonable decision-maker and would warrant interference. To this end, it held that the reviewing court need not evaluate the reasons for the arbitrator's decision to determine whether it agreed with them and whether the court disagreed with them is not material.

Duncanmec accused the arbitrator of going soft on racism and argued that dismissal was the only appropriate sanction. The CC disagreed and held that dismissal does not flow as a matter of course in matters concerning racism. The CC held: 'What is required is that arbitrators and courts should deal with racism firmly and yet treat the perpetrator fairly', and 'such a rigid rule would be inconsistent with the principle of fairness which constitutes the benchmark against which dismissals are tested'.

The CC, ultimately, held that it was clear from the arbitrator's award that

she had applied her mind to the facts of the case, the context in which the misconduct was committed and the competing interests of Duncanmec and the employees before rendering her award. As such, the arbitrator applied a moral or value judgment to established facts and circumstances, which was required of an arbitrator. The CC was satisfied that all of this shows rationality in the reasoning leading up to the arbitrator's decision and, therefore, the reasonableness requirement was met and, as such, the CC dismissed the appeal.

The CC in this case was dealing with an appeal pertaining to a review of the arbitration award in the Labour Court (LC). The LC agreed with the arbitrator and made her award an order of court. The fact that the CC did not uphold the appeal does not mean that it agreed with the arbitrator's reasoning or award. It merely means that it considers it to be reasonable in the circumstances and that a reasonable decision maker could have made the same, or a similar, award.

In conclusion, it is clear from these two judgments that the context in which potentially racial utterances are made will be determinative of whether dismissal is an appropriate sanction. If one compares the two cases it becomes clear why the dismissal of the striking employees in the *Glass Distributors* case was fair and that of the striking employees in the *Duncanmec* case was not. In the *Glass Distributors* case the striking employees entered the company's premises without authorisation and directed the song at Fourie, where they pointed at him as they were singing and moved toward him in unison and in an intimidatory manner. On the other hand, in the *Duncanmec* case, the striking employees were not referring to someone in particular with a racist term and the strike was peaceful and short lived.

- See also Moksha Naidoo 'Is dismissal the only appropriate sanction for acts of racism?' 2018 (Nov) *DR* 47.

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By  
Chris  
Maree

## How to deal with the legal forms in a parenting plan and the Family Advocate's requirements with child participation

**P**arenting plans are a child focused alternative dispute resolution process mandated by legislation, to assist the holders of parental responsibilities and rights to coordinate and regulate the manner in which the co-holders of responsibilities and rights will exercise their respective parental responsibilities and rights.

In a society in which nearly 67% of all minor children do not live within a nucleus family environment, parenting plans may serve as a very valuable tool in the hands of the family law practitioner.

In line with the requirement that co-holders of parental responsibilities and rights in relation to a child should employ actions and decisions which will minimise further legal or administrative proceedings (s 7(n) of the Children's Act 38 of 2005 (the Act)), parenting plans are just one of the benefits of mediation in such parental responsibilities and rights disputes.

The mandatory determination that the co-holders of parental responsibilities and rights in respect of a child, when experiencing difficulties in exercising their respective parental responsibilities and rights, must first seek to agree on a parenting plan before referring to litigation, is still disregarded by many practitioners and courts (s 33(2) of the Act).

Such an approach still favours the adversarial process and place the emphasis on the inability to focus on the needs of the child, and instead focus of the needs of the parents willing to destroy the other co-holder of rights and responsibilities to be crowned the ultimate victor.

### What is a parenting plan?

A parenting plan can be defined as follows: A parenting plan is a unique document that is compiled for a specific family and, which represents the best possible solutions to avoid future litigation and to ensure the optimal participation of both parents and their minor child/children. It is developed by means of a mediated process to address the ever-changing needs of the minor child/children involved taking into account the inputs made by the child/children given their age, maturity and stage of development.

### Format and other requirements

Any application for a parenting plan to be

registered by the Family Advocate or for it to be made an order of court or to be incorporated into a Court Order, must be in writing and must be in the prescribed format (s 34(2) and 34(3) of the Act, reg 9 to 11 of the Regulations published under the Act in GN R261 GG33076/1-4-2010 (the Regulations)).

### Step 1 - Form 8, 9 and 10

The parenting plan must be accompanied by a Form 8 or a form identical to Form 8 must be utilised. Form 8 consists of Part A, B, C and D. Part A of Form 8 deals with the particulars of the holders of parental responsibilities and rights to whom the parenting plan applied and will require the following information –

- surname;
- full names;
- identity number, date of birth, passport number;
- residential address;
- home telephone number;
- cellular telephone number;
- e-mail address;
- work address;
- work telephone number; and
- relationship to the child/children.

If more than two holders of parental responsibilities and rights enter into a parenting plan the details of such holders of parental responsibilities and rights can be furnished on a separate page and attached to Form 8 as an annexure.

Part B of Form 8 provides for the details of the child/children in respect of whom the parenting plan applies and will require the following information:

- the surname of the child;
- full names of the child;
- identity number, date of birth, passport number;
- residential address; and
- contact number.

If more than three children are involved in a parenting plan the details of the additional children in respect of whom the parenting plan applies can be furnished on a separate page and attached to Form 8 as an annexure.

Part C of Form 8 consists of a notification to the Family Advocate, the Clerk of the Court or the Registrar of the High Court and provides space to include the place where the parenting plan is to be registered or made an Order of Court and the date. This notification must be completed and signed by all the holders of parental responsibilities and rights whom requires the parenting to be reg-

istered at the Office of the Family Advocate or to be made an Order of Court.

Part D of Form 8 provides for a notification to the Office of the Family Advocate, Clerk of the Court or the Registrar of the High Court where a parenting plan has been prepared with the assistance of a Family Advocate, social worker or psychologist, or after mediation by a social worker or other suitably qualified person. In such matter a Form 9 or Form 10 must be attached to the parenting plan (s 33(2) and 33(5) of the Act).

This part will find application in instances where co-holders of parental responsibilities and rights have experienced difficulties in exercising their responsibilities and rights. Where assisted by a Family Advocate, social worker or psychologist referred to in s 33(5)(b) of the Act, the co-holders of parental responsibilities and rights must complete in writing a Form 9 or a form identical to Form 9 (s 33(2) of the Act; reg 10(1) of the Regulations).

I suggest that practitioners complete all the parts of Form 8 to avoid delays when submitting a parenting plan.

### • Form 9

Form 9 not only provides for a statement from the Family Advocate, social worker or psychologist who assisted the co-holders of parental responsibilities and rights to compile the parenting but also now introduces the voice of the child (ss 6(5) and 10 of the Act; reg 10 of the Regulations).

Form 9 provides for the Family Advocate, social worker or psychologist to confirm that the information regarding the contents of the parenting plan was furnished to the child/children and that the child/children have been given an opportunity to express their views and that their views have been given due consideration bearing in mind the age, maturity and stage of development of the child/children.

Form 9 will be utilised for example in matters where the Family Advocate, social worker or psychologist were approached by the co-holders of parental responsibilities and rights where the parties only disagreed on certain aspects of the parenting plan and needed assistance to finalise the parenting plan or to engage with the child/children to determine the voice of the child/children. Form 9 will also be utilised when dual mediation took place in a matter.

## • Form 10

Form 10 provides for a statement by a social worker or other suitably qualified person that a parenting plan was prepared after mediation. One could safely assume that this statement could also be made by a Family Advocate and psychologist who were pivotal in the mediation process between the parties, which culminated in the finalisation of a parenting plan.

Form 10 also provides for a statement by the social worker or suitably qualified person to confirm that the information regarding the contents of the parenting plan were furnished to the child/children, and that the child/children have been given an opportunity to express their views, and that these views were given due consideration bearing in mind the child/children's age, maturity and stage of development.

## Step 2 – child participation – s 10 of the Act

Bearing in mind the age, maturity and stage of development it is of the utmost importance that the voice of the child/children be heard during the development of the parenting plan and that the views of such a child/children have been given due consideration. I suggest that Forms 9 or 10 be utilised to confirm that the voice of the child/children have been taken into account (reg 11 of the Regulations; s 6(5) of the Act).

Recognising the child/children's right to participate is further highlighted in s 31 of the Act, which deals with major decisions involving children by a person holding parental rights and responsibilities.

## Step 3 – what should be included into a parenting plan

A parenting plan should act as a road-map and must establish guiding principles, which will assist the co-holders of parental responsibilities and rights to reach the ultimate goal of addressing the ever-changing needs of the child/children, and not the parents, always acting in the best interests of the child/children involved.

The following can be included in a parenting plan but is not limited to the aspects mentioned as the needs of child/children differs:

- Decision making and sharing of parenting.
- Period covered by the parenting plan.
- Parental responsibilities and rights:
  - Full or specific.
  - Care, namely, residency; safeguarding and promoting the well-being of the

child/children; and guiding the behaviour of the child/children.

- Contact – all aspects.
- Guardianship.
- Maintenance.
- Naming of the child, for example nick names.
- Education – school fees, namely:
  - Government or private: Who will be liable for school fees?
  - Who will be liable for tertiary institutional fees?
- Religious and spiritual matters.
- Maintenance – be specific who will contribute, amounts as well as the annual increases.
- Medical arrangements.
- Hairdressing needs, namely who will cut and style the child/children's hair.
- Clothing needs.
- Extramural activities.
- Transport.
- Communication, consultation, information on sharing and conflict resolution.
- Contact between parents to re-evaluate the parenting plan and to address the developmental needs of the minor child/children.
- Provisions about re-evaluation.
- Relocation:
  - In South Africa.
  - Out of the borders of South Africa (guardianship could be a requirement when relocating to certain countries).
- Discipline.
- New partners.
- Death of a parent:
  - Funeral arrangements.
  - Cultural heritage.
  - Contact with extended family.
  - Cultural heritage.
  - Changes to parenting plan:
    - How?
    - When?
    - What if the parents disagree?
    - Mediation.
    - The appointment of the parenting co-ordinator.
  - Provisions about legal enforceability.
  - Court orders and s 34(5) of the Act.

## Who may compile a parenting plan?

The parenting plan should be prepared after mediation/consultation with the parents by the Family Advocate, social worker, psychologist or other appropriate suitable person (for example mediators) contemplated in s 33(5)(b) to the effect that the plan was prepared after mediation by such person.

Mediation is a fair, cost effective and amicable process. The parties are in a situation where they communicate effectively and brainstorm workable solutions. In most cases, this process results in parties who can continue to communicate even after divorce, where it is vitally important when children are involved.

The mediator must explain the necessity to focus on the child/children, both parents their future and preserving their respective relationships with the child/children.

The mediator will explain the process, the parenting plan and the involvement of a professional team.

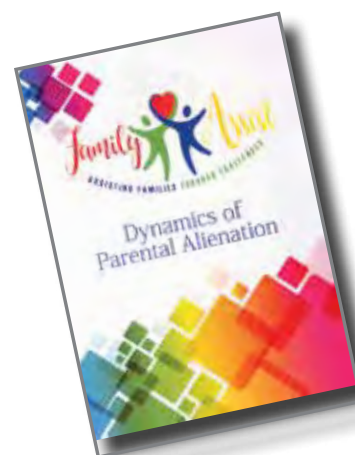
Mediators work collaboratively with professionals that are pro-mediation and pro-preserving the family dignity, to prevent alienation in the future and promote co-parenting skills.

## Changes to the parenting plan

A parenting plan registered with a Family Advocate may be amended or terminated by the Family Advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan. A parenting plan that was made an order of court may be amended or terminated only by an order of court.

Chris Maree BCom (Law) LLB (UJ) is the Senior Family Advocate and Head of the Pretoria Office of the Family Advocate at the Department of Justice and Constitutional Development in Pretoria. □

## Winner of Parental Alienation DVD



Geraldine Kaye from McClung-Mustard Attorneys in Pinetown, KwaZulu-Natal is the winner of the Family Assist DVD, 'Dynamics of Parental Alienation', which is valued at R 250.

Congratulations Ms Kaye!





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## ACROSS



The southern coast of South Africa is home to the Garden Route National Park and its jewel is the Tsitsikamma Section (proclaimed in 1964) – one of the world's most spectacular biodiverse protected areas. It comprises of indigenous rain forests that harbour 116 types of trees such as the giant Outeniqua yellowwood (some estimated to between 600 and 800 years old) and fynbos (which covers around 30% of the park). Tsitsikamma is also the country's largest marine reserve and the oldest in Africa. One of the highlights is the 77 metre-long suspension bridge which spans the width of the Storms River Mouth. The bridge hangs just seven metres above the churning waters of the river as it enters the sea. SANParks, established in terms of the National Environmental Management: Protected Areas Act, 2003, has the primary mandate to oversee the conservation of this sensitive and valuable biodiversity, landscape and associated heritage asset.

  
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## Bills

Competition Amendment Bill B23A of 2018.  
Competition Amendment Bill B23B of 2018.  
Child Justice Amendment Bill B32 of 2018.  
Electoral Laws Amendment Bill B33 of 2018.  
Division of Revenue Amendment Bill B34 of 2018.  
Adjustments Appropriation Bill B35 of 2018.  
Special Appropriation Bill B36 of 2018.  
Rates and Monetary Amounts and Amendment of Revenue Laws Bill B37 of 2018.  
Taxation Laws Amendment Bill B38 of 2018.  
Tax Administration Laws Amendment Bill B39 of 2018.  
Firearms Control Amendment Bill B40 of 2018.

## Commencement of Acts

### Legal Practice Act 28 of 2014

Commencement published in Proc R31 GG42003/29-10-2018 (also available in isiXhosa).

**31 October 2018 –**

- ch 2, except s 14.

**1 November 2018 –**

- ch 1;
- ch 3, except s 35(1) – (3) and 35(7) – (12);
- ch 4, except ss 37(5)(e)(ii), 40(1)(b)(ii), 40(7)(b), 41 and 42;
- chs 6 and 7;
- ch 8, except s 93(5);
- ch 9, except s 95(2); and
- parts 3 and 4 of ch 10.

## Selected list of delegated legislation

### Basic Conditions of Employment Act 75 of 1997

Amendment of sectoral determination

# New legislation

Legislation published from  
1 – 31 October 2018

11: Private security sector (amendment of minimum wages with effect from 1 November 2018). GN1104 GG41974/12-10-2018 (also available in isiZulu).

### Broad-Based Black Economic Empowerment Act 53 of 2003

Practice note 1 of 2018: Youth employment service. GenN640 GG41975/12-10-2018.

### Child Justice Act 75 of 2008

Accredited diversion service providers and diversion programmes. GN1076 GG41955/5-10-2018.

### Electronic Communications Act 36 of 2005

Number portability regulations. GN1021 GG41949/1-10-2018.

### Financial Markets Act 19 of 2012

Amendments of the Strate rules. BN105 GG41955/5-10-2018.

### International trade

South African Development Community and European Union Economic Partnership Agreement: Procedures for application, administration and allocation of export quotas under the agreement between European Union and Southern African Development Community for 2019. GenN622 GG41963/8-10-2018.

World Trade Organisation: Marrakesh agreement regarding market access: Conditions, arrangements and procedures for market access permits. GenN625 GG41966/9-10-2018.

### Legal Practice Act 28 of 2014

Regulations. GN R1183 GG42002/29-10-2018 (also available in isiXhosa).

### Local Government: Municipal Finance Management Act 56 of 2003

Amendments to the municipal regulations on minimum competency levels. GN1146 GG41996/26-10-2018.

### Measurement Units and Measurement Standards Act 18 of 2006

Amendment of the national measurement standards. GN1131 GG41982/19-10-2018.

### Medicines and Related Substances Act 101 of 1965

Registration of oral preparations which contain certain bacterial strains. GN R1099 GG41971/12-10-2018.

Amendment of sch 1 – 4. GN R1098 GG41971/12-10-2018.

### Military Pensions Act 84 of 1976

Determination of amounts. GN R1180 GG41997/26-10-2018 (also available in Afrikaans).

### National Environmental Management: Air Quality Act 39 of 2004

The 2017 National Framework for Air Quality Management in South Africa. GN1144 GG41996/26-10-2018.

Amendments to the list of activities and associated minimum emission standards identified in terms of s 21. GN1207 GG42013/31-10-2018.

### National Qualifications Framework Act 67 of 2008

Regulations for the quality assurance of private colleges for continuing education and training, offering qualifications registered on the general and further education and training qualifications sub-framework, and accreditation of private assessment bodies. GenN633 GG41970/12-10-2018.

### National Road Traffic Act 93 of 1996

Determination and implementation of curricula for traffic officers. GN1184 GG42004/29-10-2018.

### Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support with effect from 31 October 2018: R 276 928. BN145 GG41996/26-10-2018 (also available in Afrikaans).

### Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the Soweto area. GN1086 GG41970/12-10-2018.

Establishment of small claims court for the Komatipoort area. GN1145 GG41996/26-10-2018.

### Special Economic Zones Act 16 of 2014

Designation of Atlantis Special Economic Zone. GN1130 GG41982/19-10-2018.

### Sugar Act 9 of 1978

Transitional provisions in respect of the Constitution of the South African Sugar Association and the Sugar Industry Agreement, 2000. GN1082 GG41967/9-10-2018.

### Tax Administration Act 28 of 2011

Listing the of non-submission of returns as required in terms of the Diamond Export Levy (Administration) Act 14 of 2007, as an incidence of non-compliance. GN1175 GG41996/26-10-2018 (also available in Afrikaans).

### Veterinary and Para-Veterinary Professions Act 19 of 1982

Amendment of regulations (fees). GenN642 GG41982/19-10-2018.

## Draft delegated legislation

Notice of proposed amendment to the Legal Aid Manual in terms of the Legal Aid South Africa Act 39 of 2014. GenN607 GG41948/1-10-2018 (also available in Afrikaans).

Amendment to the Regulations for Child and Youth Care workers, Auxiliary Child and Youth Care Workers and Student Child and Youth Care Workers in terms of the Social Service Professions Act 110 of 1978 for comment. GN1075 and GN1078 GG41955/5-10-2018.

Amendment of the Public Service Regulations, 2016 in terms of the Public Service Act 103 of 1994 for comment. GN1088 GG41970/12-10-2018.

Amendment of the schedule of the small enterprise definition (sch 1) in terms of the National Small Enterprise Act 102 of 1996 for comment. GN1094 GG41970/12-10-2018.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1102 GG41971/12-10-2018.

Draft Regulations on the Registration of Births and Deaths, 2018 in terms of the Births and Deaths Registration Act 51 of 1992. GN1085 GG41970/12-10-2018.

Regulations on Compensation Fund new assessment model in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 for comment. GN1105 GG41977/16-10-2018 and GN1132 GG41984/18-10-2018.

Draft National Biodiversity Framework in terms of the National Environmen-

tal Management: Biodiversity Act 10 of 2004. GN1109 GG41982/19-10-2018 and GN1143 GG41996/26-10-2018.

Amendment of the national policy and criteria for implementation of recognition of prior learning in terms of the National Qualifications Framework Act 67 of 2008 for comment. GN1182 GG42001/26-10-2018.

## Draft Bills

Draft Fertilizer Bill. GN1083 GG41970/12-10-2018.

Draft Compensation for Occupational Injuries and Diseases Amendment Bill, 2018. GN1133 GG41985/18-10-2018.

Draft Economic Regulation of Transport Bill. GN1135 GG41992/24-10-2018.

Draft Children's Amendment Bill, 2018. GN1185 GG42005/29-10-2018.



Nadine Mather BA LLB (*cum laude*) (Rhodes) is an attorney at Bowmans in Johannesburg.

## Discrimination based on an arbitrary ground

In *Chitsinde v Sol Plaatje University* [2018] 10 BLLR 1012 (LC), the applicant was employed by the National Institute of Higher Education (NIHE) as an asset and fleet management officer. NIHE was subsequently disestablished and the applicant was dismissed for operational requirements. The newly established Sol Plaatje University was offering former employees of NIHE preference to apply for posts at the university. The applicant applied for the position of Senior Secretariat Officer and was called to an interview. The interview panel requested the applicant to set out in writing how he saw his role in the position of Senior Secretariat Officer. The applicant was subsequently unsuccessful.

The applicant's union referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that the refusal by the university to appoint the applicant amounted to unfair discrimination on an arbitrary ground,

that ground being that he was the only applicant required to write an 'aptitude test' during the interview process. The dispute remained unresolved at conciliation and the applicant referred a dispute to the Labour Court (LC) in terms of the Employment Equity Act 55 of 1998.

The LC was required to determine whether, the fact that the applicant was the only candidate who was required to write an 'aptitude test', amounted to unfair discrimination on an arbitrary ground. The court noted that where unfair discrimination is alleged on an arbitrary ground, the complainant must prove that the conduct complained of amounted to discrimination and, if so, that it was irrational, as well as unfair. The conduct complained of was that the applicant was required to write a test when no one else was.

On a balance of probabilities, the court found that the interview panel had asked the applicant to set out in writing how he saw his role in the position of Senior Secretariat Officer to give the applicant a further opportunity to show that he was suitable for the position. This is because he had failed to impress the interview panel in the oral interview. In the circumstances, the applicant was treated more favourably than any other candidate who applied for posts at the university. The court held that although the appli-

cant was treated differently to the other candidates, it was to his benefit. The applicant had been provided with a second chance to persuade the interview panel that he was suitable for the position. While this amounted to differentiation, it did not amount to discrimination.

The court held that decision by the interview panel to require the applicant to provide written submissions was entirely rational. The applicant could not claim that he was discriminated against by being treated more favourably than other candidates. Given that the applicant had failed to prove discrimination on an arbitrary ground, there was no unfair discrimination.

The applicant's claim was dismissed with costs.

## Unfair labour practice relating to promotion

In *IMATU obo Joubert v Modimolle Local Municipality* [2018] 11 BLLR 1106 (LAC), the applicant was employed by Modimolle Local Municipality on a fixed term contract. During her contract term, the applicant applied to be appointed in a permanent position as administration clerk. The applicant's application was unsuccessful, and she referred an unfair labour practice dispute relating to promotion to the South African Lo-

# Employment law update

cal Government Bargaining Council. The bargaining council found in favour of the applicant and ordered the municipality to appoint her retrospectively into the position of administration clerk.

The municipality refused to reinstate the applicant and instead sought to review the award, which review application was dismissed due to a failure by the municipality to pursue its review application timeously. Notwithstanding this, the municipality still did not appoint the applicant to the position of administration clerk. Consequently, the Independent Municipal and Allied Trade Union (IMATU) on behalf of the applicant launched a contempt application in the Labour Court (LC) against the municipality for a failure to comply with the arbitration award.

In considering whether the municipality's failure to comply with the award had been in bad faith and deliberate, the LC found that the applicant was not in fact entitled to be promoted to the position of administration clerk. This was because the unfair labour practice jurisdiction extended only to employees and since the applicant's contract had expired at the time of the award, and with no challenge to the expiry of her employment contract having been made, it was no longer competent for the applicant to demand reinstatement so that she could be promoted. The court held that

the award in an unfair labour dispute concerning promotion could not restore the employment relationship between an employee and employer.

On appeal to the Labour Appeal Court (LAC), IMATU contended that the LC had effectively sought to review the award when the contempt application before it should have been granted. In this regard, IMATU submitted that since an unfair labour practice dispute relating to promotion may be determined by a bargaining council on terms that it deems reasonable, which may include ordering reinstatement or re-employment, the relief granted was competent. When the fixed term contract expired, a dispute existed between the applicant and the municipality and, accordingly, the award was enforceable.

The LAC found that a fixed term contract employee is only employed for a limited duration to a particular post. Such an employee may, however, apply and/or be offered a permanent position and this would remove the employee from the realm of a fixed term contract and see them employed in another post. In this matter, it is apparent that the applicant applied for a post and was unsuccessful. This cannot amount to a failure by the municipality to promote her because she was not an employee who could be promoted based on her fixed term contract. She had, in effect, applied

for a vacant post and had not sought promotion to a vacant post.

The court held that a fixed term employee is in the same position as a non-employee who applied for a post. Thus, the reliance on an unfair labour practice relating to promotion was misconceived. At the time the award was issued, the applicant was no longer an employee of the municipality. Since no unfair dismissal dispute had been referred to the bargaining council for adjudication, the expiry of her fixed term contract went unchallenged. The arbitrator in the promotion dispute was not empowered to determine an unfair dismissal dispute and consequently could not order the reinstatement of the applicant into a position at the municipality.

In considering a contempt application, the court found that it is proper that a court consider not simply the order sought to be enforced but the reasons behind it. Given the expiry of her fixed term contract, the applicant was no longer an employee of the municipality, and consequently no effect could be given to an order that she be retrospectively reinstated into the promoted position of administration clerk with her former employer. In any event, the post no longer existed at the municipality. In such circumstances, the court held that there could be no contempt of court.

The appeal was dismissed.



Moksha Naidoo BA (Wits) LLB (UKZN) is a practicing advocate holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban).

## An ex-employee refers an unfair labour practice dispute

Section 186(2) of the Labour Relations Act 66 of 1995 (LRA), defines an 'unfair labour practice' as 'any unfair act or omission that arises between an employer and an employee'.

There have been divergent views as to whether a former employee can refer a dispute, other than an unfair dismissal dispute, against their erstwhile employer.

In *Sithole v Nogwaza NO and Others*

(1999) 20 ILJ 2710 (LC), the Labour Court (LC) held that the remedies concomitant with unfair labour practices, as set out in the LRA are only available to a person who was in an employment relationship at the time they referred their dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council.

In other decisions our courts have held that an ex-employee may refer a dispute regarding the alleged unfairness on the part of their previous employer. In *Malope v Crest Chemicals (Pty) Ltd* (LC) (unreported case no JS286/15, 20-2-2017) (Van Niekerk J), the employee retired and, thereafter, referred a dispute alleging unfair discrimination under the Employment Equity Act 55 of 1998. Considering the definition of an 'employee' the court held:

'It is not in dispute that the applicant was an employee during the period to which his equal pay claim relates. The fact that he was no longer an employee at the time the claim was referred, in my view, is not fatal. ... I fail to appreciate on what basis the definition of 'employee' in the EEA precludes him from referring a claim in which he exercises the right under s 6, provided of course that the claim is made within the applicable time limit or any late referral is condoned'.

In *Velinov v University of KwaZulu-Natal and Another* [2006] 6 BLLR 607 (LC) the employee unsuccessfully applied for a promotion, pursuant to which he resigned. While working his notice period he referred a dispute to the CCMA alleging his non-appointment was unfair. On review and in addressing the argument that the CCMA lacked jurisdiction to hear the employee's claim, the court held:

'I do not accept that an employee whose employment has been terminated either by resignation or otherwise, but who continues to work out his or her notice period, does not enjoy the protection of the provisions of the LRA and particularly the unfair labour practice provisions contained in Chapter VIII. This would not only be contrary to section 186(2) which, in defining an "unfair labour practice", does not distinguish between different categories of employees but it is also contrary to the definition of "employee" in section 213.'

More recently, the Constitutional Court in *Pretorius and Another v Transport Pension Fund and Others* [2018] 7 BLLR 633 (CC) appreciated the notion that the LRA has recognised unfair labour practices under the LRA may extend beyond the end of an employment relationship.



In considering the above authorities the LC in *Magoshi v Gauteng Department of Education and Others* (LC) (unreported case no JR864/15, 2-10-2018) (Tlhotl-halemaje J), had to decide whether a bargaining council had jurisdiction to hear the employee's unfair labour practice dispute.

## Background

In January 2014 the applicant, a principal of a secondary school, applied for a principal's post at another school. Subsequent to making his application but before the department assessed all applications, the applicant resigned on 30 April 2014.

In August 2014 the applicant, having been shortlisted, attended an interview for the post. Later that same month he was advised that his application had been unsuccessful.

Aggrieved by his non-appointment the applicant referred an 'appointment/promotion' dispute to the bargaining council. His matter was dismissed at arbitration whereafter he approached the LC.

On review it was unclear to the court whether the arbitrator dismissed the applicant's claim on grounds of jurisdiction or on the merits. However, once the department raised the point that the bargaining council lacked jurisdiction to hear the claim, the court was bound to

consider the matter afresh as opposed to adopting the reasonableness test.

The central question before the court was whether, under the circumstances set out above, the bargaining council had jurisdiction to hear the applicant's claim.

In assessing the decisions in *Malope, Velinov* and *Pretorius*, the court found that even on a less restrictive interpretation of the definition of an 'employee', together with the right to fair labour practice extending beyond an employment relationship; did not open the door for all ex-employees to refer disputes, other than unfair dismissal disputes, against their erstwhile employers. The common thread in all these judgments was that the alleged unfairness complained of by all three employees, occurred while they were still in the employ of their respective employer's and not after their employment relationship had been terminated.

Addressing the sequence of events in this instance the court held:

'In this case, the circumstances are quite distinguishable from those of the three above mentioned authorities. These facts do not indicate that the alleged wrong or unfairness took place during the tenure or before termination of the employment relationship. The post in contention was advertised in January 2014. When Mahlase submitted his application, he was still employed by

the department. In April 2014, he had resigned from his position. The process of interviews and the appointment of the successful candidate took place in August 2014, long after the applicant had resigned. Thus, even if Mahlase was entitled to pursue any claim of unfairness, subsequent to his resignation, the impugned process of interviews and the decision to select and appoint Njoli, took place at the time when Mahlase was no longer an employee.'

Continuing this line of reasoning, the court held that the fact that the applicant was an employee at the time he applied for the post was of little relevance – the alleged unfairness could only have taken place after the applicant resigned.

For these reasons the court substituted the award with an order that the bargaining council did not have jurisdiction to hear the applicant's claim. No order as to costs were made.



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

Send your comprehensive question to Moksha Naidoo at: [derebus@derebus.org.za](mailto:derebus@derebus.org.za)



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By  
Meryl  
Federl

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<i>IJL</i>	Industrial Law Journal	Juta	(2018) 39
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2018) 15.3 October
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) 21 September
<i>SALJ</i>	South African Law Journal	Juta	(2018) 135.3
<i>SAJHR</i>	South African Journal on Human Rights	Taylor & Francis	(2018) 34.2
<i>TSAR</i>	Tydskrif vir Suid-Afrikaanse Reg	Juta	(2017) 4
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# RISKALERT

SPECIAL POLICY UPDATE EDITION DECEMBER 2018 NO 6/2018

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## A note on amendments made to the AIIF Master Policy for the 2018/2019 scheme year

### PRACTITIONERS PLEASE NOTE THAT THE AIIF MASTER POLICY HAS BEEN AMENDED

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**Attorneys Insurance  
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund



**LEGAL  
PRACTITIONERS  
FIDELITY FUND**

SOUTH AFRICA

**T**he Attorneys Insurance Indemnity Fund NPC (the AIIF) Master Policy has been amended. The amended policy has been included in this special policy update edition of the *Bulletin*.

Historically, the AIIF Master Policy extended cover to practitioners who were in possession of, or obliged to apply for, a Fidelity Fund certificate. This has now changed. **The amended policy comes into effect on 1 December 2018.**

The effect of the amendments is that only practitioners who are in possession of a valid Fidelity Fund certificate will be afforded indemnity if they had such a certificate on the date of the cause of action (the act, error or omission) giving rise to the claim. The aims of the amendment are to align the policy with the provisions of the Legal Practice Act 28 of 2014 (the Act), the general principles of insurance and the legal obligations of the AIIF and insured practitioners.

S 84(1) of the Act provides that every attorney and every advocate referred to in s 34(2)(b) who practices or is deemed to practice -

(a) for his or her own account either alone or in a partnership; or



**Thomas Harban,  
Editor**

(b) as a director of a practice which is a juristic entity, must be in possession of a Fidelity Fund certificate.

Rendering legal services in contravention of s 84(1) is an offence (see s94(8)) and a person convicted of contravening that section of the Act is liable:

- (a) to pay a fine or to imprisonment for a period of up to two years (or both such imprisonment and payment of a fine);
- (b) to be struck off the Roll of Legal Practitioners; and
- (c) is not entitled to any fee, reward or reimbursement in respect of legal services rendered.

## A note on amendments made to the AIIF Master Policy for the 2018/2019 scheme year<sup>continued...</sup>

The AIIF will not provide indemnity in respect of legal services rendered in violation of the Act as this would amount to the indemnification of illegal action carried out intentionally - insurance cover cannot be provided in respect of an intentional unlawful act.

As a registered short-term insurance company, the AIIF must comply with the Financial Sector Regulatory Act 9 of 2017 (the Financial Sector Regulatory Act). The objects of the Financial Sector Regulatory Act include the prevention of financial crime (see s 7(e)).

The court in *NW Civil Contractors CC v Anton Ramaano Inc and Another* (993/2016) [2018] ZALMPHHC 1 (14 May 2018) found that the actions of an attorney who, in violation of s 41 of the Attorneys Act 53 of 1979 (the predecessor to s 84 of the Act), practised without a Fidelity Fund certificate were void *ab initio*.

The amendments to the Master Policy have been effected in the course of this insurance year in order to align the indemnity provided with the legal obligations of the company.

Regard must be had to the following

clauses in the policy which have been amended:

- XIV (the definition of Fidelity Fund certificate);
- XX (the definition of Legal Services);
- 5 and 6 (who is insured); and
- 16 (t) (the exclusion of claims arising from legal services carried out on violation of the Act).

Practitioners liable to practice with Fidelity Fund certificates must thus ensure that they timeously apply for such certificates in order to avoid contravening the Act and also to ensure that the legal services they provide fall within the ambit of the AIIF Master Policy.

We have also included a copy of the risk management self-assessment questionnaire which practices must complete annually (clauses XXIV and 23 of the Master Policy). It is an opportune time to complete the risk management self-assessment at the same time that the application for the Fidelity Fund certificate is made.

The annual completion of this questionnaire is compulsory, both in terms of the Master Policy (see clauses XXIV and 23) and the South African Le-

gal Practice Council Rules (the Rules) made under the Act. The AIIF will not provide indemnity when you have a claim, until you provide it with a copy of a questionnaire which has been completed in the applicable year. For attorneys, point 15 of the application for a Fidelity Fund certificate form (schedule 7A of the Rules) provides that this form must be completed. Advocates rendering legal services in terms of section 34(2)(b) of the Act must also complete this questionnaire annually (see point 13 of the application for a Fidelity Fund certificate form for advocates (schedule 7B of the Rules)). You will not be issued with a Fidelity Fund certificate if you have not complied with this requirement. Any reference to a firm in the form includes advocates referred to in section 34(2)(b) of the Act. The aim of the form is to collect risk management and underwriting information. The form must be completed even if your firm does not have any claims pending.

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## THE AMENDED AIIF MASTER POLICY FOR THE 2018/2019 SCHEME YEAR



**Attorneys Insurance  
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund

### Preamble

The **Attorneys Fidelity Fund**, as permitted by the Act, has contracted with the **Insurer** to provide professional indemnity insurance to the **Insured**, in a sustainable manner and with due regard for the interests of the public by:

- a) protecting the integrity, esteem, status and assets of the **Insured** and the legal profession;
- b) protecting the public against indemnifiable and provable losses arising out of **Legal Services** provided by the **Insured**, on the basis set out in this policy.

### Definitions:

- I **Act:** The Attorneys Act 53 of 1979 (as amended or as replaced by the Legal Practice Act 28 of 2014). Where there is any reference to a specific section of the current Act in this Policy, then such reference will be to a corresponding section in the Legal Practice Act when that section comes into effect;
- II **Annual Amount of Cover:** The total available amount of cover for the **Insurance Year** for the ag-



gregate of payments made for all **Claims**, **Approved Costs** and **Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;

- III **Approved Costs:** Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount a **Claim**;
- IV **Attorneys Fidelity Fund:** As referred to in Section 25 of the **Act**;
- V **Bridging Finance:** The provision of short-term finance to a party to a **Conveyancing Transaction** before it has been registered in the Deeds Registry;
- VI **Claim:** A written demand for compensation from the **Insured**, which arises out of the **Insured's** provision of **Legal Services**; (For the purposes of this definition, a written demand is any written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an **Insured**);
- VII **Claimant's Costs:** The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer**;
- VIII **Conveyancing Transaction:** A transaction which:
  - a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
  - b) involves the registration or cancellation of any mortgage bond or real right over immovable property; and/or
  - c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;
- IX **Cybercrime:** Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence);
- X **Defence Costs:** The reasonable costs the **Insurer** (or **Insured** - with the **Insurer's** consent) incurs in investigating and defending a **Claim** against an **Insured**;
- XI **Dishonest:** Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;
- XII **Employee:** A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This includes in-house legal consultants, associates, professional assistants, candidate attorneys, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**.);
- XIII **Excess:** The first amount payable by the **Insured** (or deductible) in respect of each and every **Claim** (including **Claimant's Costs**) as set out in schedule B.
- XIV **Fidelity Fund Certificate:** A certificate provided in terms of section 42 of the **Act**, or a certificate issued

in terms of section 85(6) of the Legal Practice Act 28 of 2014 read with Rules 3, 47, 48 and 49 of the South African Legal Practice Council Rules made under the authority of section 95(1) of the Legal Practice Act;

- XV **Innocent Principal:** Each present or former **Principal** who:
  - a) may be liable for the debts and liabilities of the **Legal Practice**;
  - b) did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;
- XVI **Insured:** The persons or entities referred to in clauses 5 and 6 of this policy;
- XVII **Insurer:** The Attorneys Insurance Indemnity Fund NPC, Reg. No. 93/03588/08;
- XVIII **Insurance Year:** The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;
- XIX **Legal Practice:** The person or entity listed in clause 5 of this policy;
- XX **Legal Services:** Work reasonably done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa in accordance with the provisions of section 33 of the Legal Practice Act. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;
- XXI **Practitioner:** Any attorney, advocate, notary or conveyancer as defined in the **Act**;
- XXII **Prescription Alert:** The computerised back-up diary system that the **Insurer** makes available to the **Insured**;
- XXIII **Principal:** A sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;
- XXIV **Risk Management Questionnaire:** A self-assessment questionnaire which can be downloaded from or completed on the **Insurer's** website ([www.aiif.co.za](http://www.aiif.co.za)) and which must be completed annually by the senior partner or director or designated risk manager of the **Insured** as referred to in clause 5;
- XXV **Road Accident Fund claim (RAF):** A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;
- XXVI **Senior Practitioner:** A **Practitioner** with no less than 15 years' standing in the legal profession;
- XXVII **Trading Debt:** A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:
  - a) a refund of any fee or disbursement charged by the **Insured** to a client;
  - b) damages or compensation or payment calcu-

- lated by reference to any fee or disbursement charged by the **Insured** to a client;
- c) payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client; and/or
- d) any labour dispute or act of an administrative nature in the **Insured's** practice.

## What cover is provided by this policy?

1. On the basis set out in this policy, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay compensation to any third party:
  - a) that arises out of the provision of **Legal Services** by the **Insured**; and
  - b) where the **Claim** is first made against the **Insured** during the current **Insurance Year**.
2. The **Insurer** agrees to indemnify the **Insured** for **Claimants' Costs** and **Defence Costs** on the basis set out in this policy.
3. The **Insurer** agrees to indemnify the **Insured** for **Approved Costs** in connection with any **Claim** referred to in clause 1.
4. The **Insurer** will not indemnify the **Insured** in the current **Insurance Year**, if the circumstance giving rise to the **Claim** has previously been notified to the **Insurer** by the **Insured** in an earlier **Insurance Year**, on the basis set out in clause 38.

## Who is insured?

5. Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insures all **Legal Practices** providing **Legal Services**, including:
  - a) a sole **Practitioner**;
  - b) a partnership of **Practitioners**;
  - c) an incorporated **Legal Practice**; and
  - d) an advocate referred to in section 34 (2)(b) of the **Legal Practice Act**.
6. The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
  - a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
  - b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
  - c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
  - d) the estates or legal representatives of the people referred to in clauses 6(a), 6(b) and 6(c).
  - e) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.

## Amount of cover

7. The **Annual Amount of Cover**, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**.  
A change during the course of an insurance year in the composition of a legal practice which is a partnership will not constitute a new legal practice for purposes of this policy and would not entitle that legal practice to more than one limit of indemnity in respect of that insurance year.
8. Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of compensation (capital and interest) as well as **Claimant's Costs** and **Approved Costs**.
9. Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.

## Insured's excess payment

10. The **Insured** must pay the **Excess** in respect of each **Claim**, directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable. Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Excess** and to the extent that one or more **Claims** arise from the same circumstance, act, error or omission the **Insured** must pay the **Excess** in respect of each such **Claim**;
11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**, and the type of matter giving rise to the **Claim**, as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
  - a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used and complied with by the **Insured**, by timeous lodgement and service of summons in accordance with the reminders sent by **Prescription Alert**;
  - b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
14. No **Excess** applies to **Approved costs** or **Defence costs**.
15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

## What is excluded from cover

16. This policy does not cover any liability for compensation:
  - a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or business managed by or carried

- b) on by the **Insured**;  
arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in Section 26 of the **Act**;
- c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the **Insured**, covering a loss arising out of the normal course and conduct of the business or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;
- d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;
- e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in:
  - (i) the Banks Act 94 of 1990;
  - (ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
  - (iii) the Agricultural Credit Act 28 of 1996 as amended or replaced;
  - (iv) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder;
  - (v) the Medical Schemes Act 131 of 1998 as amended or replaced;
- f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 78(2A) of the **Act**, and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;  
This exclusion does not apply (subject to the other provisions of this policy) to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;
- g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*;
- h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act; directly or indirectly arising from, or in connection with or as a consequence of the provision of **Bridging Finance** in respect of a **Conveyancing Transaction**. This exclusion does not apply where **Bridging Finance** has been provided for the payment of:
  - (i) transfer duty and costs;
  - (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred;
  - (iii) levies payable to the body corporate or homeowners' association relating to the immovable property which is to be transferred;
- i) arising from the **Insured's** having given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;
- j) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;
- k) arising where the **Insured** acts or acted as a business rescue practitioner as defined in section 128 (1) (d) of the Companies Act 71 of 2008;
- l) arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence or about to come into existence, at the time of the receipt or payment and in respect of which the **Insured** has received a mandate;
- m) arising out of a defamation **Claim** that is brought against the **Insured** ;
- n) arising out of **Cybercrime**;
- o) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons\* has/have a material interest and/or hold/s a position of influence or control.\*\*
- p) \* as defined in section 2(1) of the Companies Act 71 of 2008  
\*\* as defined in section 2(2) of the Companies Act 71 of 2008  
For the purposes of this paragraph, "material interest" means an interest of at least ten (10) percent in the entity;
- q) arising out of or in connection with a **Claim** resulting from:
  - (i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;
  - (ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Pub-



- lic or Local Authority;
- (iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss;
- For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;
- r) arising out of or in connection with any **Claim** resulting from:
- (i) ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;
  - (ii) nuclear material, nuclear fission or fusion, nuclear radiation;
  - (iii) nuclear explosives or any nuclear weapon;
  - (iv) nuclear waste in whatever form;
- regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;
- s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity; and
- t) **Legal Services** carried out in violation of the **Act** and the **Rules**.

## Fraudulent applications for indemnity

17. The **Insurer** will reject a fraudulent application for indemnity.

## Claims arising out of dishonesty or fraud

18. Any **Insured** will not be indemnified for a **Claim** that arises:
- a) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by that **Insured**;
  - b) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission.
- Subject to clauses 16, 19 and 20, this exclusion does not apply to an **Innocent Principal**.
19. In the event of a **Claim** to which clause 18 applies, the **Insurer** will have the discretion not to make any payment, before the **Innocent Principal** takes all reasonable action to:
- a) institute criminal proceedings against the alleged **Dishonest** party and present proof thereof to the **Insurer**; and/or
  - b) sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives;
- Any benefits due to the alleged **Dishonest** party held by the **Legal Practice**, must, to the extent allowable by law, be deducted from the **Legal**

## Practice's loss.

20. Where the **Dishonest** conduct includes:
- a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or
  - b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;
- The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.
21. If the **Insurer** makes a payment of any nature under the policy in connection with a **Claim** and it later emerges that it wholly or partly arose from a **Dishonest**, fraudulent or other criminal act or omission of the **Insured**, the **Insurer** will have the right to recover full repayment from that **Insured** and any party knowingly connected with that **Dishonest**, fraudulent or criminal act or omission.

## The Insured's rights and duties

22. The **Insured** must;
- a) give immediate written notice to the **Insurer** of any circumstance, act, error or omission that may give rise to a **Claim**; and
  - b) notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification.
23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management Questionnaire** have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.
24. The **Insured**:
- 24.1. shall not cede or assign any rights in terms of this policy;
  - 24.2. agrees not to, without the **Insurer's** prior written consent:
    - a) admit or deny liability for a **Claim**;
    - b) settle a **Claim**;
    - c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**;
 failing which, the **Insurer** will be entitled to reject the **Claim**, but will have sole discretion to agree to provide indemnity, wholly or partly.
25. The **Insured** agrees to give the **Insurer** and any of its

appointed agents:

- 25.1. all information and documents that may be reasonably required, at the **Insured's** own expense.
- 25.2. assistance and cooperation, which includes, but not limited to, preparing, service and filing of notices and pleadings by the **Insured** as specifically instructed by the **Insurer** at the **Insurer's** expense, which expenses must be agreed to in writing.
26. The **Insured** also gives the **Insurer** or its appointed agents the right of reasonable access to the **Insured's** premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any **Claim** where the **Insurer** believes such review or inspection is necessary.
27. Notwithstanding anything else contained in this policy, should the **Insured** fail or refuse to provide information, documents, assistance or cooperation in terms of this policy, to the **Insurer** or its appointed agents and remain in breach for a period of ten (10) working days after receipt of written notice to remedy such breach (from the **Insurer** or its appointed agents) the **Insurer** has the right to:
  - a) withdraw indemnity; and/or
  - b) report the **Insured's** conduct to the regulator; and/or
  - c) recover all payments and expenses incurred by it.

For the purposes of this paragraph, written notice will be sent to the address last provided to the **Insurer** by the **Insured** and will be deemed to have been received five (5) working days after electronic transmission or posting by registered mail.
28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.
29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.
30. Written notice of any new **Claim** must be given to:  
**Attorneys Insurance Indemnity Fund NPC**  
**1256 Heuwel Avenue|Centurion|0127**  
**PO Box 12189|Die Hoewes|0163**  
**Docex 24 | Centurion**  
**Email: [claims@aiif.co.za](mailto:claims@aiif.co.za)**  
**Tel:+27(0)12 622 3900**
31. The **Insured** agrees that:
  - a) the **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;
  - b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**;  
 The exercise of the **Insurer's** discretion in terms of a) will not be unreasonable.
32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:
  - a) the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured**; and
  - b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).
33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.
34. Where the **Insurer** indemnifies the **Insured** in relation to only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.
35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to report the **Insured's** conduct to the regulator and to recover any amounts that it may have incurred as a result of the **Insured's** conduct.
36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**;
37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
  - a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount Of Cover** provided by this policy;
  - b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in re-

## The Insurer's rights and duties

- c) spect of such **Claim**;  
any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.

38. If the **Insured** gives notice during an **Insurance Year**, of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a **Claim** or **Claims**, then any **Claim** or **Claims** in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the **Insured**, will for the purposes of this policy be considered to fall within one **Insurance Year**, being the **Insurance Year** of the first notice.

39. This policy does not give third parties any rights against the **Insurer**.

## How the parties will resolve disputes

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:

- written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at [disputes@aiif.co.za](mailto:disputes@aiif.co.za) or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
- should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of the submission referred to in a) then the parties must agree on an independent **Senior Practitioner**, to which the dispute can be referred for a determination. Failing an agreement, the choice of such **Senior Practitioner** must be referred to the President of the Law Society (or his/her successor in title) having jurisdiction over the **Insured**;
- the parties must make written submissions which will be referred for determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter and the costs of the **Senior Practitioner** will be borne by the unsuccessful party;
- the unsuccessful party must notify the successful party in writing, within thirty (30) days of the determination by the **Senior Practitioner**, if the determination is not accepted; The procedures in a) b) c) and d) above must be completed before any legal action is undertaken by the parties.

Complaints may be lodged with the:

Short Term Insurance Ombudsman

Tel: 011 726-8900

Fax: 011 726-5501

Share call: 0860 726 980

E-mail [info@osti.co.za](mailto:info@osti.co.za)

Web: <http://osti.co.za>

Physical Address: Sunnyside Office Park, 5<sup>th</sup>

Floor, Building D, 32 Princess of Wales, Terrace, Parktown

Postal Address: PO Box 32334, Braamfontein, 2017

## SCHEDULE A

**Period of Insurance: 1<sup>st</sup> July 2018 to 30<sup>th</sup> June 2019 (both days inclusive)**

No of Principals	Annual Amount of Cover for Insurance Year
1	R1 562 500
2	R1 562 500
3	R1 562 500
4	R1 562 500
5	R1 562 500
6	R1 562 500
7	R1 640 625
8	R1 875 000
9	R2 109 375
10	R2 343 750
11	R2 578 125
12	R2 812 500
13	R3 046 875
14 and above	R3 125 000

## SCHEDULE B

**Period of Insurance: 1<sup>st</sup> July 2018 to 30<sup>th</sup> June 2019 (both days inclusive)**

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R231 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

\*The applicable **Excess** will be increased by an additional 20% if **Prescription Alert** is not used and complied with.

\*\*The applicable **Excess** will be increased by an additional 20% if clause 20 of this policy applies.



## The AIIF Risk Management self-assessment questionnaire

### RISK MANAGEMENT SELF-ASSESSMENT QUESTIONNAIRE

#### IMPORTANT NOTES AND FAQ'S

*NB: If you have already completed one of these questionnaires in the **year** prior to notifying us of a claim/circumstance, you may submit that document and need not complete a new one.*

#### WHEN MUST I COMPLETE THE QUESTIONNAIRE?

As from 1 July 2016, the questionnaire **MUST BE COMPLETED AT LEAST ONCE PER YEAR**. The AIIF will not provide indemnity when you have a claim, until you provide it with a copy of a questionnaire which has been completed within the past year.

You may complete the questionnaire at any time, even if your firm does not have any claims pending. (In order to make it easier and save time, you might wish to complete it at the time when you complete your top-up insurance proposal or Fidelity Fund Certificate application. That way, you will have much of the information at your fingertips.)

#### WHERE DO I GET A COPY OF THE QUESTIONNAIRE?

1. You can complete a hard copy and send it to us. (You can obtain a copy from the AIIF or download it from our website ([www.aiif.co.za](http://www.aiif.co.za));
2. You can complete it online ([www.aiif.co.za](http://www.aiif.co.za)).

#### WHAT IS EXPECTED OF MY FIRM?

1. Every practice **MUST properly** complete this assessment every year and must submit it together with the claim form to the AIIF before indemnity can be provided.
2. It must be completed by a **SENIOR PARTNER/SOLE PRACTITIONER/RISK and/or COMPLIANCE OFFICER or MANAGER/CHAIR OF THE RISK COMMITTEE**.
3. When answering certain questions, you will come across the following request:

*"If no, see Risk Management Tips on Website [www.aiif.co.za](http://www.aiif.co.za)." If you do not have access to the internet and would like a copy of these tips, we can send you one by e-mail on request.*

#### SOME OF THE QUESTIONS DON'T REALLY APPLY TO ME AS I AM A SINGLE PRACTITIONER WITH NO STAFF/FEW STAFF. WHAT SHOULD I DO?

The questionnaire is aimed at practices of all sizes and types. Inevitably, there will be some questions that are not applicable to your practice. If that is the case, by all means answer "n/a".

NB: If you have already completed one of these questionnaires in the year prior to notifying us of a claim/circumstance, you may submit that document and need not complete a new one.

***Please read the following before the self-assessment is done:***

#### WHY DO YOU WANT THE INFORMATION?

**The information which we ask for in this assessment will be treated as strictly confidential.** It will not be disclosed to any other person, without your practice's **WRITTEN permission**. It will also not be used by the AIIF in any way to affect your practice's claims records or individual cover. An analysis of information and trends revealed by your answers may be used by the AIIF for **GENERAL** underwriting and risk management purposes. I elaborate below:

- To assist the insurer when setting and structuring deductibles and limits of indemnity for the profession as a whole, deciding on policy exclusions, conditions and possible premium setting.
- To raise awareness about risk management and to get practitioners thinking about risk management tools/procedures for their practices.
- To obtain relevant and usable general information and statistics about workloads, staff numbers, types of matters dealt with, stress levels, risk management/practice management and claims history.

# RISKALERT

To gain insight into which risk management/practice management procedures are in place/need to be in place in practices.

- To assist in the selection and formulation of the most effective risk management interventions.
- To assist in formulating a strategy to improve risk management/practice management at all levels.

## PRACTICE SELF-ASSESSMENT FORM

**THIS ASSESSMENT MUST BE COMPLETED ANNUALLY BY ONE OF THE FOLLOWING:**

**A SENIOR PARTNER/SOLE PRACTITIONER/RISK MANAGER/COMPLIANCE OFFICER/CHAIR OF THE RISK COMMITTEE**

### SECTION 1

#### 1. General practice information:

- I. Name under which practice is conducted .....
- II. Practice number.....
- III. Law Society membership .....
- IV. Is your practice a Sole Practice/Partnership/Incorporated Company?
- V. Have there been any significant changes to the constitution of your firm during the past three years?  
YES/NO
- If yes, please provide details of these changes.....
- .....
- .....

#### 2. Principal office details:

- I. Address and postal code .....
- II. Telephone .....
- III. Email .....
- IV. Docex .....
- V. Website .....
- VI. Details of any other physical address at which the practice will be carried on and name of practitioner in direct control .....
- .....
- .....

#### 3. Contact details of person completing this assessment.

- I. Capacity:  
Select **one of the following:** Senior Partner/Risk Manager/Chair of Risk Committee/Compliance Officer:
- II. Telephone .....
- III. Cell phone.....
- IV. E-mail address.....

#### 4. Composition of the practice.

Number of:

- I. Partners/directors.....
- Associates.....
- II. Candidate Attorneys.....
- III. Paralegals.....

IV. Other staff including secretaries.....

V. Total.....

VI. **DOES YOUR PRACTICE HAVE ANY LEGAL PROCESS OUTSOURCING (LPO) ARRANGEMENTS WITH OFFSHORE COMPANIES OR FIRMS OF ATTORNEYS?** YES/NO

If yes, please provide details of these arrangements and the numbers of professional staff and support staff involved .....

.....

VII. (For practices with fewer than 10 directors/partners) in the table below, list all partners/directors by name, together with their number of years in practice and their areas of specialisation.

PARTNER/DIRECTOR'S NAME	PARTNER'S PRACTICE NO	YEARS IN PRACTICE	AREA OF SPECIALISATION

5. For the past financial year, please provide approximate percentages of total fees earned in the following categories of legal work:

i. Conveyancing

ii. Commercial

iii. Criminal

iv. Debt collection

v. Estates – trustees executors administrators

vi. Insurance

vii. Investments

viii. Liquidations

ix. Marine

x. Matrimonial

xi. Patents & Trademarks

xii. Personal injury MVA

xiii. Medical malpractice

xiv. General litigation

xv. Legal Process Outsourcing (LPO)

xvi. Other (please specify any type of work that makes up a significant percentage of your fees)

.....

## SECTION 2

### Risk Management Information

6. Does your practice have a specific individual responsible for risk management and/or quality control within the practice? YES/NO

If this is someone other than you, please give name, position, qualifications and contact details. That person should complete the Risk Management Section below, or assist you in completing it.



# RISKALERT

- .....  
.....  
.....  
.....  
.....
7. When **engaging new employees**, does your practice always require and check references carefully? YES/NO/n/a
- 7.1 Do you check for unexplained gaps in employment history? YES/NO/n/a
- 7.2 Do you include criminal checks? YES/NO/n/a
8. Does your practice have in place **Minimum Operating Standards (MOS)** or a uniform set of standards of best practice for staff? YES/NO
- If no, see Risk Management Tips on Website [www.aiif.co.za](http://www.aiif.co.za)*
- If yes:
- I. are they (choose the correct one) for professional staff only/administrative staff only/both professional and administrative staff?
- II. are they reduced to writing and available to staff in either electronic or hard copy? YES/NO
- III. do you have a system in place to measure and ensure compliance with your MOS? YES/NO
9. Do you know your clients? Do you have systems and checks in place to ensure that FICA requirements are always followed before any work is done or any deposit is taken from a prospective client or money is paid out to a third party? YES/NO
- If no, see The Financial Intelligence Centre Act 38 of 2001/FIC website [www.fic.gov.za/LSSA](http://www.fic.gov.za/LSSA) website and Risk Management Tips on AIIF Website [www.aiif.co.za](http://www.aiif.co.za)*
10. Many claims arise out of practices having taken on “problem” clients. Does your practice **screen prospective clients** before taking on a mandate? YES/NO
- If no, see Risk Management Tips on Website [www.aiif.co.za](http://www.aiif.co.za)*
- If yes,
- I. does your practice have any uniform system in place for this? YES/NO
- II. does this include a conflict of interest check? YES/NO
- III. does this include any checks whether other attorneys have previously been instructed on respect of the same matter? YES/NO
- IV. does this include obtaining comprehensive contact details for the client and family or employers? YES/NO (see *Mlenzana v Goodricke & Franklin Inc* 2012 (2) SA 433 FB)
11. Claims sometimes arise out of practitioners’ having acted for family/ friends/acquaintances. Does your practice have any policy that regulates acting for them? YES/NO
12. Does your practice have a policy that formal **Letters of Engagement** must be signed by clients? YES/NO
- If yes:
- I. Is your policy strictly enforced? YES/NO
- II. Does the format ensure that, prior to taking on the mandate, client’s requirements are clearly identified and can be met by your practice? YES/NO
- III. Does it deal fully with your billing rates and policies? YES/NO
- IV. Does your policy include amending the letter of engagement as circumstances change? YES/NO
- V. Does your policy include the use of letters of non-engagement? ( letters sent to prospective clients confirming that you have not accepted the mandate eg. where there is a conflict) YES/NO
- If no, see Risk Management Tips - Letters of Engagement on website [www.aiif.co.za](http://www.aiif.co.za)*
13. Does your practice use **Checklists** for matters where appropriate? YES/NO
14. Does your practice have a policy that requires staff to draw up a **Working Plan** (plan on steps to be taken to implement and manage their planned strategy) for their matters? YES/NO

If yes:

- does the policy stipulate that the Working Plan should be updated as circumstances change? YES/NO
- does the policy provide that the Working plan should be communicated to client? YES/NO

If no, see Risk Management Tips on Website [www.aiif.co.za](http://www.aiif.co.za)

15.

- Is all advice confirmed in writing? YES/NO
- Are all instructions confirmed in writing? YES/NO

If no, see Risk Management Tips on Website [www.aiif.co.za](http://www.aiif.co.za)

16. Claims can arise out of matters having been transferred from one attorney to another (either within or from outside the practice.) Does your practice have a policy dealing with this situation? YES/NO

If yes, briefly describe your system

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If no, see Risk Management Tips on Website [www.aiif.co.za](http://www.aiif.co.za)

17. Claims against practitioners sometimes arise out of ineffective delegation. Does your practice have policies in place with regard to delegation? YES/NO/n/a

If yes, describe them

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If no, see Risk Management Tips on Website

18. Many claims against practitioners arise out of a lack of or poor supervision.

- 18.1 Does your practice have policies in place with regard to the supervision of all staff including attorneys, support staff and candidate attorneys? YES/NO/n/a

If yes, describe them

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If no, see Risk Management Tips on Website

- 18.2 Do you allow candidate attorneys, paralegals or newly-qualified attorneys to handle their own matters without close supervision? YES/NO/n/a

- 18.3 Do they have authority to “sign-off” advice to client? YES/NO/n/a

If yes, is the advice checked by a partner/director before it is conveyed to client? YES/NO/n/a

- 18.4 Do you impose fee targets on your candidate attorneys? YES/NO/n/a

If yes, are you satisfied that they are able to deal with the personal pressure of these targets? YES/NO/n/a

- 18.5 Does your firm have a substantial debt collection practice? YES/NO

If so, is it run by a director/partner/associate with a minimum of 2 years’ experience? YES/NO

If not, is it supervised by a director/partner/associate with a minimum of 2 years’ experience? YES/NO

If yes, specify whether the matters are run by a candidate attorney / paralegal.

19. Does your practice have a policy in place with regard to the drafting of documents? YES/NO

If yes, describe it

# RISKALERT

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*If no, see Risk Management Tips on Website*

20. Does your practice have a policy in place for training of;

- professional staff? YES/NO
- support staff? YES/NO

If yes, does it include the following?

- Vocational (including legal developments) YES/NO
  - Risk management YES/NO
  - Ethical YES/NO
  - Best business practice YES/NO
  - Basic legal procedures YES/NO
  - Your firm's ethos YES/NO
  - Quality standards YES/NO
  - Client care YES/NO
  - Fraud and money laundering YES/NO
  - Other (PLEASE SPECIFY)
- .....  
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21. Are partners, directors, professional and support staff trained to be made aware of :

- your risk management structure and procedures, YES/NO/n/a
- the chain of responsibility and authority YES/NO/n/a
- their individual responsibilities to report all issues and concerns to the responsible person? YES/No/n/a

22. 1 Many claims arise out of the failure of or non-existence of a diary system. Does your practice have an effective diary system FOR FILES in place? YES/NO

If yes, does it include;

- the use of a dual system YES/NO
- the use of a centralised system YES/NO
- the use of checks and balances to ensure that diarised matters are attended to YES/NO
- the use of Prescription Alert YES/NO

Briefly describe your system:

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22.2 Does your practice have an effective diary system FOR COURT AND IMPORTANT DATES in place? YES/NO

If yes, describe it

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23. Does your practice have a system of client file audits and reviews? YES/NO

If yes, do you use it effectively for:

- risk management YES/NO
- performance assessment YES/NO

Describe your system briefly

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*If no, see Risk Management Tips on Website and a practical guide in Risk Alert Bulletin (May) 2/2015 p 4 or the AIIF website: <http://www.aiif.co.za/file-audits>*

24. Does your practice have regular meetings of professional staff to discuss problem matters? YES/NO/n/a

25. Does your practice have effective policies on uniform file order? YES/NO

If yes, describe them

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*If no, see Risk Management Tips on Website*

25.2 Does your practice have policies on file storage and retrieval? (Procedures to ensure that files are not lost or misplaced or overlooked)

If yes, describe them

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26. A director of a large practice in Pretoria rightly believes that practices should promote the important principle that IF IT IS NOT IN WRITING IT IS NOT DONE!

26.1 Many claims cannot be successfully defended because of the absence of relevant file notes. Does your practice have a uniform policy on the making of file notes? YES/NO

*If no, see Risk Management Tips on Website*

26.2 Does your staff record all telephone discussions in writing? YES/NO/n/a

*If no, see Risk Management Tips on Website*

27. Does your practice have a system in place for checking all relevant incoming correspondence by a partner/director, principal or departmental head? YES/NO/n/a

*If no, see Risk Management Tips on Website*

28. Do you have a formal file closing procedure? YES/NO

If yes:

- does it include a formal policy for closing/ending the mandate? YES/NO
- does it include a termination of mandate letter? YES/NO

*If no, see Risk Management Tips on Website*

29. Do you have effective and uniform billing policies and procedures in place? YES/NO

30. Are all your policies reduced to writing and available to staff in either electronic or hard copy? YES/NO /n/a

# RISKALERT

31. Do you have effective checks and balances in place to ensure that your policies and procedures are being complied with? YES/NO/n/a
32. Do you have a client complaints procedure in place? YES/NO
33. Do you have a fraud prevention program and policy in place? YES/NO
34. Do you have a policy that monitors and ensures control over your professionals' workloads? YES/NO/n/a

## SECTION 3

### Claims Information

Please insert the required claims information into the table below:

Insurance Year	No of claims/circs notified	No of claims settled	No of claims withdrawn	No of claims still not resolved

Have any actions been taken to prevent the recurrence of the claims situations that arose as set out above? YES/NO

If yes, please elaborate

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## SECTION 4

### Insurance Information

1. How did you find out about the AIIF and its functions?

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2. Do you believe that the existence of the AIIF and its functions is adequately communicated to the profession? YES/NO

If no, please suggest ways in which these could become better known to the profession.

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3. Do you make use of any of the AIIF's risk management interventions? YES/NO

If yes, which ones? Risk Alert Bulletin/Prescription Alert/Website/Other

4. Are there any other interventions that you would find helpful in your practice? YES/NO

If yes, please discuss

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NAME : .....

CAPACITY: .....

SIGNATURE: .....

DATE OF COMPLETION: .....