THE SA ATTORNEYS' JOURNAL

JANUARY/FEBRUARY 2019

THE BASIC STRUCTURE DOCTRINE: A CHALLENGE TO EXPROPRIATION WITHOUT COMPENSATION?

Applying Uniform r 23 into the landscape of tax litigation

Court bundles – how to prepare them properly

Employment references: Practical guidelines to avoid delictual liability

Is it safe to rely on a court to draw an adverse inference from the absence of a witness?

The risks affecting the sustainability and viability of law firms

Cyber liability insurance

Which rules apply? Some further notes on maintenance of common property at sectional title schemes

Limitation of police powers on search and seizure

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FEATURES

26 The basic structure doctrine: A challenge to expropriation without compensation?

In February 2018, Parliament adopted a resolution in support of the concept of expropriation of private property without compensation. The resolution, among other things, directed the Parliamentary Constitutional Review Committee to review various provisions, including s 25 of the Constitution – the right to property – to determine how to make expropriation without compensation possible. Since then, there has been much discourse on, especially, the morality and the economics of such an amendment to the Constitution. While the legality and legal implications of such an amendment have been analysed, there has been little engagement on how, or whether such an amendment could be challenged on constitutional grounds if it should pass through both houses of Parliament and be signed into law by the President. **Martin van Staden** discusses the overview of the basic structure doctrine and gives his views on the matter.

30 Applying Uniform r 23 into the landscape of tax litigation

Tax courts are created by s 116(1) of the Tax Administration Act 28 of 2011 (TAA). As such, by virtue of s 166(*e*) of the Constitution, they are part of South Africa's judicial system. Under s 107(1) of the TAA, a tax court adjudicates taxpayer appeals against tax assessments, as well as appeals against a 'decision' falling within the remit of s 104(2). Unlike a tax board established under s 108 of the TAA, a tax court is 'a court of record' who is empowered by s 117(3) to 'hear and decide interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the "rules"' promulgated in terms of s 103 of the TAA. **Dr Fareed Moosa** also writes that a tax court must hear an appeal *de novo*. This entails a full hearing or re-hearing of a matter, as the case may be. Proceedings in a tax court are, thus, akin to a trial. Evidence of witnesses, including experts, is led. In the same vein as the Magistrates' Courts Rules and Uniform Rules of Court pertaining to civil trials. In this article, Dr Moosa takes us through the landscape of tax litigation.

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De Rebus: No more free printed copy

As we begin the year with the combined January/February issue of *De Rebus*, this will, unfortunately, be the last free printed copy made available for practising attorneys and candidate attorneys.

Due to the changes brought about by the Legal Practice Act 28 of 2014, the Law Society of South Africa (LSSA) – which publishes *De Rebus* – is on a three-year trajectory to realign its functions to those of a membership-based professional association. This means that the funding model of the LSSA will have to change so that the organisation will be able to meet its obligations of being self-sustaining (see p 14).

With limited funding, the LSSA will continue to publish *De Rebus* in digital format. Those who wish to receive the printed version will, unfortunately, have to bear the cost for its subscription. We have no way around this, given the circumstances in which the profession finds itself Alternatively, a PDF version of the journal is available for personal printing. The Classifieds section, however, will only be available on the website and in PDF format and not be printed.

How will *De Rebus* be distributed?

In the coming weeks, *De Rebus* will be sending an e-mail to practising attorneys and candidate attorneys, who will have to 'opt in' to receive a newsletter, which will contain a link that will direct readers to the latest online issue. This is to ensure we comply with the Audit Bureau of Circulations of South Africa's guidelines, which is the body that regulates circulation statistics in the country. Please be on the lookout for this mailer because if you do not 'opt in', we will not be able to send the newsletter to you.

The publication will continue to be a monthly publication, which is published 11 times a year. All the sections that have been in the journal will continue to be published. Therefore, we urge legal practitioners to continue sending us letters, case notes, feature articles, practice notes, etcetera.

Those who wish to receive the paid printed version of the journal can fill in a subscription form available on our website. The link to the subscription form is available at the foot of the homepage, under 'Tools'. Subscription will only be available for postage within South Africa The annual cost of subscription is R 1 500 (including VAT).

What changes will the digital format have?

The news section and any other information, which is pertinent to legal practitioners, will be published online as soon as possible. This is so that practitioners do not receive outdated news. Practitioners should follow *De Rebus* on Twitter because articles that are published immediately will be tweeted. In keeping up with the digital age, practitioners should also download the *De Rebus* app, which is available for Android and Apple. The app will notify readers when new content is uploaded on the website through push notifications.

Other sections of the journal will be published monthly, and a newsletter will be sent out on the first of every month, alerting readers of the latest issue. Throughout the month of publication, articles in a particular issue will be tweeted and also be available on the app.

Reading the journal online has the added benefit of allowing one to search for articles, cases or phrases for research purposes. In future, the *De Rebus* website will also be used for Post-Qualification Professional Development (PPD, previously known as CPD).

De Rebus, which has served the legal profession for many years through education, information and by being the mouthpiece of the profession, will continue to serve the profession diligently. Although this change will not be welcomed by all, the financial situation dictates that the journal be distributed digitally. We hope that legal practitioners will continue to read the journal and send through educational and thought-provoking articles to be shared with the rest of the profession. The next issue, which is the March issue, will be available from 1 March on the website at www.derebus.org.za.

Mapula Sedutla – Editor

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Would you like to write for *De Rebus*?

***De Rebus* welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.**

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

- **Please note that the word limit is 2000 words.**
- **Upcoming deadlines for article submissions: 18 February and 18 March 2019.**

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.

Response to 'maintenance of common property in sectional title schemes'

I fully agree with Brian Agar's views expressed in his excellent article 'Maintenance of common property in sectional title schemes' 2018 (Oct) *DR* 19. However, I am surprised that he did not deal with subs 10(2) of the Sectional Titles Schemes Management Act 8 of 2011 (the Act), which states at s 10(4) that: 'The management or conduct rules referred to in subsection (2) take effect from the date of establishment of the body corporate.' This is nonsense if it means that it applies to schemes, which were established before the Act came into force, and were subject to rules prescribed in terms of the Sectional Titles Act 95 of 1986. But it makes perfect sense if, as Mr Agar states, subs 10(12) of the Act means that management and conduct rules made pursuant to the Act only apply to schemes established after the Act came into force, namely, 7 October 2016. Schemes established before the date of commencement, 7 October 2016, accordingly do not in terms of their rules, have to have a maintenance plan and the consequent reserve fund, as they are subject to the management and conduct rules prescribed in terms of s 55 of the 1986 Act. The Act repealed much of the 1986 Act, but not the subsections of s 55 – which authorise regulations – which provide for management and conduct rules. This enables future amendments of the separate prescribed management and conduct rules, which apply to schemes established before 7 October 2016.

Finally, Mr Agar says 'trustees are faced with a dilemma by the commands of the Act to establish a reserve fund', but s 3(1)(*b*) of the Act continues 'but not less than such amounts as may be prescribed by the Minister'. As no amounts have been prescribed for schemes established before 7 October 2016 presumably these 'commands' are a nullity for as long as no amounts have been prescribed.

Mike Simpson, attorney, Johannesburg

• See also p 20 – ***editor***.

Book announcement

The Responsible Mind in South African Criminal Law
By James Grant
Cape Town: Juta
(2018) 1st edition
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226 pages (soft cover)

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BLA AGM: Fusion is the way to go

The Black Lawyers Association (BLA) held its 41st annual general meeting (AGM) in October 2018 in Cape Town under the theme: 'Access to legal profession: Fusion is the way to go'. On the evening preceding the AGM, a gala dinner was held which incorporated the Fourth Annual Godfrey Pitje Memorial Lecture.

Attorney Thokwane 'TP' Moloto delivered the memorial lecture. Mr Moloto began his address by stating that the administration of justice should be viewed from the global village perspective with respect to the principle of separation of powers in accordance with the theory advanced by Montesquieu on 'trias politica', meaning that there are three categories of politicians in any democratic scenario of governance, namely, the legislator, the executive and the judiciary. He added: 'There are checks and balances to avoid the three arms to interfere with one another. The aforesaid separation of powers, of relevance today is the role of judiciary as one of them which is also separated into three sub-divisions, being the presiding, prosecuting and defending arms to maintain the balance of the administration of justice, for justice to be seen to be done.'

Mr Moloto went on further to say: 'I find it suitable to start with the basic principles to be applied to the judiciary in accordance with "Basic Principles on the Independence of the Judiciary" as adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders at Milan on 26 August 1985. Among other provisions are Articles 1 and 2, which state: "1. The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."'

Mr Moloto noted that the relevant section that pertains to lawyers as legal representatives, as far as the basic guidelines are concerned is provided in the 'Basic Principles on the Role of Lawyers', adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at Havana on 27 August 1990. The following principles were adopted:

Attorney Thokwane 'TP' Moloto delivered the Godfrey Pitje Memorial Lecture.

'[Article] 1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

[Article] 2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status'.

Speaking about Godfrey Mokgonane Pitje, Mr Moloto took delegates down memory lane and said: '"As a result of all the difficulties I have discussed relating to practice of law and as our numbers picked up, I called the black lawyers together to make common representations to the authorities to be allowed to have offices in town and to be freed from influx control, pass laws, the lot. The lawyers used to meet in my office. Sometimes there would be three or four or five. The number gradually increased so that by 1978, when Dikgang Moseneke was admitted there were more than ten of us". These words were uttered by the late GM Pitje in an interview with one of the friends of BLA from the United States of America before he passed on in 1997. Basically, GM Pitje was our mentor and father figure in the legal fraternity and African community and his spirit is still living in the circles of BLA till today. May his soul rest in peace.'

Mr Moloto noted that the struggle to access the legal profession is as old as time and is continuing. He said that others are going to take some time to reach the destination as the pace of the transformation process is very slow because it is not revolutionary but evolutionary.

He added: 'There was a hope that the new Act [Legal Practice Act 28 of 2014 (LPA)] for administration of the legal profession will get rid of the unnecessary and uneconomic division between attorneys and advocates in which the poor, who are incidentally blacks, cannot easily get access to justice because of the double payment to lawyers for the same service. There is still separate rolls of attorneys and advocates in terms of sections 24 and 25 of the [LPA] and further classification of advocates as senior counsel and junior counsel. There is still a long way to travel in order to reach the destination and distance where our neighbours like Zimbabwe and Namibia are at the moment. However, since every situation which is created by the legislation is amenable to be amended by the same as time goes on, we hope that the BLA will pull its socks up and see to it that the coming [LPA] is being amended from time to time till it reaches the stage where it will be acceptable to the demographic majority of our population, without confusion but with fusion as the only way to go. I wish the new Legal Practice Council good luck.'

- For Mr Moloto's full speech see www.derebus.org.za under the resources and documents tab.

Fusion: Is the profession ready?

On the day of the AGM, President of the BLA, Lutendo Sigogo, was first on the podium to open the proceedings of the

President of the BLA, Lutendo Sigogo, noted that 2018 marked the year of the 41st anniversary of the BLA and the centenary of the lives of two democratic icons, namely Albertina Sisulu and Nelson Mandela.

A panel discussion was held to discuss the topic of the day. From left: Attorney Anthony Millar; advocate Fezile Memani; and Legal Practice Council member, Noxolo Maduba-Silevu.

day. Mr Sigogo noted that 2018 marked the year of the 41st anniversary of the BLA and the centenary of the lives of two democratic icons, namely Albertina Sisulu and Nelson Mandela. He added: 'In commemoration of the work Mandela and Sisulu have done, as the legal profession, we need to provide tangible answers facing our society and contribute towards building and offer opportunity for growth.'

Speaking about the theme of the conference, Mr Sigogo said that the notion of fusion is not a new topic in the profession. He asked: 'Is the profession ready for fusion, can fusion be used as a tool to transform the profession?'

A panel discussion was held to discuss the topic of the day. Legal Practice Council (LPC) member, Noxolo Maduba-Silevu, noted that the notion of fusion has been around for many years and that there are countries where there are no distinctions in the legal profession. Ms Maduba-Silevu said in South Africa the legal profession has been moving in the direction of fusion for a number of years.

Attorney Anthony Millar noted that fusion would bring advocates closer to clients, which is necessary. Mr Millar said that the direct consequence of fusion would be greater access to justice for the public. He added that fusion would also lead towards a unified legal profession. 'The name advocate is a job description and does not mean that advocates are better than attorneys. When cases are presented in court, the public sees advocates as the face of the profession while attorneys are viewed as the poor cousins. We need to change this,' he said.

Chief Executive Officer of the Legal Practitioners Fidelity Fund (the Fund), Motlatsi Molefe, presented a report on the Fund.

Advocate Fezile Memani said that in his perspective, there is no difference between advocates and attorneys as they have the same qualification. Mr Memani noted that advocates are a necessary evil in the profession. 'It is a misconception that advocates charge exorbitant amounts, in fact attorneys charge more than us. If there is fusion, I hope that there will be some sort of magic that changes that scenario. There are no separate professions, we are all the same. We do not differ on matters of substance, we only differ on issues that are commercial in nature,' he added.

Report from the Legal Practitioners Fidelity Fund

Chief Executive Officer of the Legal Practitioners Fidelity Fund (the Fund), Motlatsi Molefe, presented a report on the Fund. Mr Molefe said that the current value of the Fund sits at R 468 billion nett of withdrawals of R 175 million. Mr Molefe noted that this amount is geared towards the settlement of claims, payments of professional indemnity (PI) cover on behalf of attorneys as well as the subvention of regulatory activities. He added that the payment of the PI premium remains within the discretion of the Board of the Fund.

The Fund, which was previously named the Attorneys Fidelity Fund, will continue to exist as a juristic entity. Mr Molefe said there is a six-month period for the new Board of Control to be elected in terms of the LPA. He highlighted the fact that exclusive control by attorneys of the Fund will cease with the election of the new Board. 'The board will shrink to nine members with only four attorneys and one advocate with a Fidelity Fund Certificate (FFC). The other four members will be two auditors nominated by Independent Regulatory Board for Auditors via the LPC and two ministerial representatives, which clearly says that the focus of the Fund will now be in many ways multi-dimensional and clearly emphasise public protection more than professional interest,' he added.

Speaking about contribution towards PI insurance, Mr Molefe said that the implementation of contributions towards PI insurance by legal practitioners is envisaged to come into effect in 2019 and will form part of the FFC application process for 2020. He added: 'The issuing of a Fidelity Fund Certificate by the LPC is dependent on the payment of the contribution for PI insurance to the Fund. This is perhaps the single most important development within the LPC that will affect all practitioners. At this point the premium for PI stands at R 212 million inclusive of VAT. This is a figure way above our core function payments that we make annually for misappropriation of trust funds. However, the contribution regime, which the Fund has introduced, will have an element of subsidisation for a period of five years beginning this year wherein the Fund will be responsible for half of the premium and the profession the rest. The Fund will gradually reduce this subsidy over a period of five years until the full premium becomes the responsibility of the profession although the operational costs of running the scheme will be borne by the Fund in perpetuity. It must be added that to avoid creating barriers of entry, new entrants into the profession will be subsidised for a period of two years.'

Chairperson of the Attorneys Development Fund (ADF), Nomahlubi Khwinana, gave a report on the ADF.

Chairperson of the Attorneys Development Fund (ADF), Nomahlubi Khwinana, gave a report on the ADF, see 2018 (Dec) *DR* 7.

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Rule of law in the age of expropriation without compensation discussed at AGM

The KwaZulu-Natal Law Society held its final annual general meeting (AGM) in October 2018 in Durban. Guest speaker at the AGM, advocate Tembeka Ngcukaitobi, presented a paper titled 'Reimagining the rule of law in the age of expropriation without compensation'.

Mr Ngcukaitobi, who wrote the book *The Land Is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism*, began his address by looking into the history of black lawyers and their role in the question of disposition of land and positioned that to the current discourse of land expropriation. Mr Ngcukaitobi said that in South Africa (SA) there is a cry for the land that was lost together with citizenship under colonial conquest. He added: 'Our ancestors fought for this land, but in the pitiful and the genocidal wars of colonial conquest the land was lost.'

Mr Ngcukaitobi noted that as early as 1875, black lawyers had begun to wage the struggle against disposition. He illustrated this by citing a case that took place in 1875 where a dispute arose in the diamond fields of Kimberley about land. 'At issue was who owned the land under which the diamonds were supposedly discovered … The principle was that whoever owned the land also owned the diamonds. On behalf of the Griqua community was an attorney David Arnold, who was born of a Griqua man and a Scottish woman. He was classified in the official records as colored but he self-identified as Griqua or Khoikhoi. … Who would have known that in 1875 a black man was already practicing as an attorney in Kimberley.

Guest speaker at the Annual General Meeting, advocate Tembeka Ngcukaitobi, presented a paper titled 'Reimagining the rule of law in the age of expropriation without compensation'.

A number of potential claimers presented themselves, the Afrikaners from the Boer republics of Transvaal and the Orange Free State, and the diamond diggers. Everybody claimed a piece of the land, the Griqua represented by Arnold based on prior occupation. Their argument was that the area was occupied by the Griquas, people of mixed racial origins between the Khoikhoi and the whites in the 18th century when they fled discrimination from the Cape. When the British proclaimed the area as British territory, the rights of prior occupation were not extinguished. …

In this particular case, the British government set up the first land court. … It was known as the Land Court for Griqualand West and its jurisdiction was to decide the ownership of the land. … The Griqua's argument was ownership to the land by reference of detailed research and prior treaties concluded with the British under the colonial governor in 1834. … Ultimately the justice rejected the claim of the Griquas. Basing his reasons which are, I argue is reflective of colonial attitudes, that the Griqua were a nomadic people. The jurisdiction of their chiefs was over people not specific land or area. The findings were quite significant … because it was the notion of converting the argument around ownership of land rights on its own head. It is because the Griquas refused to recognise private ownership that they lost the land. It was because according to the Griquas, land cannot belong to one man. Land is an inheritance from God, it belongs to the community as a whole. The question really was not about ownership. It was about the nature of African ownership. It was that nature of African ownership that was turned on its head and ultimately led to the disposition.'

Reports by stakeholders

Managing Director of the Attorneys Insurance Indemnity Fund NPC (AIIF), Sipho Mbelle, addressed delegates on the happenings of the AIIF during 2018. Mr Mbelle said: 'The year has been momentous for all stakeholders in the legal profession. The full implementation of the Legal Practice Act 28 of 2018 [LPA] ... will be a watershed moment for the South African legal profession. The implications of the [LPA] have been taken into account by the AIIF in its strategic planning for the years ahead, as well as in its operational preparation as part of the broader [Legal Practitioners Fidelity Fund] structure.'

Managing Director of the Attorneys Insurance Indemnity Fund NPC (AIIF), Sipho Mbelle, addressed delegates on the happenings of the AIIF during 2018.

Speaking about professional indemnity claims, Mr Mbelle noted that the claims continue to make up the biggest part of the operations of the AIIF. He added: 'As at 30 June 2018, the reserve requirements for outstanding claims was actuarially calculated at R 498 million. This is a significant amount considering the size of the AIIF. The majority of the claims still arise from circumstances which could have been avoided had the appropriate internal controls been implemented in the firms.'

Mr Mbelle noted that the changes to the AIIF funding model were included in the 2017 AIIF report. He added that the date for the implementation of the premium contribution will be communicated to the profession prior to implementation.

Other reports were presented by:

- The Chief Executive Officer of the Legal Practitioners Fidelity Fund, Motlatsi Molefe, see p 5.
- The Chairperson of Attorneys Development Fund, Nomahlubi Khwinana, see 2018 (Dec) *DR* 6.
- Executive member of the Legal Practice Council (LPC) and attorney, Jan Stemmett, gave an update on the LPA see 2018 (Dec) *DR* 6.

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Legal practitioners should not be afraid of change

The Free State Law Society (FSLS) held its last annual general meeting (AGM) in October 2018 in Bloemfontein. President of the FSLS, Vuyo Morobane, began the proceedings by welcoming guests to the meeting.

Guest speaker, Director at ITEC and Chairperson, Non-executive Director of Ruwacon, Valentine Rantsoareng, began his address by stating that lawyers are an important part of society, particularly for those who conduct business in the country. Mr Rantsoareng noted that lawyers need to have foresight when dealing with clients that run businesses, because the lawyer needs to understand where the business wants to be in the next 15 years to adequately assist it.

Mr Rantsoareng said often times the law assumes that society knows what the law is, that is not always the case and that is where lawyers must step in. He pointed out that his business grew because he employed a lawyer that understood where he wanted his businesses to be from day one. He added that it cannot be overstated that every aspect of life is intertwined with the law.

Speaking about the Legal Practice Act 28 of 2014 (LPA), Judge of the Free State High Court Division, Johann Daffue, noted that the LPA deals with issues affecting the running of the legal profession so that the profession can best serve government and the public.

Speaking about the Legal Practice Act 28 of 2014 (LPA), Judge of the Free State High Court Division, Johann Daffue, noted that it took many years of negotiations for the LPA to be enacted. Judge Daffue said the LPA deals with issues affecting the running of the legal profession so that the profession can best serve government and the public. He cautioned against resistance to the LPA and advised legal practitioners to not be afraid of change.

• For more information on the workings of the FSLS during 2018 see www.derebus.org.za under the resources and documents tab.

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The Hague Convention must be looked at through the eyes of a child

Clarks Attorneys held its fifth Annual Family Law Conference on 4 and 5 October 2018 in Johannesburg. The keynote speaker, Supreme Court of Appeal Judge Halima Saldulker, spoke on civil aspects of The Hague Convention (the Convention). She said when looking at the Convention, it should be looked at through 'the eyes of a child'. She added that the Convention helps in cases when a child is taken out of the country by one parent from the other, especially in countries that are party and signatory to the Convention, however, she added that sometimes the Convention cannot help. She said there are countries reluctant to sign the Convention, because of various cultural and religious problems, which make it difficult for women and children to have their rights enforced.

Judge Saldulker pointed out that much has been written and said about the Convention, with regard to its effectiveness, applications, clauses and its successes. The main focus of the Convention is that its preamble is a return mechanism where the objects are set out to secure the prompt return of children who were wrongfully removed or retained in the contracting country. She added that wrongful removal is when the left behind parent's custody rights have been violated.

Judge Saldulker said the Hague Convention on the Civil Aspects of the International Childs Abduction, 1980, was incorporated in South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, which came into operation in 1997. In the Children's Act 38 of 2005 ch 17, ss 274 and 280 deal with child abduction. She pointed out that the domestic legislation of South Africa (SA) provides that the mechanism, which formally adopts the Convention into the jurisprudence, is an exemplary step in the right direction.

Judge Saldulker said in SA the Chief Family Advocate is designated as the central authority who assists in both incoming and outgoing cases. She added a party may submit its submission to the central authority for the return of the child, the central authority also applies on behalf of the applicant to the central authority of the country to which the child has been taken, requesting them to –

- take steps to discover the whereabouts of the child;
- prevent any further harm to the child; and

Supreme Court of Appeal Judge Halima Saldulker, was the keynote speaker at the Clarks Attorneys fifth Annual Family Law Conference held in Johannesburg.

- attempt to secure the voluntary return of the child.

Judger Saldulker pointed out that according to research the Western Cape Division, the Gauteng Local Division and North West Division of the High Court, have practice directives with regard to Convention matters. She added that at the Supreme Court of Appeal, she together with the Judge President tried to set up rules – which they are considering putting to the rules board – with regard to how Convention matters will be dealt with at the court and if such matters arise they will be dealt with on an urgent basis.

Educational Psychologist, Doctor Martin Strous, said psychologists who act as expert witnesses are ethically bound to provide information that is impartial and accurate. He, however, added that psychologists often receive disparate advice from legal practitioners and other psychologists as to what is constituted as proper conduct when obtaining permission to assess minor children and when to release information. He pointed out that psychologists conducting care and contact evaluations should thoroughly consult with all participants and must weigh up potentially significant data, opinions, and alternative hypotheses thoroughly and impartially.

Dr Strous added that psychologists should be prepared to articulate the basis for their decisions concerning their methodology and they should be mindful of the pitfalls of simplistic, linear arguments. He said they should consider alternative hypotheses to explain the causes of the phenomena they observe. Dr Strous said recommendations should be based on the best interests of minor children and not on feelings of partiality toward one of the parents. He noted that psychologists – nationally and internationally – are often reported to their regulatory bodies for misconduct by unhappy parents in custody-related disputes.

Dr Strous said that it is important for legal practitioners and psychologists to apply their minds to ethical issues. The regulated rules of conduct for psychologists' states that if a psychologist's ethical responsibilities conflict with the law, the psychologist shall make their commitment known with regard to the ethical rules and take steps to resolve the conflict. However, if the conflict cannot be resolved, the psychologist must comply with the requirements of the law.

Advocate, Beverley Fourie, discussed the role, relevance and purpose of expert evidence. She said there are three issues with regard to expert evidence namely –

- the role of an expert in court;
- the relevance of expert evidence; and
- the purpose of the expert evidence.

Ms Fourie said the primary duty of an expert witness is to give the court the benefit of its expertise. She added that the responsibility of an expert witness is to provide the court with an objective and unbiased opinion, based on its expertise. She pointed out that it is not a hired gun who dispenses their expertise

Educational Psychologist Doctor Martin Strous, said psychologists who act as expert witnesses are ethically bound to provide information that is impartial and accurate.

Advocate, Beverley Fourie, discussed the role, relevance and purpose of expert evidence at Clarks Attorneys fifth Annual Family Law Conference in October 2018.

for a particular case, nor do they assume the role of an advocate. She pointed out that an expert witness is a witness of the court assisting the court in its determination and adjudication of any issues in the matter, which requires specialist expert knowledge. She added that an expert does not belong to any party, the expert is a court's witness and the expert's professional duty is to the court, not to the party who pays them.

Development in Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning rights

Professor at the University of Cape Town, Pierre de Vos, said in 2005 the Constitutional Court (CC) in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others,* Amici Curiae*); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), the court held that the denial of 'marriage like rights' to same sex couples was infringing on the Constitution and it unfairly discriminated against such couples. He added that in the wake of that, Parliament passed the Civil Union Act 17 of 2006. He pointed out that in another matter, *Gory v Kolver No and Others* (*Stark and Others Intervening*) 2007 (4) SA 97 (CC), the CC heard a case of a same sex couple where one partner passed away, the question was whether one party could inherit from the other, because there was no Will.

Prof de Vos noted that the CC said that they had done everything they could by adding words in the legislation to remedy the constitutional defect where discrimination against people based on their sexual orientation took place. He added that the CC said all the legislation where the legislature included phrases like 'same sex partners' or 'same sex life partners', will remain, unless Parliament amends the legislation.

Prof de Vos said if one looked at surveys statistics they are a bit depressing. He added that there was a survey done in 2008 on social attitudes, which asked if people thought homosexuality is always wrong or right or sometimes wrong? He pointed out that 82% of respondents said they thought homosexuality was always wrong. Another survey from 2013 showed that 61% of respondents said they believed that homosexuality should never be accepted. He said a more recent study done in 2016, found that 72% of people that responded, believed same sex relationships are morally wrong, but interestingly, over 50% responded that same sex couples should have the same rights as heterosexual couples. He added that the argument was that South Africans want to give the rights, but personally they prejudice against one another.

Prof de Vos said the above shows how people would be treated if they are in a same sex relationship, when their case is going to be heard in court, when there is a divorce or when a person in a heterosexual relationship has decided that they would rather be in a same sex relationship and the judge has to decide who gets custody of the children or when it comes to adoption who gets to adopt. He pointed out that those decisions are not always captured in legal judgments and that is where the problem lies, because the extent to which legal protection translates to social acceptance depends on many factors, such as class, race, gender, where one lives and so on.

Professor at the University of Cape Town, Pierre de Vos, spoke about the development in Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning rights since the advent of democracy at the conference.

Advocate, Elizabeth Nieuwoudt, spoke about children's participation in court proceedings.

Child participation

Advocate, Elizabeth Nieuwoudt, said the subject of child participation can be found in s 28(*h*) of the Constitution where it states that every child has the right 'to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.' She added that s 7 of the Children Act 38 of 2005 (Children's Act) tried to give a guide explaining the term 'best interest of the child'. She pointed out that s 10 of the Children's Act says how and when a child will participate in proceedings. She added that this is a test that looks at the age, maturity and development of the child.

Ms Nieuwoudt said legal practitioners and courts like to use phrases and terms, which people do not understand. She added that a court once tried to put a meaning to 'substantial injustice' and when it occurs. In the case of *HG v GG* 2010 (3) SA 352 (ECP) at 361 F–G, the court held that '[b]y all accounts the children are of an age and maturity to fully comprehend the situation, and their voices cannot be stifled, but must be heard'. She pointed out that further sections in the Children's Act refer to child participation, s 14 states that every child has the right to bring and be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court. Ms Nieuwoudt also discussed when a child can participate in court proceedings and other sections that refers to children's participation in matters involving them.

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Challenges and successes of the competition practice

The Competition Law Committee of the Law Society of the Northern Provinces held its last Annual Gala Breakfast in October 2018 in Johannesburg. The gala breakfast was organised and hosted by ENSafrica. Members of the panel discussed 'Experiencing twenty years of competition practice'. The Competition Commission Commissioner, Tembinkosi Bonakele, said South Africa (SA) has challenges in the economic front and added that employment growth numbers were not impressive.

Mr Bonakele said this is a challenge and added that there can be talks about what the Competition Commission can contribute, however, there are concerns about the structure of the economy and concentration levels in the economy. He pointed out that another challenge, is with regards to developing competition experts. He said that SA could have done better in developing experts. He pointed out that when looking at who the experts are, the economic front is dominated by European experts, instead of local experts.

Competition Commission Commissioner, Tembinkosi Bonakele, spoke at the last annual gala breakfast of the Competition Law Committee of the Law Society of the Northern Provinces, held in October 2018 in Johannesburg.

Mr Bonakele said it was easy for legal practitioners to make the transition into competition law. However, he added that another challenge is with economists. He said universities should produce a pool of economists that can help in the industry. Full-time member of the Competition Tribunal, Yasmin Carrim, added that the industry was not doing enough and that the pool of economists is small. She pointed out that it was not only up to universities to produce expert economists. She said the industry needed to grab the opportunity and utilise different strategies, such as giving practical training or internships to students, so that when they graduate they would have a sense of the work environment.

Ms Carrim, however, said that from her personal experience, one of the successes in the industry has been the quality of work done by both legal practitioners and economists in the country. Mr Bonakele added that SA has made strides in establishing itself as a respected jurisdiction with locally developed practices and sharpened skills in the competition area, he noted that these were good signs. Judge President of the Competition Appeal Court, Dennis Davis, posed a question to Mr Bonakele with regards to work done by experts outside SA.

Mr Bonakele said the Competition Commission has relied on local experts. However, he pointed out that the issue is with the number of local experts. He noted that the country has knowledgeable experts even though they are few in numbers. He added that even though foreign experts are brought in to work in SA, they should team up with local experts as they understand the local conditions, they are open minded and are trained by the best in the world.

Full-time member of the Competition Tribunal, Yasmin Carrim, listed the quality of work done by competition law legal practitioners and economists in South Africa as one of the successes in the industry. She spoke at the last annual gala breakfast held in Johannesburg by the Competition Law Committee of the Law Society of the Northern Provinces.

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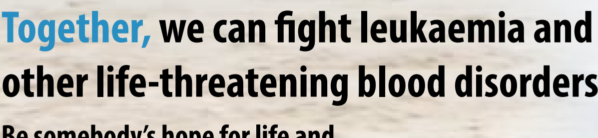

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Possibilities and challenges of international arbitration

Werksmans Attorneys together with McDermott Will and Emery and the International Chamber of Commerce (ICC) jointly hosted the International Arbitration Seminar in October 2018 in Johannesburg. Director at Werksmans Attorneys, Roger Wakefield, said time is a great advantage in arbitration. He added that more efficient arbitrations mean less costs. He pointed out that the ICC has rules that give an arbitrator and the court, specific powers to curtail discovery, length of argument and submissions. He said with the rules, arbitrators cannot complain that they were not given due process to deal with their matter. However, he pointed out that there have been instances where a losing party would raise some concerns with how the arbitration process works.

Mr Wakefield added that there is a perception that ICC arbitrations are only suitable for complex claims, that they are lengthy and expensive, and that led to the revision of the rules in March 2017. He said the most significant revision was the introduction of an expedited procedure for claims amounting to a certain amount. He noted that the reason for the expedited procedure to be faster than the traditional standard procedure is case management. Case management must be held within 15 days of the arbitrator receiving the case file. The arbitrator must make an award within six months of the case management.

Mr Wakefield said art 30 of the ICC rules, provides that by agreeing to arbitrate under the ICC rules the parties agree that the expedited procedural rules shall take precedence over any contrary terms of the arbitration agreement. He added that the ICC court powers have been increased. The ICC has the power to appoint a sole arbitrator, arguably because a sole arbitrator is more efficient, which leads to speedy arbitration.

Senior Legal Adviser at PetroSA, Jackie Lichaba, spoke at the International Arbitration Seminar.

Director at Werksmans Attorneys, Roger Wakefield, spoke at the International Arbitration Seminar that was held in October 2018 in Johannesburg.

Mr Wakefield also discussed costs in arbitration. He said that ad hoc arbitrations are more expensive and take longer because they are not managed. He added that the ICC has taken steps to curtail costs for standard arbitration and administrative fees are much lower. He said that the ICC rules provide case management techniques. Techniques include –

- embracing technology, by using video or telephone conferencing for meetings instead of physically being at the meeting;
- curtailing the length of scope for submission statements or evidence;
- avoiding unnecessary objections; and
- complying with the rules.

Mr Wakefield pointed out that in terms of art 38(5) of the ICC rules, the tribunal has the discretion to award costs to the winning party, according to how the party had conducted itself.

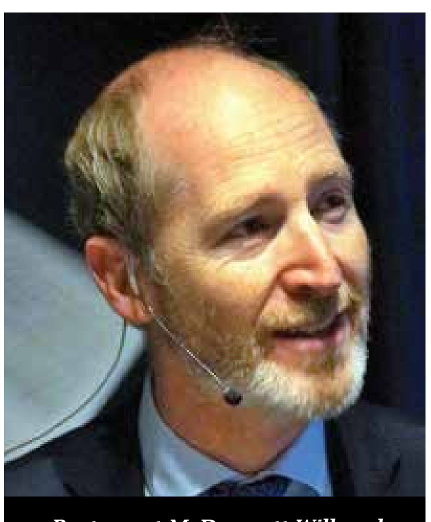
Neutrality

Senior Legal Adviser at PetroSA, Jackie Lichaba, said neutrality is very important in arbitration. He pointed out that if one goes to court, arbitrators are perceived to have an inherent prejudice. He said that in instances where there is a long standing feud between two countries, parties stand a better chance to solve the matter through arbitration. He noted that an arbitration tribunal can be established in a seat at a country where it is neutral for both parties, with arbitrators from different nationalities.

Mr Lichaba said that one aspect of neutrality is the venue where the arbitration will take place. He pointed out that in choosing the venue for arbitration, there must be an equal footing because if a venue was chosen and there was a biased move to choose the venue favourable to one party it might be unfair for the other party. He added that it must be ensured that the venue chosen is party to one of the arbitration treaties, if not there might be some difficulties in enforcing the award.

Mr Lichaba said that the selection of an arbitrator is associated with citizenship of the arbitrator. He noted that it is important that the chairperson of the tribunal, for example, be of a different nationality from the arbitrators. He added that another issue of neutrality relates to the law, on which law will be applicable and which law will be neutral to all parties.

Partner at McDermott Will and Emery, Jacob Grierson, said if one asked the general public and users of arbitration about arbitration and why they use arbitration, they would often say it is important because it is done in private. He added that the 2010 International Arbitration Survey: Choices in International Arbitration by Queen Mary University of



Partner at McDermott Will and Emery, Jacob Grierson, spoke about confidentiality at the seminar.

London survey asked users of arbitration why they chose to use arbitration in their matters, the response given by 62% of people was confidentiality. However, Mr Grierson said it may come as a surprise to the users of arbitration and to the general public to know that arbitration is not perfectly confidential. He pointed out that national laws of countries in the world with the exception of New Zealand and China do not provide for confidentiality and common law in some countries does not provide for confidentiality in arbitration.

Flexibility

Partner at McDermott Will and Emery, Stuart Mathews, said there is flexibility with regards to arbitration agreements, he added that it worked efficiently with experts. He pointed out that experts can sit next to each other during a matter, where they can both give their statements and also be cross-examined. He noted that often the tribunal will have a series of questions for another expert and ask the neutral expert what they thought of the other expert's answers. He said in that process experts can end up agreeing on what should be the true position of the arbitration.

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South Africa's regulatory environment for mining discussed at a seminar

Herbert Smith Freehills and Pinheiro Neto Advogados hosted a seminar titled 'Investing in Mining and Infrastructure Projects in South Africa (SA) and Brazil: A Comparative Discussion,' in November 2018. In his opening remarks Brazilian ambassador, Nedilson Jorge, said it is of great relevance for both SA and Brazil to continuously have a fruitful discussion of mutual interests on topics such as mining and infrastructure and to exchange ideas between the two countries. Mr Jorge added that the Brazilian Embassy has been committed to promoting events such as seminars dedicated to engaging Brazil and SA.

Partner and Co-chairperson of its Africa Group at Herbert Smith Freehills, Peter Leon, said the SA mining industry has been characterised by regulatory uncertainty for the past five years. He added that among other things this was a result of arbitrary and dilatory decision making by the Department of Mineral Resources officials under the Mineral and Petroleum Resources Development Act 28 of 2002, and the damaging provisions in the Mineral and Petroleum Resources Development Amendment Bill B15D of 2013 (the Bill) which Parliament proved inept to ameliorate.

Mr Leon said another issue the mining industry has is the controversy surrounding the final Mining Charter III, which was the successor to the 2010 Mining Charter. He pointed out that these factors have weighed heavily on investor confidence. He added that SA was not doing well in investment attractiveness as it was 54% in 2014 and 43% in 2017.

Mr Leon said another issue was with the exploration budgets in the country. He noted that in 2012 exploration budgets in SA mining companies were nearly at US$ 350 million, but in 2017 it dropped to US$ 80 million. However, Mr Leon, pointed out that in 2018 the mining sector started showing signs of recovery and in September 2018, Minerals Council South Africa, formerly known as the Chamber of Mines reported that, from 2016 to 2017, investments grew by 20% from R 67, 6 billion to R 80, 9 billion. Production rose by 10% from R 574 billion to R 630 billion, with exports rising by 4% from R 295 billion to R 307 billion.

Partner and Co-chairperson at Herbert Smith Freehills, Peter Leon, spoke about the state of South Africa's regulatory environment for mining at a seminar hosted by Herbert Smith Freehills and Pinheiro Neto Advogados on 22 November 2018 in Johannesburg.

Mr Leon added that on 27 September 2018 the Minister of Mineral Resources, Gwede Mantashe published the final version of SA's third official Mining Charter III. He added that this version was welcomed by the Mineral Council as opposed to the version that was published by his predecessor in 2016 and 2017, which provoked acrimony, litigation and adverse pronouncements by sovereign credit ratings agencies.

Mr Leon said after several years of extremely damaging regulatory uncertainty, the mining sector in SA appears to be turning a corner. He added that the withdrawal of the Bill, and the finalisation of a more manageable Mining Charter, has created the conditions for an improved cooperation between the government and the mining industry. He pointed out that with deep capital markets, sophisticated financial systems, as well as world-class engineering schools and firms, SA still has the necessary attributes to reclaim its place as the continent's leading mining destination.

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In Johannesburg have appointed Lavarn Gounden as the Head of the Real Estate Department

Compiled by Barbara Whittle, Communication Manager, Law Society of South Africa
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Law Society of South Africa in transition

The Law Society of South Africa (LSSA) is on a three-year trajectory to realign its functions to those of a membership-based professional association. The LSSA's constitution was amended at the end of October 2018 outlining its structure and commitments. The amended constitution can be viewed on the LSSA website at www.LSSA.org.za under the 'About us' then 'This is the LSSA' tabs.

The LSSA has a long-term commitment to –

- legal education;
- an independent profession;
- the public interest;
- the rule of law; and
- protect, promote, support and train legal practitioners and candidate legal practitioners.

LSSA's legal education functions: Core and mandatory in terms of the Legal Practice Act 28 of 2014

Practical vocational training (PVT) before admission to practice and currently carried out by the LSSA –

PVT through nine attendance Centres of the School for Legal Practice –

- Bloemfontein (night school);
- Cape Town (day and night school);
- Durban (day and night school);
- East London (day and night school);
- Johannesburg (day and night school).
- Polokwane (day and night school);
- Port Elizabeth (night school);
- Potchefstroom (night school); and
- Pretoria (day and night school).

Including, Distance training school in cooperation with Unisa.

PVT takes place on a part-time basis (five-weeks) in a programme of structured course work for candidate legal practitioners.

Practice management training (PMT) must be completed within a specific time to continue to practise for one's account with a Fidelity Fund Certificate (FFC) (currently one-year from the date of receipt of the first FFC, or within such further period as the Legal Practice Council (LPC) may approve).

Post professional development (PPD) to maintain and enhance the knowledge and skills to deliver a professional service to clients and the community. This ensues the practitioner has the relevant knowledge and expertise to practise in the interests of the public. Currently provided by the LSSA through seminars, workshops, webinars, e-learning and certificate courses for specialisation (some of these in conjunction with universities).

The above mandatory programmes will, by necessity, continue irrespective of whether they are housed within the LSSA or not.

The LSSA focuses on –

- supporting the development of the administration of justice;
- the interests of the profession;
- supporting legal practitioners;
- enhancing of professional standards;
- the public interest;
- research;
- transformation/empowerment initiatives; and
- international liaison.

The **Professional Affairs** department administers the LSSA's specialist committees that analyse legislation and policy liaise with stakeholders and lobby Parliament for changes in the interest of the profession and the public.

The LSSA publishes ***De Rebus***, the mouthpiece of the profession, which is distributed to all attorneys and candidate attorneys to inform and educate. *De Rebus* has functionality for PPD.

Join us

LSSA conference and AGM:

The Maslow Time Square, Pretoria 29 and 30 March

The Law Society of South Africa (LSSA) will be holding its annual general meeting (AGM) of the Council and annual conference at The Maslow Time Square, Pretoria on 29 and 30 March. As a legal practitioner, this will be an opportunity for you to meet with your colleagues, to raise issues of concern, to interrogate the LSSA on its activities and also attend free training sessions. The results of the LSSA's Survey on Young Lawyers will be launched at the conference and a way forward drafted.

Since the provincial law societies no longer exist and will not be holding AGMs, this will be one of the few opportunities for practitioners to meet as a profession. There is no specific provision in the Legal Practice Act 28 of 2014 for the Legal Practice Council to hold annual meetings.

Register to attend the LSSA Annual Conference on the LSSA website at www.lssa.org.za/?q=form,83 or e-mail us on LSSA@LSSA.org,za and we will assist you.

Apply to be on the LSSA's arbitrator/expert panel

The Law Society of South Africa (LSSA) would like to update its panel of legal practitioner arbitrators, mediators and experts, which is used as its primary source when the LSSA is called on to appoint or nominate arbitrators/experts/mediators in contractual and other disputes. Applicants must be practising attorneys and/or advocates and must possess sufficient relevant experience in a specialist field of practice. The LSSA will take into account its briefing-pattern policy when recommending appointments. The LSSA will also confirm good standing of applicants with the Legal Practice Council. The form can be found on the LSSA's website (www.LSSA.org.za) under the 'Legal practitioners' tab, or e-mail Kris Devan at kris@LSSA.org.za for a link to the online application form.

LSSA guides and guidelines: We need your assistance

The Law Society of South Africa (LSSA) requests the assistance of legal practitioners to draft new and/or update existing guidelines currently in its 'Resources for attorneys' section under the 'Legal practitioners' tab on its website (www.LSSA.org.za), on a voluntary basis. Should you be keen to assist us with this task, or should you wish to suggest a guideline that would be useful to practitioners in any specific field of practice, e-mail us at LSSA@LSSA.org.za.

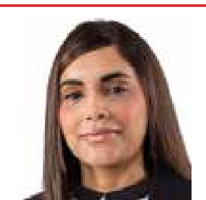
Although the LSSA is not in a position to remunerate authors for guidelines, the author and their firm will be acknowledged in the guideline.

❑

People and practices

Compiled by Shireen Mahomed

All People and practices submissions are converted to the *De Rebus* house style. Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo.



Tomlinson Mnguni James in Pietermaritzburg has promoted Farzanah Ebrahim as a director in the litigation department.

Eversheds Sutherland in Durban has appointed Pascale de Froberville as an associate in the Environmental and Sustainable Development Department.

Norton Rose Fulbright in Johannesburg has appointed Sentebale Makara as a senior associate in the construction team. He specialises in construction, engineering, mining, energy and commercial litigation.

M P Lutge Inc in Durban has appointed Sayrian David as a director. He specialises in family law, estates, litigation and medical law.

Hogan Lovells in Johannesburg has appointed Nothando Tshabalala as an associate in the corporate department. She specialises in corporate law with emphasis on mergers and acquisitions, business restructurings and corporate governance.

❑

By Thomas Harban

The risks affecting the sustainability and viability of law firms

Many legal practitioners indicate that they face a constant struggle to survive economically in practice. There are a multitude of reasons for the challenges faced by these practitioners and there are a number of risks posed by the challenges associated with the sustainability and viability of the legal practices concerned.

The Law Society of South Africa (LSSA) reports that there are currently 26 701 attorneys and 6 669 candidate attorneys in South Africa (SA) (www.lssa.org.za, accessed on 19-11-2018). There has been a steady growth in the profession in the past decade and this growth must be considered against the background of the slowing economic growth and other factors that affect the profession. With the unique nature and structure of the South African economy (and society) in general, questions must be asked regarding whether or not the landscape of legal practice is saturated and to what extent current practices are sustainable in the medium to long-term. Is the available 'legal services economic pie' large enough to cater for the growing number of legal practitioners? Does the current spread of legal services offered by the profession cater for the ever-changing needs of the consumers of legal services? Is there an appropriate spread of legal skills and instructions to meet the needs of all stakeholders in a sustainable basis?

It is against this background, that the question of the sustainability and viability of individual legal practices must be considered. The statistics published by the LSSA indicate that in 2016, of the 12 373 firms in the country, 10 182 (82,3%) were sole practitioners and firms with between two and nine partners made up 2 084 (16,9%) of the legal practices. The overwhelming number of firms in SA are thus small in terms of the number of partners. Smaller firms face unique challenges in respect of viability and sustainability. Generally, larger firms may have increased resources to share the risks, but this does not mean that those firms (or individual departments/business units within those firms) do not face risks associated with viability. No law firm or other business enterprise is immune from this risk. Similarly, a small firm may have developed and implemented sufficient measures to address the risks of viability and sustainability and could be generating sufficient income to meet its operational needs. The number for claims notified to the Attorneys Insurance Indemnity Fund NPC (the AIIF) indicate that claims arising from sole practitioners perennially make up the highest number by far. In some instances, the quantum claimed exceeds the available AIIF limit of indemnity and the firm does not have top-up insurance in place (or does not have a sufficient amount of top-up cover). The result is the practice faces significant exposure in respect of the claim/s and its continued existence is threatened. The firm will be regarded as self-insured for the exposure in excess of the available insurance cover.

The assessment of the viability of the firm must be one of the considerations taken into account in the ongoing assessment of the risk environment in which the firm operates. The factors affecting the viability of the practice may be internal or external. Some of the factors may be within the control of the practitioner while others are not. The financial stability of a firm is one of the risk factors affecting the viability and sustainability of a firm, but is not the only factor. The ability of the firm to meet its operational needs can be affected by a wide variety of factors. In circumstances where the firm is not generating sufficient income to meet its operational expenses, serious consideration must be given as to whether or not it is prudent to continue with the practice in its current form or even at all. The risks associated with pursuing a technically and financially insolvent practice must be appreciated. In mitigating this risk, some of the options available will be to consider –

- cutting the past losses and closing or selling the firm;
- investigating whether or not a merger with another firm is viable;
- downsizing;
- exploring new areas of practice; or
- even upskilling oneself in order to be better equipped to meet the challenges of practice.

A marketing strategy (within the Rules) and other measures of securing new clients can be considered. One may be technically gifted in ones chosen area of specialisation in practice, but it does not necessarily follow that such a person has the necessary business acumen or the required work ethic to be an astute and successful business person running a successful firm. It is important to be able to do an honest self-assessment and to identify your strengths and weakness even where these are not necessarily aligned with your intended ambitions and plans.

The factors posing a risk to the legal profession in general include:

- The generally challenging economic environment across the globe, an economic downturn is often followed closely by an increase in professional indemnity claims against legal practitioners.
- Organisations outside of law firms offering services traditionally carried out by law firms (these include banks, audit and advisory firms, estate agents and legal consultancy organisations, which are not law firms. In some jurisdictions internationally, audit firms have purchased law firms).
- The slowdown in some areas of practice (such as conveyancing as the property market stalls or Road Accident Fund claims as the legislative environment changes).
- The loss of key clients.
- The loss of key staff.
- Certain areas (geographically and/or in terms of area of practice) may have become saturated.
- The negative reputation of the profession in some circles.
- An inability or refusal by some practitioners to adapt to the changing legal, economic and technological environment.

Practitioners must recognise the internal and external risks which, if they materialise, will affect their individual firms and also to assess the potential impact on the risks materialising. Appropriate planning is essential in addressing these risks. The risk or risks associated with the long-term sustainability of the firm must be one of the key risks addressed in the firm's risk management plan. When any risk materialises, its potential impact could have severe consequences for stakeholders within the firm, as well as external parties.

The structure, size, geographical location of the firm and the suite of services are some of the factors that will impact on its viability in the event that there is no effective risk management plan in place. Appropriate resourcing must also be taken into account in order to address the risks. This includes the human resources, as well as the infrastructure and other resources necessary to enable the firm to meet its business and operational needs and its servicing obligations to clients and other stakeholders. This, in many ways, can lead to a so-called 'chicken-and-egg' situation for emerging firms in that in order to operate successfully, these resources are required. However, the acquisition of these resources requires a significant initial capital out-

lay before the financial benefits can be reaped. The firm may not have the financial resources to procure such resources upfront. This is of particular significance in the South African context, where entry barriers to the profession by historically disadvantaged groups persist and the adequate distribution of certain types of legal work remains a challenge.

As many institutions seek to rationalise their expenditure, one of the areas where they seek to reduce are costs associated with legal expenses. Such institutions may, for example, choose to build up their internal legal resources and make appointments of legal advisers and corporate counsel, resulting in a reduction in the amount of work sent to law firms. The reliance on a key client is also a significant risk in that the firm will be affected where, for instance, the key client may elect to engage the services of another law firm, go out of business or is the subject of corporate activity or where the business relationship deteriorates.

When faced with challenges related to meeting the bottom line of the firm, practitioners normally dedicate an inordinate amount of their time, resources and energy to ensuring that the business continues as a growing concern. While dedicating an inordinate amount of time to addressing these challenges, the focus on other key risk areas, as well as on the management of the firm is usually placed on the back burner and not seen as an immediate priority. This situation creates the perfect environment for errors to occur, significant risks to the viability of the firm to materialise and the practitioners affected often comment that the risks arose out of a so-called 'blind spot'. Similarly, in a firm facing significant challenges in respect of income, there may be an increased temptation for the theft of trust money.

While a significant amount of expertise can be built up over many years in practice, no one individual is equipped with the specialist skills required for each and every risk faced by a business enterprise. The fact that there may be one (or few) key individuals in a practice who are able to deal with a variety of areas and functions in the firm is, itself, a risk of over-reliance on a key person. Where a firm's institutional knowledge is centralised with one key person, this is also a risk. In the event of the unavailability of that key person, the continued existence of the firm is then placed at risk. Depending on the personality of the person involved, the key individual may have a dominant character, which excludes others from the proper appreciation of the risks. A young practitioner, for example, may have the desire to pursue a practice for their own account but may not have the business acumen, the appropriate goodwill and reputation or the necessary desire to deal with the administrative responsibilities of practising for their own account. A lack of employment opportunities after the completion of the term as a candidate attorney or pupillage may result in some practitioners opening their own practices when they are not ready to embark on the entrepreneurial journey or do not have the acumen, interest or discipline to be self-employed. Similarly, an experienced practitioner may consider venturing out on their own when they are not equipped to practice for their own account.

In order to address the risks highlighted in this article, firms can consider:

- Developing business plans that address issues of the sustainability and viability of the practice in the medium to long-term. The business plan must address the unique circumstances of the firm. Simply following a precedent or downloading a generic business plan off the Internet will not be sufficient to properly deal with the risks in the practice.
- Including these risks in the risk assessment and identifying appropriate risk mitigation measures.
- Identifying appropriate risk treatment options (acceptance, avoidance, mitigation or transfer of the risk). The purchase of appropriate insurance cover is one example of a risk transfer option. It must be noted that the purchase of insurance does not eliminate the underlying risk, nor can insurance be used to make an otherwise loss making practice profitable.
- Consideration of whether or not the practice should continue (in its existing form or at all).
- Getting help from appropriate institutions available to the profession. Depending on the nature of the assistance required, practitioners can consider approaching institutions such as the Legal Practice Council, the Legal Practitioners Fidelity Fund, the AIIF, the Attorneys Development Fund (for funding), Legal Education and Development and the LSSA for assistance.
- The use of IT as a business enabler and as a means of facilitating and enhancing the efficient management and administration of the law firm.
- Obtaining appropriate training and/or mentorship.

Practitioners must never turn a blind eye to the red flags associated with risks of viability and sustainability. All areas of potential risk must be appropriately addressed. It must be remembered that there will always be potential liability on the part of the practitioner concerned in the event of any of the risks materialising.

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By Martie Bloem

Employment references: Practical guidelines to avoid delictual liability

The high unemployment rate in South Africa (SA) has the inevitable effect of high numbers of job applications in different employment sectors. The fact that there are currently more prospective job applicants than employment opportunities, often has the result that employers are inundated with applications by job seekers who do not meet the specific minimum requirements or falsely claim that they do. It is for this reason that employers have become wary of appointing an employee without a reliable reference.

Understanding the importance of employment references

Mistakes in employment selection can be very costly, with serious implications for both the individual and for the organisation. From an employer's perspective it is important to understand that, once an applicant has been appointed, a process of dismissal in terms of labour law legislation is very lengthy and burdensome. Besides the burdensome process of dismissal, the negative impact of appointing an unsuitable candidate may lead to unproductivity, additional training costs, wasted expenditure and overall decreased profitability.

It is in this context that the requirement of a reliable reference will be investigated. The importance of references in the employment context is obvious, although certain aspects thereof are not clearly defined in South African law. The current situation is that considerable uncertainty exists in practice and a number of aspects require clarity.

One of these aspects is that it is currently not certain whether a former employer has an obligation to provide an employment reference. The existence, or not, of such an obligation will be investigated in this article, as well as the nature of such possible obligation and the extent of the information that must or should be contained in such a reference.

The typical problem that arises from employment references is that the information provided by a former employer is either inaccurate or constitutes an unsubstantiated subjective opinion about the employee, which should be irrelevant. Such an opinion may nevertheless create the risk of a negative inference being made by the prospective employer and lead to the eventual non-employment of the applicant based on the unfavourable reference.

Apart from the risk of not being employed, the employee's right to a good name (*fama*) may also be infringed by the unfavourable reference (whether it be true or false) and the employee, depending on their status in a particular employment sector, might suffer considerable reputational damage.

A job applicant, therefore, risks incurring two types of damages by a negative employment reference, namely –

- prospective patrimonial loss caused by their non-employment; and
- defamation.

The fact that a prospective employee suffers damages does not necessarily mean that they will be able to claim such damages. It will obviously depend on whether the other delictual elements, besides damages, can be proven.

With regard to the element of wrongfulness, the question of whether a former employer is obliged to provide a reference, whether they owe a legal duty towards a former employee and possibly also towards a prospective employer, has to be considered. To this extent the nature of the relationship between the parties plays an important role.

The content of the reference, whether it is true or false, the intention of the former employer (*bona fide* or *mala fide*), as well as the relevance of the information will be of importance in establishing an element of fault. While negligence will be sufficient to establish a fault element for the *aquilian* action, intention (*animus iniuriandi*) is required in cases of defamation.

The appropriate action available to an aggrieved employee will, however, always depend on the circumstances of each case. The different delictual actions in South African law available are discussed below in order to determine their suitability in variable circumstances.

The types of damages that could potentially be claimed

According to existing common law principles, a job applicant could have a claim for prospective damages in the form of loss of prospective gains due to non-employment and/or a claim for defamation, should the content of the reference be defamatory in nature. There are, however, a number of qualifications and requirements for the successful institution of such claims.

When instituting a claim for a loss of prospective gains, the employee will have to prove that there was a reasonable possibility that they would have been appointed, had it not been for the unfavourable employment reference issued to their prospective employer, that the issuing of this reference was wrongful and negligent and that they suffered damages due to non-employment.

In order to prove a claim for defamation, the job applicant will have to provide evidence to the effect that the reference issued by their former employer constituted a wrongful, intentional publication, which resulted in the injuring of their status, good name or reputation. Even true publications can constitute defamation depending on the circumstances, and the job applicant will have to prove that the publication is defamatory (and that it actually refers to them) to constitute a *prima facie* case of wrongfulness.

The main question that will arise in matters where an employer has made defamatory remarks in an employment reference – which led to non-employment and damage to the employee's good name and reputation – is whether the employer was protected by privilege in the form of discharge of a duty or furtherance of an interest. If this is indeed the case, then I submit that the publication cannot be *contra bonos mores* and that the job applicant will not be able to succeed with either of their prospective claims.

In addition, and contrary to the possible claims of the employee, the prospective employer who appointed an unsuitable employee based on an overly favourable and false employment reference, might also be able to institute an action for negligent misrepresentation against the provider of such reference. This action will be available if the plaintiff can prove that they acted on the negligent misrepresentation of the defendant (a former employer) to their detriment, and suffered damages as a result.

It is doubtful whether this action will be available to the employee who was the subject of an unfavourable employment

reference, since it is a third party who acted on the misrepresentation to their detriment of not being appointed.

In establishing wrongfulness in each of the possible claims described above, the respective rights of the parties involved have to be considered. This entails a weighing-up process of the rights infringed against the rights protected with due consideration of the possible impact of the Constitution in order to establish fairness of the infringement and boundaries of the privilege.

Limited authority in the South African context

The practice of employment referencing in SA is largely unregulated and discretionary in nature.

Although there has to date not been a reported South African case, which decided on the liability for damages suffered due to an unfavourable employment reference, employers are in general wary of the possibility of incurring liability. I submit that this can mainly be attributed to an increased awareness of human rights, particularly human dignity, and the right to a good name. Another contributing factor for the restricted information employers are prepared to provide might be the cautionary guidelines published by human resource consultants and legal practitioners. These guidelines seem to be drafted and provided from the point of view that the employer should rather stay on the safe side and provide as little information as possible. The problem is that this practice of providing as little information as possible or making use of extensive qualifying statements to avert liability, will eventually render the reference completely meaningless.

In the light of the importance of a well-functioning employment reference system, one expects that advice directed at employers would be based on adequate authority and proper consideration of the impact of such advice on the employment sector.

Employers should not from the onset be discouraged from providing employment references on the premise that liability is likely to follow. The fact that the value of employment references is undisputed and that it is undoubtedly in the best interest of all the parties concerned – that the most suitable candidate be employed – should lead to greater circumspection. Employers who seek as much information as possible but are not prepared to provide references in return, cannot sustain a well-functioning reference system.

It is important to understand that the purpose of an employment reference is to ensure that the appointed candidate possesses the required skills and competencies. The reference required from a previous employer should, therefore, never contain more information than is necessary to assess the skill and competency of a candidate.

Practical guidelines

As explained above, it is not recommended that employers simply refuse to provide employment references to avoid the risk of liability. Employers should instead ensure that they provide meaningful, truthful and relevant references, which will make a positive contribution to establishing a well-functioning and reliable reference system in the South African employment sector.

I suggest that an employer consider the following practical guidelines when preparing such references:

- Since there is no general duty to provide an employment reference other than a certificate of service, an employer should confirm whether such an obligation is not created by legislation or regulations applicable in the sector or profession of operation.
- Implement a workplace policy that specifies who is entitled to provide a reference, how references should be dealt with and which information should rather be avoided when providing a reference. The purpose of this policy must be to ensure consistency in the provision of references and to avoid references, which are falsely positive or negative about an employee.
- Ensure that the prospective employer, who is requiring the reference, has obtained the necessary consent to do so from the job applicant.
- To ensure compliance with Protection of Personal Information Act 4 of 2013 (POPI), include a provision in the employment contract at the commencement of an employee's service, in terms of which they agree to specific information being published in an employment reference at termination of their service or otherwise on request.
- In order to further comply with POPI, make sure that the reference is treated as private and confidential and that it is provided to the person who has consent to receive it, whether in writing or verbally.
- Verify the information contained in the reference and make sure that it is a fair and accurate reflection of the employee's skills and abilities. The reference should be brief and only contain information relevant to the inquiry. Avoid subjective personal views. Information or allegations, which cannot be substantiated, must not be included. Ensure that the reference is objective and minimises the risk of misinterpretation of statements by making use of plain language and terminology that is common in the specific industry.
- Ensure that the contents of the reference are factual in nature and do not constitute an overly positive or negative opinion about the employee's abilities.
- Treat all employees equally and consistently and avoid comments that may be construed as discriminatory.
- If necessary, provide a qualification to create a context in which the reference must be read and understood, for example, limited time that the referee has known the employee.
- Consider including a disclaimer, which stipulates that the employee has consented to the provision of the reference and that both the employee and prospective employer accept exclusion of liability, even though the effectiveness of such a clause is unsure.
- The same care should be taken in providing telephonic or verbal references as the care taken when providing a written reference.

Conclusion

The importance of a well-functioning referencing system in the employment context has been illustrated and emphasised above and more arguments can be made in favour thereof. It is, however, of equal importance that the employee's rights are not ignored and that a less intrusive way of reaching the same outcome is always considered. The challenge seems to be developing clear guidelines for providing employment references, that are truthful, relevant and reliable (without exposure to possible liability), while simultaneously considering and protecting the different interests of the respective parties.

- This article is an abstract to the author's full dissertation, which can be found at http://scholar/ufs.ac.za

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By Tertius Maree

Which rules apply? Some further notes on maintenance of common property at sectional title schemes

I refer to the article by Brian Agar 'Maintenance of common property in sectional title schemes' 2018 (Oct) *DR* 19. I must firstly agree with Mr Agar that there is much to be criticised about the new sectional title legislation. My first and most important criticism is the extent to which the administration of sectional title schemes has unnecessarily been rendered more complicated and difficult, particularly by the prescribed management rules.

However, I must disagree with some very important aspects of Mr Agar's views expressed in the article. Let me start with the most important one, namely the question as to which schemes the currently prescribed rules apply. Mr Agar states that 'while schemes registered after 7 October 2016 must observe the Act and its Regulations, schemes registered under the Sectional Titles Act 95 of 1986 retain most of their Management Rules and these do not require a maintenance plan.' This view is based on s 10(12) of the Sectional Titles Schemes Management Act 8 of 2011 (the Act), which reads as follows:

'Any rules made under the Sectional Titles Act are deemed to have been made under this Act.'

I must agree that this bland statement can be interpreted in different ways. However, the ruling interpretation as applied by trustees, managing agents, practitioners, academics, as well as the Community Schemes Ombud Service is that the word 'made' should be understood to mean amended rules adopted by respective bodies corporate and not rules 'made' by the legislature.

The latter interpretation is supported by the transitional clause, s 21 of the Act, which reads as follows:

'Rules prescribed under the Sectional Titles Act must continue to apply to new and existing schemes until the Minister has made regulations prescribing management rules and conduct rules referred to in section 10(2) of this Act.'

The minister prescribed the new rules on 7 October 2016, at which point, the 'old' prescribed rules lapsed and the new rules became applicable to all schemes, old and new, except in respect of special rules 'made' by the bodies corporate prior to that date, which special rules are retained. The latter exception is subject to a proviso that such special management rules may not be irreconcilable with any prescribed management rule.

In general, it should, therefore, be understood that the rules prescribed under the Act apply to all sectional title schemes and that the requirements for a maintenance plan apply similarly to all schemes.

Mr Agar then finds a contradiction between formulas prescribed under management r 22(2) and reg 2. What should be understood is that management r 22(2) prescribes the formula, which must be applied, and the result should then be tested against the three minima prescribed under reg 2. These two provisions do not contradict each other.

The next point that warrants comment is the statement that 'the proposed annual contributions to the reserve fund are voted on by owners at the AGM.' This is not true. The owners vote on the budget only. Although this does ultimately result in determination of the levies, it is not the same as voting on the levies, which owners may not do. Should the owners adopt an inadequate budget, it will eventually unavoidably lead to the imposition of special levies by the trustees, about which the owners have no say.

I agree with Mr Agar that the preparation, adoption and upkeep of a maintenance plan is onerous and may be costly. However, the introduction of such a system has become unavoidable due to trustees and managing agents continuing to fund maintenance projects with special levies under the previous regime, despite many warnings, myself included.

No legislation is ever perfect, and this applies particularly to sectional title legislation. The concept of sectional titles was first developed for blocks of flats and the laws were framed accordingly. However, the concept very quickly washed over to other property formats, such as free-standing houses, shops and offices, mixed residential/commercial schemes, hospitals, caravan parks and even boat moorings. Soon it is likely also to apply to farmland. Each of these demand different legislative formats and to create a single law catering for all possibilities is very difficult and demands constant legislative adaptations.

New sets of problems arise constantly, and the legislature must provide solutions. Two examples are the building of mezzanine floors, which extend the floor areas of sections, doors and windows not fitted on the median lines of walls. Both required legislative amendments.

I cannot agree with Mr Agar that the issue of doors and windows have not been clearly resolved. The amendment referred to by him was that the median lines of external walls deviate to the median lines of doors and windows fitted in such walls. This means that the external halves of such features are common property, while the inner halves are private property. The accepted practice is that, as far as maintenance and replacement is concerned, the costs in respect of such features are split 50/50 between owner and body corporate. Mr Agar describes the amendment as 'half-baked.' Although not perfect, I would challenge him to draft something better.

• See also p 4.

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By Neels Coertse

International problem of expatriate Chinese with more than one child

I am mindful of the decision in the then Transvaal Provincial Division in the matter between *Fang v Refugee Appeal Board and Others* 2007 (2) SA 447 (T).

The court in *Fang* concluded, *inter alia*, that 'the one-child policy of the People's Republic of China is a law of general application. It applies to all the people in the country. The relevant penalties are applied to those who have contravened said policy. They are punished for what they have done and not for what they are.'

South Africa (SA) treated Fang with dignity and respect and the family flourished with a total of four children. The Fang family were served with a prohibited person's permit, effectively a notice to return to China. That is where the Fang family's problems started.

This discussion is not about this specific court case; it did, however, lead me to investigate the family planning policy of the People's Republic of China (China) as I was not entirely satisfied with the court's findings and decision.

Mr and Mrs Fang, are to me, the face of an international problem of expatriate Chinese with more than one child.

What does the family planning policy of China have to do with SA? In light of the current international political and economic ties between SA and China it should only be prudent for South African lawyers to be aware of the special circumstances surrounding expatriate Chinese families with more than one child.

It is safe to envisage an influx of citizens from China into SA. And it is further safe to expect the concomitant problems flowing from the Immigration Act 13 of 2002, as amended, and the Refugees Act 130 of 1998 as amended.

China's Constitution

Article 25 of the Constitution of China provides: 'The State promotes family planning so that population growth may fit the plans for economic and social development.' It makes one ask the question: What is China's family planning policy? How is it practically applied?

Having regard to the above quote, art 49 of the Constitution states:

'Marriage, the family and mother and child are protected by the State. Both husband and wife have the duty to practise family planning. Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents.'

This sounds very well and good, but the question remains whether the policy is as good as it looks on paper. Let us examine this.

The heihaizi

Who are the heihaizi? The heihaizi are the children who are born out of the one child policy, they are the unauthorised children in China and are foreigners in their own country.

The penalties for having more children than the policy allows includes –

- forced abortions;
- no access to medical facilities;
- no access to education;
- no access to public transport; and
- the parents of the child have to pay hefty fines (which are referred to as a 'social upbringing charge') up to ten times the parent's annual income.

A couple who adhere to the policy, receive a certificate of honour. This certificate gives the couple access to a range of enhanced benefits throughout their lives, from –

- priority schooling;
- free medical treatment;
- longer maternity;
- paternity and honeymoon leave;
- priority access to housing and to retirement homes; and
- enhanced pension provisions.

This certificate can, however, be revoked if the couple breaches China's Family Planning Policy.

Even in spite of the above 'perks', married couples in urban areas are still reluctant to have more than one child. The reasons behind this reluctance are complex and not too clear, but to state that the high costs of rearing an additional child, the lack of adequate child care and education facilities and the decades long governmental propaganda against more children takes their toll against having more than two children. The 'penalties' for couples that exceed the limitations means lifelong hardship for the entire family.

When an unauthorised child is born the family faces additional penalties, for example, in the workplace it may mean demotion or even loss of employment. The social upbringing charge is based on income and you have to pay a 50% down payment and the balance within three years.

Although the official policy has somewhat relaxed, it is still too early to really assess the practicalities of the changes. The one-child mindset was carefully and stringently crafted and then the policy has been forced on Chinese citizens since 1979.

Extramarital sex in China was taboo until fairly recently when it was legalised. A legal marriage is, however, still a prerequisite to procreate.

To obtain a birth certificate means that a certificate was obtained prior to the birth of the child to certify the birth was authorised by China.

The one-child policy – as it was previously known – was changed during 2015 and it is now legal to have two children. There are stringent requirements in place to have a third child without incurring penalties, but couples no longer needed governmental authorisation to have two children.

It is far too early to assess the effect of China's Family Planning Policy in its new format, especially in light of what China's Vice Minister of National Health and Family Planning Commission, Wang Peian, reportedly said shortly after the announcement of the two-child policy:

'China would not abandon its family planning restrictions. … A large population is China's basic national condition so we must adhere to the basic state policy of family planning. … "China needs to … promote birth monitoring" before the two-child policy comes into effect. … The problem with the one-child policy is not the number of children "allowed." Rather, it is the fact that the CCP [Chinese Communist Party] is telling women how many children they can have and then enforcing that limit through forced abortion and forced sterilization' (www.gpo.gov, accessed 30-11-2018).

China's Family Planning Policy

China's Family Planning Policy has been amended from the stringent one-child policy to maximum two children without prior governmental authorisation. The previous policy led to many socially unacceptable results, such as infanticides of baby girls in preference to that of boys. Girls were even abandoned in childbirth or left to their own devices. There were other negative social outcomes, such as gender imbalances, aging population and shrinking workforce. All these negative outcomes called for a revision of the old policy.

Urban and rural hukou

The 'hukou' determines your status in life. It is more desirable to have an urban hukou than a rural hukou. You cannot move easily from rural areas to urban areas in China. This population control system reminds me of the old passbooks used during Apartheid. If you were born

in a rural area you obtain a rural hukou and that determines your lot in life. It is commonly accepted that China's Family Planning Policy is more relaxed in respect of those registered with a rural hukou.

Recommendations

What will the approach in SA be to Chinese couples that have exceeded China's Family Planning Policy?

It is recommended that the legal practitioner should:

- Start with a very thorough investigation of the clients' personal circumstances.
- Canvass, *inter alia*, what the consequences will be when the clients return to their country of origin.
- Obtain the client's valid travelling documents.
- Obtain the client's marriage certificate and compare it with the birth dates of their children.
- Verify if the clients are in possession of a certificate of honour. Obtain the supporting documents pertaining to the certificate of honour, which will enable the practitioner to access background facts and circumstances.
- Birth certificates of the client's children (irrespective of where these children were born).
- What is the client's hukou status? Obtain supporting documents underlying the status as it will enable the practitioner with background facts and circumstances.
- Read the *Fang* case thoroughly and, more particularly, try and obtain the enabling statute namely the Aliens Control Act 96 of 1991 and the prohibited person's permit.
- Obtain sworn translations of all the documents that are in a foreign language.
- Ascertain whether the clients are in SA legally or illegally. That will determine what to do next.

Study the Refugees Act especially ss 2, 3 and 4.

- Be thoroughly acquainted with the definition of a 'sur place' refugee. This is a well-known scenario where people leave their home country with a legal passport and while they are in a foreign country, they will defect and then apply for refugee status. Fatima Khan and Tal Schreier (eds) in *Refugee Law in South Africa* (Cape Town: Juta 2014) at p 29 gives a definition for a 'sur place' refugee: 'A "sur place" claim concerns a person who was not a refugee when they left their country, but who becomes a refugee due to changes in circumstances in their home country or as a result of their own actions while in the foreign country.'
- Be familiar with the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the chapters and paragraphs that relate to 'sur place' refugees and the importance of the family unity.
- Build a case around the aspect of the dire lifelong consequences flowing from a breach of the threshold of China's Family Planning Policy.
- Do not forget to get guidance from the Bill of Rights in the South African Constitution and, more specifically, consider the following:
  - equality (s 9);
  - human dignity (s 10);
  - life (s 11);
  - freedom and security (s 12);
  - privacy (s 13);
  - health care, food, water and social security (s 27);
  - children (s 28); and
  - education (s 29).

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Court bundles – how to prepare them properly

By Amarentiea Pienaar

The purpose of this article is not to list specific examples of different court bundles and their indexes, but to list general guidelines on how to prepare various court bundles regardless of whether it is for an unopposed motion, an opposed motion or a trial.

You must always have regard to the obligatory guidelines on indexing and pagination in your specific jurisdiction before you commence with the task (for example, see practice rules 6.3 Gauteng directive (bundles in civil trials); Johannesburg directive 6.3 and Gauteng directive 13.2 to 13.4 (motion proceedings); and Johannesburg directive 9.2 to 9.4 and Practice Direction 10 in the Land Claims Court relating to all documents).

The golden rule when you prepare any court bundle is to start timeously and to prepare it well.

How do you achieve this?

Step 1 – determine the purpose of the bundle

Personally, I distinguish between 'prescribed bundles' and 'substantial evidence bundles'.

The content of prescribed bundles are normally obligatory and prescribed by a directive. This bundle is normally a mere compilation of a group of documents of the specified class, collated and numbered consecutively in one bundle. The content thereof requires little in the way of thought processes from the compiler. All that the compiler must do is to group the documents of the correct class in a specified order and manner. This rarely presents any difficulty as paralegals and junior staff should be well able to execute a basic instruction such as this. Typical examples of prescribed bundles are –

- pleadings bundles;
- pre-amendment pleadings bundles;
- notices bundles; and
- pre-trial minute bundles.

The content of substantial evidence bundles are not prescribed. This bundle separates the proverbial wheat from the chaff. It is a compilation of all the pieces of the puzzle that you will assemble when you present your client's case. The content thereof requires thought and careful consideration from the compiler. This is the most difficult bundle to compile. Typical examples of substantial evidence bundles are the combined documents bundle and the expert evidence bundle. The discovery bundle may, in certain circumstances, also be considered to belong to this class. The compilation of these bundles requires a clear understanding of not only one's own case as they appear on the pleadings, but also that of the opposition.

Step 2 – determine what documents need to be included in the bundle

The purpose of the bundle will determine which documents should be included in the bundle and which should be left out.

The rule is that only documents relevant to the purpose of the specific bundle should be included in that bundle.

With prescribed bundles, relevance will normally be determined by the class or group of documents to be included in that bundle. One will not include a notice of intention to defend with the pleadings bundle. Why? The notice of intention to defend is a notice – not a pleading. It does not belong to the class or group of documents called pleadings. It is irrelevant for the purposes of that bundle and should accordingly be excluded.

With a substantial evidence bundle – relevance will be determined by answering the following questions:

- What ruling or finding does the party require the judge to make or what relief is sought by that party (even if only dismissal and costs), in other words, what is the application or hearing about from the point of view of the compiler's client?
- What documents will the judge require to make the required ruling or finding in other words, the so-called vital/key documents for the order required? Note that the vital documents will not only include the documents central to the disputes between the parties, but also documents on evidence that are undisputed.

What evidence is available to rebut the other party's assertions in support of the finding or ruling that they require – whether in direct contradiction or on probabilities?

Step 3 – sort your documents in chronological order according to purpose and relevance

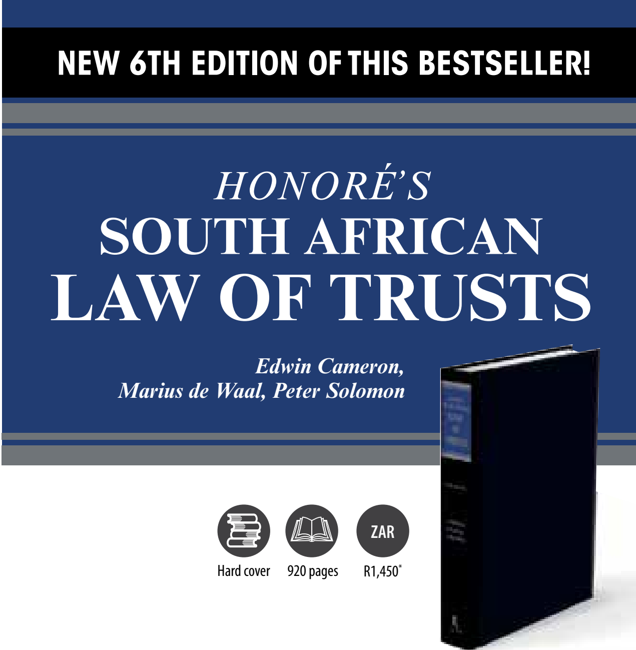
With prescribed bundles, the compilation would normally entail a simple exercise of sorting the documents in a specific group, in date order, from first to last.

With a substantial evidence bundle, the date on the documents does not necessarily determine the sequence in which they are included in the bundle. The chronology will be determined by the sequence in which the events/evidence will be presented at the hearing. This may closely follow the date sequence of the documents, but will not always be so. If we use an unopposed divorce as an example you will start with the summons, the return of service and then the marriage certificate and birth certificates of any children born into the marriage. The date of the marriage and birth certificates may well be before that of the summons, but the judge will first want to read what the matter is about and ensure that all technical requirements have been complied with before you will be allowed to call your witness to give evidence on the date of the marriage and the birth of any children.

With the combined documents bundle, it is important to first read all the documents and understand all the issues in dispute. A proper understanding of all the parties' respective cases in the matter is of vital importance. Thereafter, one needs to contemplate strategically on the sequence in which the evidence will be presented to not only present the client's case in a logical and structured fashion, but also to effectively attack the opponent's case. This will assist in avoiding the 'keep your finger at page 54 and turn to page 99' routine. It works well to follow the same sequence of addressing disputes than the sequence followed in the pleadings. If one could use as example an elementary claim to repair or replace the damage to a motor you will start with the documents that relate to the identity of the parties, followed by those relating to the ownership of the vehicle (*locus standi*), the fact of damage caused, the issue of fault (negligence), the calculation of the damages and finally demands made and reactions received thereto. It is important to bear in mind that a combined documents bundle should include documents relating to both disputed and undisputed issues. If you use counsel, it may be prudent to ask them for their input on the sequence of the documents in the bundle before you finalise your bundle. The ideal is that when the judge pre-reads the bundle, it should read like a book and should give the judge a clear picture of how the evidence will unfold. When bundles are prepared electronically it is most useful to annotate the index at the side of each document with a reference to the item number of the document in the discovery bundle, or to create a hyperlink to the original document. This will curtail disputes on whether a document was discovered or not, and if discovered when and how it was so discovered. The combined documents bundle is by its nature intended to be used by all the parties. Agree on the content and the sequence of the documents with your opponent before you finalise the bundle. Do not duplicate documents in this bundle.

In general

- The court bundle is supposed to make everybody's life easier and it should be user friendly. Keep it simple and do not clutter it with unnecessary documents.
- Documents that are not relevant for the purpose of the bundle should be omitted.
- If possible, use available technology to prepare your bundle. There are several desktop and Internet applications that you can use to prepare your bundles electronically. Other than the immense time-saving factor, the legibility and general quality of the documents in these bundles – when uploaded from the original source document – are much better than the copies that inevitably end up being made of copies, of copies, of copies. Photographs and diagrams can be included in colour. Technology also permits the insertion of annotations and hyperlinks to the different documents that saves time from searching for documents during preparation or presentation of the case.
- Technology also permits the annotation and cross-refer-



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encing by hyperlink for purposes of preparation of the case – whether in leading witnesses or challenging evidence of the other party.

- Inquire of the judge whether they would prefer an electronic copy of the indexed and paginated papers.
- Do not add filing notices to the pleadings bundle. Filing notices should be included in the notices bundle.
- With a motion, include a lost file/original affidavit (if applicable) and a draft order in your bundle.
- Make a separate bundle for witness statements and affidavits. Start with those of the plaintiff first and then add those of the defendant. Avoid adding the same exhibit or annexure to each statement or document – rather index these separately or as a subfolder and create an annotation or a hyperlink to the exhibit/affidavit.
- When you prepare your index, it is not helpful if you merely identify a document as 'Annexure A' or 'Annexure B'. Give a short description of the content of the annexure, for example: Annexure A – cancellation letter by X to Z dated 3 March 2000.
- Correspondence and e-mails should clearly reference the content thereof. It is meaningless to describe a document as letter from attorney A to attorney B, especially if a number of these letters where exchanged on the same day. Give a short description of what the letters are about.
- A complete copy of the e-mail and correspondence should be included in the discovery bundle, but in the combined documents bundle strip the e-mails from their trails and from pages containing irrelevant information like advertisements, anti-virus warnings and confidentiality notices. If the e-mail is a reply to a previous mail, limit the trail to only the first paragraph of the previous e-mail for identification purposes, and index and paginate each e-mail or reply separately in date order from first received/send to last received/send. Insert an annotation and/or a hyperlink to the original e-mail in the discovery bundle.
- Consult the practice manual or directive to determine the maximum number of pages for each bundle. Rather have less pages in a bundle than continue with part of the document in the next bundle. You may exceed the page restriction slightly if it will avoid continuation of the document to the next bundle.
- Paginate numerically in the top right-hand corner of the document.
- Do not paginate too close to the edge of the document – the number may be outside the printable margin or lost in copying.
- Paginate per page – do not paginate per document.
- Try to ensure that each page has only one number at the top right-hand corner thereof. Remove or strike out previous numbering.
- Avoid late insertions. Index and paginate your bundle timeously. It is better to use a blank page in place of the outstanding document. If you paginate late insertions as 7.1, 7.2 etcetera, the page number of the PDF-copy of your document will not correspond with the pagination on your document. In your PDF-document page 8 will then be page 7.1, page 9 will be page 7.2 and page 10 will be page 8 of you paginate papers. It may also invalidate hyperlinks that have been included in electronic formatting of bundles.
- Paginate the document before you make copies of the bundle.

Finally, consider if you are proud to affix your name and signature as compiler to the bundle or not. If the bundle is a source of endless embarrassment to you, it is recommended that you must start at step 1 again.

Are court bundles a friend or foe?

Nowadays, South African courts require indexed and paginated court bundles for everything. Sadly, most of us seem to consider this requirement to be a wasted effort, an unnecessary expense and a task that must be delegated to the most junior of junior members of our staff.

If you are of like mind, consider why retired English District

Judge Paul Waterworth stated that: 'A good bundle cannot win a bad case, but a bad bundle can damage a good case' (District Judge Paul Waterworth 'Trial bundles: Why are they important and how to get them right' The Law Society Gazette, 28-1-2010) (www.lawgazette.co.uk, accessed 5-12-2018).

The answer is simple – a properly prepared court bundle is an invaluable tool and an invaluable asset used for the preparation, presentation and determination of your client's matter.

The value of documentary evidence in the preparation and presentation of any case should never be underestimated. To a large extent documentary evidence provides the contemporaneous record of the events leading up to litigation. Documents capture the time line within which the disputed events occurred, and they record facts, and very often the smallest fact on which the case turns. They also, within context, establish the other party's contemporaneous response or the lack of the response to those facts – which in turn influences the probabilities in evidence. Documents are indispensable in tying witnesses to dates and events during the presentation of their evidence. They are also indispensable in cross-examining the opponent's witnesses.

If one considers the process of presenting evidence at trial as comparable with that of building a puzzle, the evidence represents pieces of the puzzle that are to be assembled in a pre-determined order to build a specific picture. Each piece of evidence tells a small part of the whole story, fits in a specific place, cannot be replaced by another piece, complements all the other pieces, and stands out like a sore thumb when missing or incorrect. It is the one party's job to build the puzzle by assembling the evidence so that it portrays a clear and comprehensive whole of all the component pieces, which supports the probabilities of the case and which corroborate one another. It is the opposing party's job to try to distort that picture by presenting credible contradictory evidence or evidence that renders the first party's picture improbable. It is the function of the presiding officer – be it a judicial officer or an arbitrator to determine whether they accept the picture or whether they reject the evidence.

When one prepares a bundle for use in court (or at an arbitration and the like), you are in effect preparing a box of puzzle pieces that you will use to build your picture. In addition thereto, you are determining the appropriate place to introduce that piece of the puzzle during the presentation of evidence, and the value that should be attributed to that piece. If you prepare your client's court bundle in a logical and structured manner from the outset it will simplify the presentation of, not only, documentary evidence but also oral evidence at the hearing.

When done poorly, your court bundle will have the following disadvantages:

- You will appear to be unprepared.
- You will waste time in court, looking for documents.
- You run the risk of confusing your witness.
- You may present your evidence in an illogical manner that may distort the picture that you are trying to paint.
- You may well also confuse the judge so that points that should carry the case to success become lost in the confusion.
- You will have difficulty in discrediting the opponent's case.
- You may have to seek a postponement that will have cost implications for you and your client.
- The judge will most likely criticise you.

When done properly, your court bundle will have the following advantages:

Preparation

- It helps you to focus on what remains to be resolved (the disputes);
- it assists you to consider which documents are required to determine the remaining disputes;
- it affords you the opportunity to prepare for the hearing effectively, saving your client money; and
- it allows the presiding officer to, when pre-reading the papers, determine what story is to unfold at court without an undue waste of time.

Presentation

- It helps you to present your case in a logical order;
- it enhances the smooth flow of the hearing;
- it reduces the time spend at court;

it makes it easier to refer to information during the hearing;

- it can be used to lead your witness or to cross-examine a witness effectively;
- it avoids unnecessary postponements; and
- it avoids embarrassment and costly errors – you will not close your case without presenting all the necessary documents included in your bundle.

Determination

- It saves the presiding officer time when refreshing their memory on the evidence led at the hearing and the disputes that they must determine;
- it assists the presiding officer to prepare their written judgment in a reasonable time; and
- it avoids wrong rulings and/or judgments.

The time and money spent on preparing proper court bundles is well worth it. The process should be embraced. We will achieve more by considering it our friend than making it our dreaded enemy.

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The basic structure doctrine: A challenge to expropriation without compensation?

In February 2018, Parliament adopted a resolution in support of the concept of expropriation of private property without compensation. The resolution, among other things, directed the Parliamentary Constitutional Review Committee to review various provisions, including s 25 of the Constitution – the right to property – to determine how to make expropriation without compensation possible.

Since then, there has been much discourse on, especially, the morality and the economics of such an amendment to the Constitution. While the legality and legal implications of such an amendment have been analysed, there has been little engagement on how, or whether such an amendment could be challenged on constitutional grounds if it should pass through both houses of Parliament and be signed into law by the President.

If the amendment process falls foul of the provisions of s 74 of the Constitution, which determines how an amendment of the Constitution should be processed, it should quickly be declared invalid by the Constitutional Court (CC). However, other than the ordinary procedural arguments that could, and probably will come up – which includes questions about whether the public participation process was adequate – is there a substantive argument to challenge the legality of the amendment? The *prima facie* answer is 'no'. If a constitutional amendment is procedurally sound, a superior court will have no grounds on which to declare the amendment unconstitutional.

But the richness of constitutional theory may provide an alternative answer. It has happened in other jurisdictions, and it may happen in South Africa (SA), that an otherwise procedurally-valid constitutional amendment is in substance unconstitutional, and, therefore, void. One of the ways this could come to pass is by application of the so-called 'basic structure' doctrine.

Overview of the basic structure doctrine

The immensely valuable doctoral thesis of Dr Yaniv Roznai on unconstitutional constitutional amendments was my point of departure for this article (Y Roznai *Unconstitutional constitutional amendments: A study of the nature and limits of Constitutional amendment powers* (PHD thesis, London School of Economics and Political Science, 2014) (http://etheses.lse.ac.uk, accessed 16-8-2018)). This thesis has since been developed into a book by the same author, published by Oxford University Press, and has inspired central arguments in legal challenges to constitutional amendments around the world, most recently in the CC of Uganda's *Constitutional Petitions* Nos. 49/2017 *et al.*

In brief, the basic structure doctrine posits that there are certain features or principles so engrained in the fabric of the Constitution that even if a supermajority, or indeed, every member of Parliament, were to decide to interfere with that feature or principle, it would be unconstitutional. This is because the Constitution merely gives a power of amendment to Parliament (a constituted power), and not a power of replacement (a constituent power). Thus, to validly 'amend' the Constitution in terms of s 74, Parliament's proposals must still operate within the logic and framework of the Constitution and not attempt to replace it. If Parliament were to adopt something, which is an amendment in name only, but in fact is a 'replacement' of the Constitution with what, effectively, would be a 2018 Constitution, the courts would be justified in setting that 'amendment' aside.

Chandrachud CJ, in the Indian Supreme Court case of *Minerva Mills Ltd and Ors v Union of India and Ors* AIR 1980 SC 1789 said at para 21:

'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.'

The basic structure doctrine has received the most fleshing out in Indian jurisprudence and is most closely associated with the above court. But, the doctrine has been considered in the jurisprudence of courts as far

By Martin van Staden

afield as Kenya, Uganda, Thailand, Argentina and Peru.

At the time of writing this article, the doctrine had not been adopted into or recognised in South African law, but given the relative youth of our constitutional order, it is not surprising that there may be many doctrines and theories yet to be discovered and developed by the superior courts. The CC has, however, in passing, recognised that the basic structure doctrine could be applicable in SA, but declined to decide the issue.

In *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC), Mahomed DP remarked at para 47 that: 'It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an "amendment" at all'. Sachs J posed a similar question at para 204 in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC) noting, *inter alia,* that: 'There are certain fundamental features of parliamentary democracy, which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose'. The basic structure doctrine was again noted in *United Democratic Movement v President of the RSA and Others* 2002 (11) BCLR 1179 (CC), where, in contrast to the prior two judgments, it appears the court is moving away from the doctrine. But, it is clear, our superior courts are not completely closed to the notion that the doctrine may find application in SA.

Celine van Schalkwyk of Stellenbosch University argues that the basic structure doctrine would likely not find application in SA, *inter alia*, because the Constitution allows for amending any provision of the Constitution, even s 1 – the Founding Provisions, said to be a surrogate for the basic structure doctrine – for which the National Assembly requires a 75% majority to do, and because the CC will likely regard using the basic structure doctrine as a violation of the separation of powers (C van Schalkwyk 'Die basiese-struktuur-leerstuk: 'n Basis vir die toepassing in Suid-Afrika, of 'n skending van die skeiding van magte?' (2015) 12(2) *LitNet Akademies* 347 (www.litnet.co.za, accessed 16-8-2018)). Although it is outside of the scope of this article, it is useful to note that one of the other potential avenues of challenging the constitutionality of an expropriation without compensation amendment, is a s 1 review.

I submit, however, that the doctrine should be recognised as applicable in SA.

Not all of the basic structure of the Constitution is encapsulated in s 1. Section 1 does not, for instance, speak of the separation of powers and, particularly, of judicial review, which are two of the features that have appeared almost universally in existing global jurisprudence on the basic structure doctrine. Section 1, however, does provide assistance in identifying what could be the features of the basic structure of the Constitution.

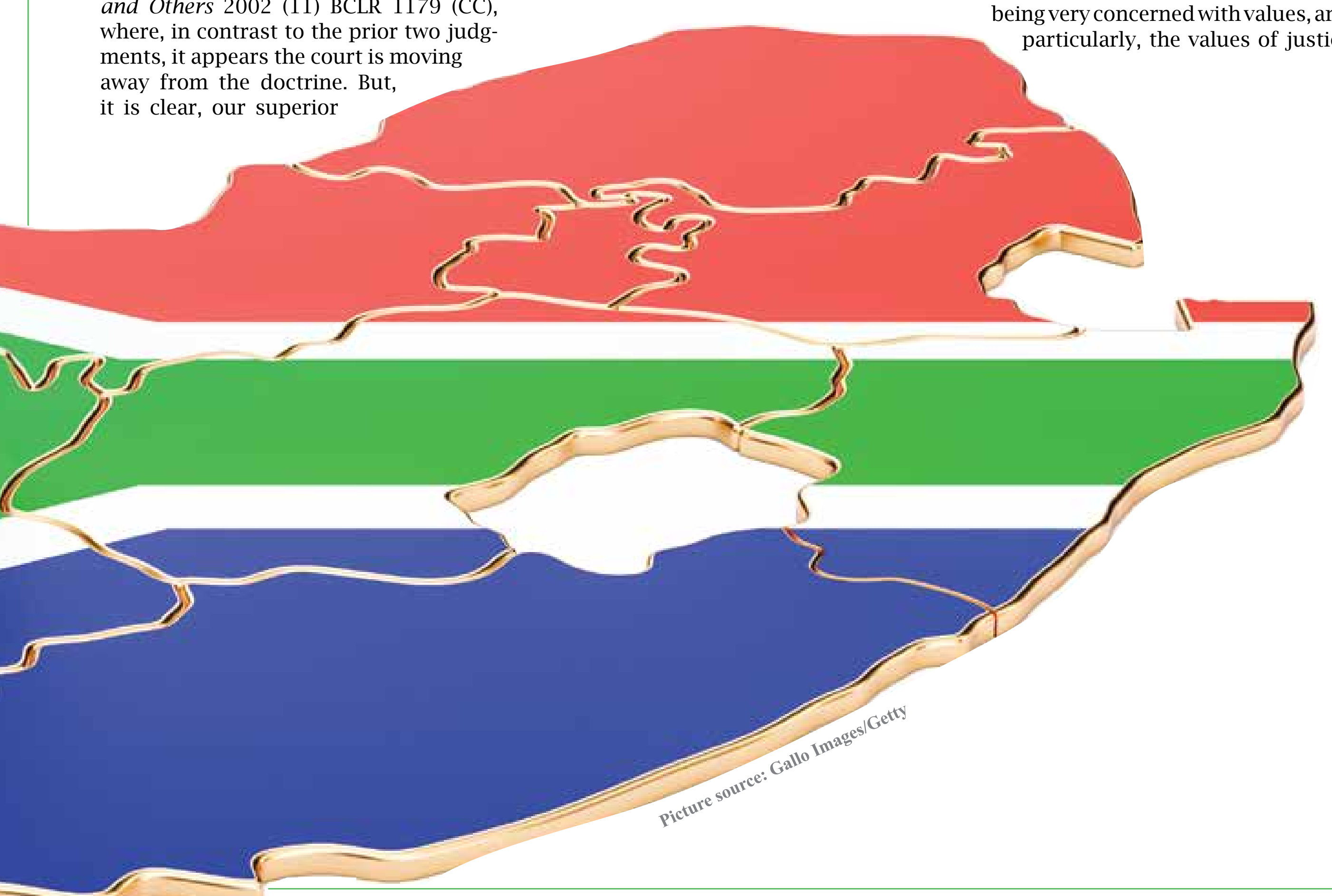
Property rights and the Constitution

If we assume the doctrine will find application in South African constitutional law, the pertinent question to ask is whether the s 25 right to property, and its associated and inseverable right to compensation, forms part of the basic structure of the Constitution. If it does not, even if the doctrine is recognised, it will not succeed in hindering expropriation without compensation.

There is no prescribed method in the basic structure doctrine of determining what is the basic structure of a Constitution. Indeed, with some significant overlap, every Constitution will have a different basic structure. Federalism, for instance, is certainly part of the basic structure of the Constitution of the United States, but the same would not be true for SA; whereas universal franchise is likely a part of the inherent identity of both.

To determine whether something features as a part of a Constitution's basic structure, one would need to ask the following question: If the feature in question is removed from the Constitution, will the Constitution still retain its identity?

The Constitution is not a formalistic statute. It is internationally renowned for being very concerned with values, and, particularly, the values of justice,



Picture source: Gallo Images/Getty

fairness, human dignity, equality, and respect for fundamental rights. Indeed, s 1(*a*) of the Constitution specifically says SA is founded on, *inter alia,* the protection of dignity and the advancement of human rights and freedoms.

Paying compensation for expropriated property is more than 'international best practice'. In open and democratic societies, it is the only practice. The notion of not providing compensation for expropriated property is alien to constitutional democracies and is known only in repressive nations, such as Venezuela and Zimbabwe. As the economic discourse on expropriation without compensation has gone to great lengths to show, every country in history that has ventured down this path has only created for itself destitution and pariah status and eventually had to roll it back; something Zimbabwe is starting to do.

The right to security of property is also deeply embedded in South African history, and something the Constitution takes very seriously. Apartheid was characterised by its denial of tenure security to black South Africans. Section 25(6) specifically enjoins government to bring about security of tenure to those who were denied it in the past. It could be argued that the Constitution represents a securing of property rights to a people who, up to at least 1990, had no secure private property rights to speak of. Section 25 is not a run-of-the-mill property provision but is very involved with South African history and redressing the consequences of racial discrimination.

Even during Apartheid, the notion of expropriation was wedded irrevocably to compensation. Thus, writing in 1955, AV Dickinson, QC wrote that 'expropriation may be described as a compulsory sale, because provision is made to pay a price, i.e. compensation' (AV Dickinson 'The Freedoms of the Individual' in HJ May 3ed *The South African Constitution* (Cape Town: Juta, 1955)). Of course, this meant nothing to the disenfranchised majority who were not regarded as 'owners' of their property in 'white South Africa', and who could thus lose that property without being entitled to a cent of compensation. But 'expropriation without compensation' can be regarded as an oxymoron, at least as far as constitutional law, if not politics, is concerned.

Private property as a concept is intimately related to the very notion of constitutionalism, according to Prof Koos Malan of the University of Pretoria, because it is the only vehicle by which the people and civil society can exercise autonomy from the state and cause a balance to be struck in society between the powers of government and of the people (K Malan 'The totalitarianism of transformationism' *Politicsweb* 11 March 2018 (www.politicsweb.co.za, accessed 16-8-2018)). Furthermore, the most progressive nations today that have vast systems of welfare, have strong protections for private property. The Scandinavian countries of Finland, Norway and Sweden consistently rank in the first quartile of protecting property rights, according to both the *International Property Rights Index* and the *Economic Freedom of the World.*

A strong argument, thus, can be made that private property rights, and, specifically, the right to compensation when property is expropriated by the state, is an imperative of constitutionalism and part and parcel of the basic structure of the Constitution. Doing away with the right to compensation would thus, it may be argued, not amount to an amendment of the Constitution, but an attempt to change the very identity of the Constitution and replace it with another: A power not granted to Parliament.

Conclusion

Much of the above arguments will depend on the text of the eventual amendment. If it is a complete repeal of the right to compensation, I argue that the basic structure doctrine could be employed to have the amendment set aside. If, however, the amendment is framed in strict and narrow language that would allow for expropriation without compensation in specific, clearly-defined instances that would appear fair to a reasonable person, I do not believe it would amount to a change in the identity of the Constitution and thus the doctrine would provide no such assistance.

Making use of the doctrine would signal a radical move by the otherwise conservative CC, which has repeatedly indicated an aversion to interfering with what it considers political or legislative questions. Section 1(*c*) of the Constitution, however, declares the Constitution and the rule of law to be supreme, meaning that the court does not truly have a discretion to remain uninvolved when Parliament has somehow made itself guilty of contravening the rule of law.

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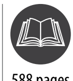 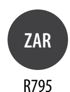

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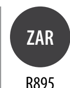

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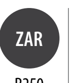

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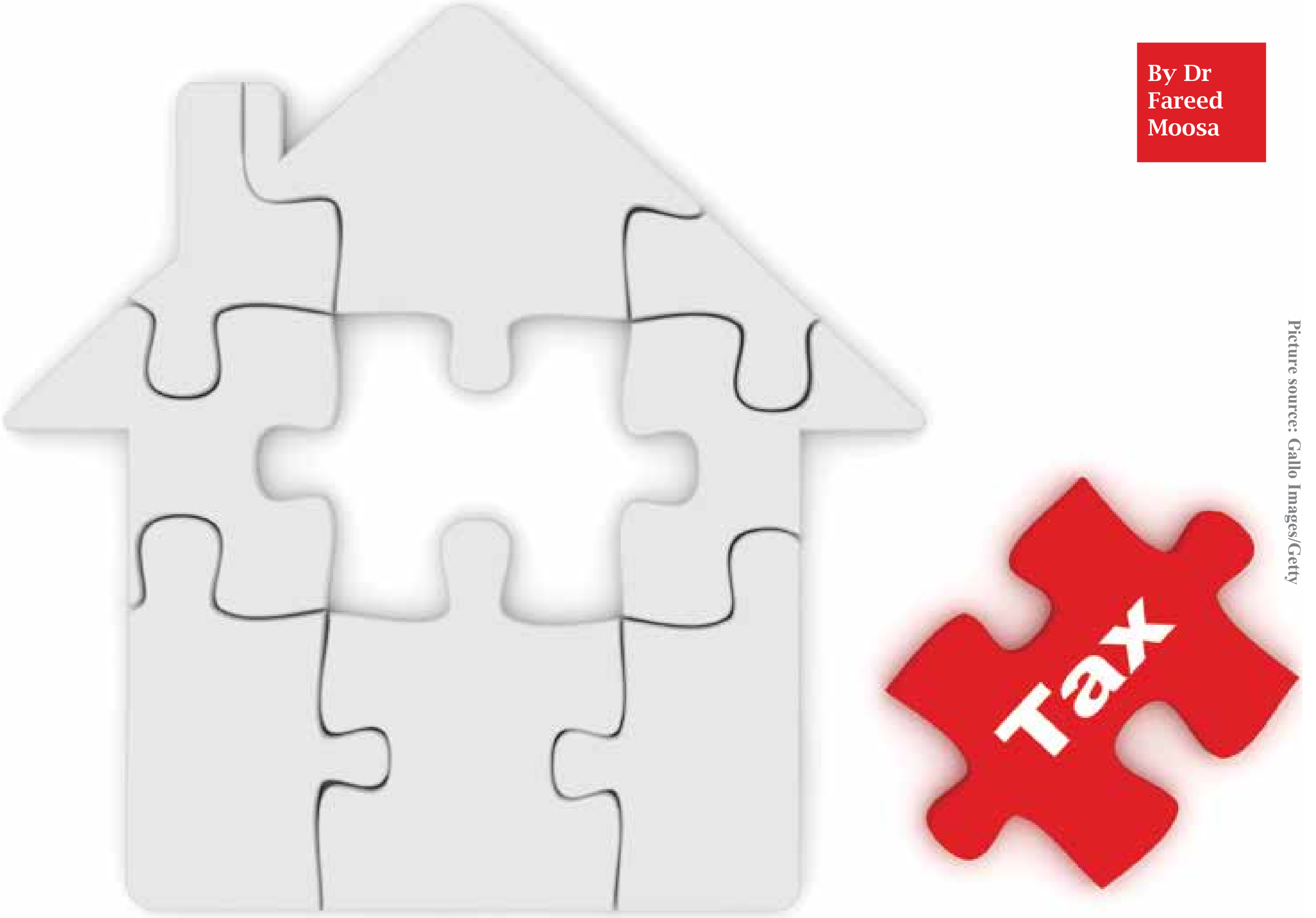
Applying Uniform r 23 into the landscape of tax litigation

By Dr Fareed Moosa



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Tax courts are created by s 116(1) of the Tax Administration Act 28 of 2011 (TAA). As such, by virtue of s 166(*e*) of the Constitution, they are part of South Africa's (SA's) judicial system. Under s 107(1) of the TAA, a tax court adjudicates taxpayer appeals against tax assessments, as well as appeals against a 'decision' falling within the remit of s 104(2). For the meaning of 'assessment', see *HR Computek (Pty) Ltd v Commissioner for the South African Revenue Service* (SCA) (unreported case no 830/2012, 29-11-2012) (Ponnan JA). For a discussion of s 104(2), see *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Services* (SCA) (unreported case no 301/2017, 27-3-2018) (Ponnan JA). Unlike a tax board established under s 108 of the TAA, a tax court is 'a court of record' (s 116(2)) headed by a judge or acting judge of the High Court (s 118(1)(*a*)) who is empowered by s 117(3) to 'hear and decide interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the "rules"' promulgated in terms of s 103 of the TAA. Presently, the rules governing tax appeals are those gazetted in GN550 *GG*37819/11-7-2014.

In terms of s 109(5) and s 115(2) of the TAA, a tax court must hear an appeal *de novo*. This entails a full hearing or rehearing of a matter, as the case may be. Proceedings in a tax court are, thus, akin to a trial. Evidence of witnesses, including experts, is led. In the same vein as the Magistrates' Courts Rules and Uniform Rules of Court pertaining to civil trials, the tax court rules provide for discovery of documents (r 36), for a 'pre-trial conference' (r 38), and for subpoena of witnesses (r 43). These steps do not apply to conventional appeals in ordinary courts of law where litigants are bound by the record of proceedings in a court *a quo*. Indeed, a tax court may itself be a court of first instance, such as where a dispute falls beyond the monetary jurisdiction of the tax board as prescribed under s 109(1)(*a*) of the TAA. Therefore, a tax court is not an appeal court in the ordinary sense. Like its predecessor, that is, the Special Court, a tax court is a court of

revision. See *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at para 47.

In terms of tax court r 34, '[t]he issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal [filed by the South African Revenue Service (Sars) under tax court r 31] read with the statement of the grounds of appeal [filed by a taxpayer under tax court r 32] and, if any, the reply to the grounds of appeal [filed by Sars under tax court r 33]'. In common parlance, documents of this nature in the tax court are referred to as 'pleadings' (see *ITC 1846* 73 SATC 96 at para 18). As with pleadings in actions before ordinary courts of law (*Presidency Property Investments (Pty) Ltd and Others v Patel* 2011 (5) SA 432 (SCA) at 440A – B), the object of the pleadings filed pursuant to tax court rs 31, 32 and 33 is to formulate the factual and legal issues to be ventilated at the (re-)hearing of the case and to place each party (that is, Sars and the taxpayer) in a position whereby it knows the case that it has to meet.

In a manner comparable to Uniform r 18(4), tax court r 32(2) stipulates that a taxpayer's statement of grounds of appeal filed under tax court r 32(1) 'must set out clearly and concisely –

(a) the grounds upon which the appellant appeals;

(b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31'.

Unlike Uniform r 23(1), which permits exceptions to be raised by a defendant against any pleading filed by a plaintiff on any recognised ground (such as, the pleading is vague and embarrassing or lacks averments necessary to disclose an action), the tax court rules are silent on whether Sars has the procedural right to raise an exception against the tax court r 32 statement.

Exceptions play an important role in civil litigation generally, namely, '[t]hey provide a useful mechanism to weed out cases without legal merit' (*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para 3). The test in exception applications is whether – on all possible readings of the facts – an excipient has proved that the conclusion of law for which the pleader on the other side contends cannot be supported on any interpretation that can be placed on the facts. Consequently, in *Eastern Produce Cape (Pty) Ltd t/a Linton Park Wines v Glen Faure International Consultancy* (WCC) (unreported case no 2916/2010, 17-5-2011) (Steyn J) at para 15, it was held that '[a] pleading is only excipiable if no possible evidence led on the pleadings can disclose a cause of action or defence'.

The absence of a tax court rule providing for exceptions raises the question whether – as a matter of law – the exception procedure also applies to litigation before a tax court. Put differently, can Sars file an exception to a tax court r 32 pleading? If so, on what basis can this be done? This question was recently answered in the affirmative by Meyer J in *Commissioner for the South African Revenue Service v Massmart Holdings Limited* (unreported case no IT 4294, 11-7-2018) (Meyer J) at paras 6 and 7. The starting point of the inquiry is the empowering provision in tax court r 42(1). It reads: '*If these rules do not provide for a procedure in the tax court, then the most appropriate rule* under the Rules for the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the Act [that is, the TAA] and these rules, may be utilised by a party or the tax court' (my italics). In the absence of tax court r 42(1), a tax court, being a creature of statute (*Lion Match Company* (at para 6), would not be imbued with the discretionary power ('may') to resort to the Uniform Rules when a *lacuna* appears in the tax court rules. The directive in tax court r 42(1) is aimed at 'plugging holes' in the latter rules so as to promote enhanced efficiency and effectiveness in the administration of justice in tax appeals. Unlike the High Court, a tax court – although presided over by a judge or acting judge – does not have any inherent power to regulate its own processes by deviating from the tax court rules. It is in this context that tax court r 42(1) plays a pivotal role.

In the *Massmart Holdings* case Meyer J, at para 6, held that '[t]he exception procedure is consistent with the TAA and the Tax Court Rules'. However, the judge did not elaborate on, nor indicate, the nature and extent of the consistency. In support for his conclusion, Meyer J relied exclusively on the fact that in *ITC 1899* 79 SATC 315 'Eksteen J upheld the exception on the basis that the proposed amendment was not legally sustainable'. Meyer J's reliance on *ITC 1899* is misplaced because a reading of Eksteen J's judgment reveals that the appeal *in casu* against a tax assessment was lodged on 4 July 2012, that is, prior to the coming into effect of the TAA on 1 October 2012 and prior to the tax court rules being gazetted on 11 July 2014. Although the appeal before Eksteen J was heard on 7 December 2016, the judge did not refer to, nor apply tax court r 42(1). Eksteen J also makes no mention of Uniform r 23(1), nor comments on its applicability to tax court litigation. This is because that issue was never raised. It arose for the first time in the *Massmart Holdings* case. Thus, *ITC 1899* provides no legal foundation for the conclusion reached by Meyer J. This notwithstanding, and for the reasons outlined below, I submit that Meyer J's decision to apply Uniform r 23(1) to tax court litigation ought to be welcomed for its precedential value under *stare decisis.*

When applying tax court r 42(1) with a view to ascertaining if a particular High Court rule is appropriate to tax litigation and consistent with the TAA and the tax court rules, a purposive *cum* contextualist methodology must be adopted (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 to 22 as amplified in *Commissioner for the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd* (SCA) (unreported case no 185/2017, 25-5-2018) (Van der Merwe JA) at paras 31 to 33 (read with footnotes 1 to 2 therein)). In this regard, important considerations include –

- the purpose of tax court rules generally;
- the nature and purpose of the Uniform Rule concerned in the context of ordinary High Court litigation;
- the intended role to be played by the relevant Uniform Rule in the context of tax court litigation;
- if more than one procedural Uniform Rule exists, which may serve the same or similar purpose as the rule selected, then whether the selected one is 'the most appropriate rule'; and
- whether the selected rule, and its utilisation, is in harmony with the TAA and the tax court rules.

If it is inconsistent for any reason, then the express wording of tax court r 42(1) permits the relevant Uniform Rule to be applied, but then only 'to the extent consistent' with the TAA and the tax court rules.

The tax court rules, just as the rules of the High Court, exists for the court and not the court for the rules. As such, the rules are invaluable tools that are not to be applied in a mechanical fashion. See *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at paras 30 to 31. The tax court rules are designed to promote efficient and effective administration of justice by facilitating and regulating the orderly, structured adjudications of tax appeals. This is its underlying purpose. The nature and function of the exception procedure in Uniform r 23(1) is outlined above (see also *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) paras 34 to 37). There is no other Uniform Rule that serves the same or similar purpose. Therefore, Uniform r 23(1) would be 'the most appropriate

rule' for dealing with a pleading filed by either party which is objectionable on any ground recognised in this sub-rule.

The adoption of Uniform r 23(1) onto the landscape of tax litigation will, on the one hand, aid Sars to 'weed out' appeals that are spurious or otherwise unsustainable; on the other hand, an exception will enable taxpayers to overcome baseless defences or grounds of opposition raised by Sars. In this way, exceptions will promote the expeditious resolution of tax appeals, which will foster protection of the public purse against wasteful costs incurred in the administration of tax appeals. At the same time, the private purse of taxpayers may also be protected, particularly in the light of the 'pay now, argue later' rule that is legislated in s 164(1) of the TAA.

It must at all times be borne in mind that taxpayer appeals to a tax court triggers the access to court provisions in s 34 of the Bill of Rights. Since the tax court rules constitute subordinate legislation and the TAA primary legislation, the interpretive directive in s 39(2) of the Constitution finds application when the relevant legislative provisions are interpreted with a view to establishing whether harmony exists between Uniform r 23(1), the TAA and the TCR. I submit that the use of the exception procedure in Uniform r 23(1) promotes the 'spirit, purport and objects of the Bill of Rights' because, as explained above, it fosters fairness and the speedy resolution of tax disputes. These are values engrained respectively in s 34 and s 35(3)(*d*) of the Constitution and form part of the 'spirit' of the Bill of Rights (see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 87 to 89).

In conclusion, the view expressed in this article also finds support in the *Lion Match Company* case where the Supreme Court of Appeal, at para 9, held that jurisdictional challenges to a tax court's jurisdiction 'should be raised either by exception or special plea'. Although the judgment *in casu* makes no reference to the absence of provision in the tax court rules for either exceptions or special pleas, it appears that the court endorses the view that such procedures are appropriate for tax litigation. Accordingly, by virtue of tax court r 42(1), the relevant High Court rules may be resorted to in order for these procedures to find application in a tax court.

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THE LAW REPORTS

November 2018 (5) South African Law Reports (pp 1 – 332); [2018] 4 All South African Law Reports October (pp 1 – 287)

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

ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Civil procedure – law of evidence

Admissibility of evidence adduced by way of video-link conference: The applicant in *Krivokapic v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD) was a resident of Yugoslavia. In May 2001, the applicant's son (the deceased) was employed aboard a ship as an employee of the respondent (Transnet). The vehicle in which he was transported collided with a gantry crane and fell over the edge of a wharf into the bay on Transnet's property. The applicant instituted an action for damages against Transnet, alleging that the deceased owed her a duty of support.

Transnet conceded liability and the action was settled to the extent of 70% of the applicant's proven or agreed damages. The only outstanding issue was the determination of the quantum of damages suffered by the applicant. That led to the present application in which permission was sought for the applicant to testify from premises in Montenegro in Yugoslavia, by way of a video conference link, and giving Transnet an opportunity to appoint legal representatives to monitor and be present during the process. The applicant's attorneys would arrange for the video conference link to be set up at the offices of a South African firm of attorneys or any other place agreed to by the court, in order for the presiding officer and the legal representatives of Transnet to be present during the process. The basis for the application was that due to old age, ill-health and impecunious state of the applicant, she was unable to travel and testify in a court in South Africa.

Two main points fell to be decided. First, whether the present matter was an admiralty one. Mbatha J held that for the following reasons, the applicant's claim was indeed a maritime claim as defined in s 1(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act). First, the deceased had died as a result of an accident which occurred in connection with the employment of a ship (s (1)(*f*)). Secondly, it involved the employment of the deceased as an officer or seaman of a ship (s 1(1)(*s*)) and fell within the all-embracing provisions of s (1)(1)(*f*), s (1)(1)(*s*), s 1(1)(*ee*) and (*ff*). The application could, therefore, be entertained in line with the provisions of s 6(3) of the Act.

The second point concerned the aspect of admissibility of the applicant's evidence by way of video-link conference. Ordinarily, in civil proceedings, oral testimony is given by the plaintiff in a court of law. However, the court acknowledged that modern technology makes it possible for direct evidence to be taken from a witness in another country and for cross-examination to take place while the witness is visible to all. The test with regard to evidence in general is that the court should consider all material, which may help it reach a proper conclusion. Although it is trite that the value of some evidence is outweighed by the problems it creates, the court is required to balance the competing considerations in exercising its discretion.

Rule 38 of the Uniform Rules of Court provides for various procedures to produce evidence for trial. The main consideration is whether evidence is placed before the court in that manner, justice is likely to be done. The court was satisfied that the nature of the evidence to be adduced by the applicant was material to the real issues in the litigation and likely to contribute significantly to their determination. Taking into account a number of factors, including old age, serious illness, costs of travelling and other incidental costs, the court concluded that the applicant would not be in a position to give oral testimony in court due to her advanced age and serious illness.

The application succeeded. The applicant was authorised and directed to adduce her evidence as sought.

Company law – minority shareholder

Approval of disposal of assets by company: The facts in *Cilliers v La Concorde Holdings Ltd* 2018 (6) SA 97 (WCC) were as follows: The applicant (Cilliers) was a minority shareholder in La Concorde Holdings Ltd (the holding company) that held all the shares in KWV South Africa (Pty) Ltd and a 'significant interest' in KWV Intellectual (Pty) Ltd. In May 2016 it was announced that KWV would dispose of all its operational assets to a third party.

The disposal by KWV also constituted a disposal of all or the greater part of the assets or undertaking of La Concorde. This was clear from a reading of the consolidated financial statements of the holding company. As a result, a meeting of shareholders of La Concorde was called to approve the disposal as required by s 115(2)(*b*) of the Companies Act 71 of 2008 (the Act).

Cilliers and a few other shareholders voted against the proposed transaction at the meeting. La Concorde initially held the view that appraisal rights were available to its dissenting shareholders but changed its mind after the meeting. La Concorde made an offer to the dissenting shareholders to acquire their shares but this was rejected as being inadequate. The dissenting shareholders then instituted action against the holding company for the appointment of two appraisers to determine the fair value of their shares in terms of s 164.

Papier J held that s 115(2)(*b*) of the Act requires approval by shareholders of the holding company because the disposal of all or the greater part of its assets or undertaking by a subsidiary constitutes such a disposal by the holding company. The parties agreed to apply to court in terms of

r 6(5)(*d*)(iii) of the Uniform Rules of Court for determination, as a question of law, whether appraisal rights are established in favour of dissenting minority shareholders of a holding company where s 115(2)(*b*) applies.

The arguments that La Concorde itself did not dispose of any assets and that reference to the votes of shareholders in s 112 only refer to votes of shareholders in the subsidiary company that sold the assets, were rejected.

Section 112 is subject to s 115, which contains the requirement that the shareholders of the holding company should also vote to approve a disposal by the subsidiary if it constitutes a disposal of all or the greater part of the holding company's assets or undertaking. It is also in s 115(8) that the appraisal remedy in terms of s 164 is made available to the holder of any voting rights in a company and must, therefore, be taken to include the shareholders of the holding company.

The protection of minority shareholders is one of the important stated aims of the Act and the appraisal rights provided by s 164 are important in providing minority shareholders with an exit from the company where they cannot influence company direction and decisions effectively.

The appraisal remedy does not dilute or negate the power of majority shareholders, but merely provides minority shareholders with equitable protection and fairness. For these reasons, a minority shareholder in a holding company is entitled to the protection of the appraisal rights in terms of s 164 where s 115(2)(*b*) applies.

The application was thus allowed with costs.

• See Marvin Petersen 'Appraisal rights of minority shareholders in a holding company, in relation to the subsidiary of the holding company' 2018 (Aug) *DR* 42.

Competition law

Enforcement of restraint of trade agreement pending application for leave to appeal: The facts which led to the appeal in *Swart and Another v Cash Crusaders Southern Africa (Pty) Ltd* 2018 (6) SA 287 (GP) were as follows: On 17 January 2018 Kollapen J granted an order enforcing a restraint of trade agreement concluded between the respondent (Cash Crusaders) in the present appeal and its erstwhile national general manager (Swart), who was the appellant in the present proceedings. The order granted interdicted Swart from, *inter alia*, being employed by the second appellant (Cash Converters) at any time until 7 April 2019. Cash Converters is a direct competitor of Cash Crusaders. On 24 January 2018 Swart and Cash Converters gave notice of their intention to apply for leave to appeal. Leave to appeal was refused. Swart and Cash Converters subsequently lodged an application for leave to appeal to the Supreme Court of Appeal. The relevant affidavits that have been lodged and the outcome of the application are awaited. On receiving the Swart/Cash Converters' notice of intention to apply for leave to appeal, Cash Crusaders brought an application in terms of the provisions of s 18 of the Superior Courts Act 10 of 2013, seeking an order directing that, pending the outcome of any appeal process instituted, the interdict granted on 17 January 2018 would operate. This application was granted on 27 February 2018. Section 18(4) of the Superior Courts Act grants to a party aggrieved by such an order an automatic right of appeal to the next-highest court, and states that such an appeal must be dealt with 'as a matter of extreme urgency'. The present appeal was lodged in terms of s 18(4) of the Superior Courts Act and served before a Full Bench of the High Court.

Fabricius J confirmed that under s 18 two requirements had to be met before an order appealed against can be put into operation pending the outcome of the appeal –

• exceptional circumstances must exist; and
• proof, on a balance of probabilities, that the applicant seeking execution will suffer irreparable harm if the order is not put into operation and the other party will not suffer irreparable harm if the order is put into operation.

Cash Crusaders did not, when it applied for execution, deal with the position of Cash Converters at all, having alleged only that Swart would not suffer irreparable harm if the order were put into operation.

The court held that it was clear from the affidavits before the court *a quo* that it did not deal with the effects his preclusion from being employed by a competitor would have on Swart after the period of restraint, and that the scope of its inquiry under s 18(3) was, therefore, limited. However, Cash Crusaders' failure to deal, in its s 18(1) application, with the position of Cash Converters, went to the heart of the matter. Both Swart and Converters brought an application for leave to appeal against the order of 27 February. Consequently, Cash Crusaders was required to make out a case of absence of irreparable harm in regard to both Swart and Cash Converters. Its failure to do so was a fatal omission to its application, and it ought on that basis alone to have been dismissed with costs by the court *a quo*.

The appeal was upheld with costs. The order of the court *a quo* was set aside and replaced with the following order: 'The application is dismissed with costs'.

Corruption – minimum sentence

Acceptance of gratification in unlawful exercise of duties: The crisp facts in *Scholtz and Others v S* [2018] 4 All SA 14 (SCA) were as follows: The first appellant and accused in the court *a quo* (Scholtz) was a shareholder in the Trifecta Group of companies (Trifecta), of which one Breda was a director and shareholder. Breda was a historically disadvantaged individual and businessman of the Northern Cape. Breda had Black Economic Empowerment (BEE) credentials.

In late 2004, or early 2005, Scholtz learned that the Northern Cape lacked the necessary infrastructure and housing to accommodate provincial government departments. Leasing suitable accommodation to the state was a potentially lucrative source of income, particularly for an entrepreneur having BEE credentials. He envisaged a business model of acquiring largely rundown buildings, renovating and refurbishing them, and then leasing them to provincial government departments. It was decided that Breda would identify people or entities as potential BEE participants in the venture.

Breda would then introduce such property to the provincial government, mostly before the formality of an advertisement calling for bids for accommodation having been published. He would then negotiate the terms of the lease for such property. In the event of such negotiations being successful and a lease either having been concluded or likely to be agreed, he would then acquire the property using one of the Trifecta group of companies. The conclusion of the leases was riddled with irregularities.

Various charges were brought against the accused relating to these irregularly concluded lease agreements. Suffice it to mention here that the court *a quo* convicted Scholtz and Block and each was sentenced to an effective 15 years' imprisonment.

The remainder of the present discussion will be restricted to Scholtz' and Blocks' appeal against their sentence of imprisonment.

On appeal Leach JA pointed out that the appeal in respect of sentence was limited to the charges of corruption on which Scholtz and Block were convicted. Each count involved an amount far in excess of R 500 000. Consequently, Part II of the Second Schedule to the Criminal Law Amendment Act 105 of 1997 applied, in terms of which a minimum sentence of 15 years' imprisonment was prescribed unless there were substantial and compelling reasons justifying a lesser sentence. While the courts have a residual discretion to decline to pass the prescribed minimum sentence, they should only do so where there are circumstances present which provide truly convincing reasons for a lesser sentence. The court *a quo* determined that there were

no such circumstances in the case of either Scholtz or Block and, accordingly, imposed the prescribed minimum of 15 years' imprisonment. In considering the appeal, the SCA emphasised the seriousness of the offences, and found no mitigating circumstances weighty enough to depart from the prescribed minimum sentences.

The two appeals against sentence were thus dismissed.

Costs

Counsel fees – wasted costs: The facts in *Trollip v Taxing Mistress* 2018 (6) SA 292 (ECG) were as follows: The Taxing Mistress of the Grahamstown High Court reduced the fees of the counsel for the applicant by half where a case was postponed on the day of the trial at the request of the defendant, who had applied for a postponement and offered to pay wasted cost.

Counsel charged a full day's fee for the day of the trial he had set aside to attend court. The order for postponement was granted at 10:45 am.

Plasket J held that taxation ensures that 'the party who is condemned to pay the costs does not pay excessive, and the successful party does not receive insufficient costs in respect of the litigation which resulted in the order for costs in terms of Rule 70 of the Uniform Rules of Court.'

In *Thusi v Minister of Home Affairs and Another and 71 Other Cases* 2011 (2) SA 561 (KZP) Wallis J held that the indemnity principle is of general application in the field of costs, and that it has not become outdated.

The discretion vested in the Taxing Master is to allow (all) costs, charges and expenses as appear to them to have been necessary or proper. Their opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable.

The Taxing Master has the discretion to allow, reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that they must act reasonably, justly, and on sound principles with due regard to all the circumstances of the case.

The Taxing Master's discretion is wide, but not unfettered. In exercising it, the Taxing Master must properly consider and assess all the relevant facts and circumstances relating to the particular item concerned. While a Taxing Master may not ignore evidence that may show that work that has been charged for has, in fact, not been done, this does not mean that there is a duty on practitioners to 'prove their claims'.

A Taxing Officer is entitled to take counsel's fee list at face value as constituting a record of the work that has been done. The honesty and professional ethics of counsel ought not to be lightly questioned.

The suggestion that an advocate, when rendering a fee for a full first day trial fee in respect of a matter which has settled or postponed, must necessarily demonstrate that they had turned away work and have no other work, is erroneous. A Taxing Master's starting point should be that, in the absence of evidence to the contrary, advocates as members of an honourable profession, render fees honestly and behave ethically.

An advocate may charge a full day's fee if they '[have] been left with no other income for the day'. 'No other income' means income derived from appearance work, and not chamber work, as this is consistent with the case law.

The Taxing Mistress was guided in her decision by the Guidelines to Taxation of Bills of Costs – Eastern Cape High Courts. However, the guidelines in respect of settled matters conflict with established case law.

The court concluded that the Taxing Mistress erred in reducing counsel's fees and she did not exercise her discretion in accordance with established case law and principles.

Customary law

Appointment of a traditional leader: The facts in *Ludidi v Ludidi and Others* [2018] 4 All SA 1 (SCA) concerned a battle for succession as *Inkosi* (Chief) of the amaHlubi tribe in Qumbu in the Eastern Cape. The appellant and the first respondent were cousins vying for the position. At the time of the death of the last chief in 2012, the recognition of traditional leaders countrywide was regulated by the Traditional Leadership and Governance Framework Act 41 of 2003 (the National Act), read with the Traditional Leadership and Governance Act (Eastern Cape) 4 of 2005 (the Provincial Act).

Acting in terms of the Provincial Act, the Hlubi Royal Family identified the first respondent for recognition as the Chief of the amaHlubi by the Premier. The fifth respondent, the Mancaphayi Royal Family, identified the appellant for the same position. Unable to resolve the impasse, the Member of the Executive Council (MEC) referred the matter back to the Hlubi Royal Family for its decision. The MEC was then informed that the first respondent had been identified as the next Chief of the amaHlubi. The MEC recognised the first respondent as chief and issued a recognition certificate to that effect. However, he did not inform the House of the recognition before it was published as required by s 18(2) of the Provincial Act.

Maya P held that the issues on appeal were, first, whether the appellant's expectation that he had an automatic right to the chieftainship of the amaHlubi on his father's death based on the validity of the latter's appointment under the Transkei Constitution Act as the permanent Chief of the amaHlubi – was legitimate. Secondly, whether the MEC arbitrarily recognised the first respondent as the Chief of the amaHlubi in disregard of evidence that she was identified by only one faction of the fractured royal family and the opposing faction's recommendation. Thirdly, whether the MEC was obliged to afford the appellant a hearing before recognising the first respondent. Fourthly, whether the MEC's failure to inform the House of the first respondent's recognition before its publication in the *Gazette* nullified the recognition.

The court *a quo* correctly decided the various material disputes of fact on the respondents' version and found that the Mancaphayi Royal Family was a recent splinter of the Hlubi Royal Family, formed by the latter's erstwhile members who were not direct descendants of Chief Dyubhele and were opposed to having a female chief.

The foremost question, which arose in the dispute concerned, was who had the right to choose a Chief of the amaHlubi. Based on the relevant provisions of the National and Provincial Acts, and the respondent's version, the court found that the Hlubi Royal Family was a royal family as envisaged in the statutory definition. It was made up of Chief Dyubhele's direct descendants, and remained the custodian of the customs of the amaHlubi and their royal family's lineage and was the sole repository of the right to identify the Chief of the amaHlubi. There was no evidence that the decision-maker in this case, that is, the Hlubi Royal Family, ever made any representation to the appellant that he would become the Chief of the amaHlubi when his father died.

The appeal was dismissed, with no order as to costs.

Insurance law – non-disclosure

Right to avoid liability in the case of material non-disclosure: The facts in *Basson v Hollard Life Assurance Co Limited* [2018] 4 All SA 77 (GJ) were as follows: The plaintiff was the beneficiary under a life insurance policy taken by her husband (the insured) before his death. The insured subsequently passed away and the plaintiff sued the defendant (as insurer) for payment of the proceeds of the policy. The defendant had rejected the claim on the grounds of the insured's alleged misrepresentation and non-disclosure of certain facts to the defendant at the time when application was made for the policy. It was alleged that the deceased had misrepresented the truth regarding a lung mass/dot, which showed on an X-ray. The insured was also alleged to have failed to

disclose that he had a number of other health issues, including a heart or circulation ailment.

The plaintiff admitted that the insured failed to disclose certain facts but stated that the manner in which the relevant questions were phrased in the policy application form was confusing and the insured acted in the honest belief that he was answering correctly. According to the plaintiff, once it was shown that the insured had acted *bona fide* and with an honest belief, it could not be regarded as misrepresentation. The plaintiff also pointed to the fact that the insurer had paid out a funeral benefit, as indicating that the insurer considered itself liable. On the ground that both the funeral policy and the life policy were regulated by the same agreement, the plaintiff argued that any material misrepresentations would result in forfeiture of all benefits in terms of the agreement.

Avvakoumides AJ pointed out that s 59 of the Long-Term Insurance Act 52 of 1998 deals with misrepresentation and failure to disclose material information. An insurer has the right to avoid a contract of insurance not only if the proposer has misrepresented a material fact, but also if they have failed to disclose one. The burden of proving materiality is on the party alleging the misrepresentation or non-disclosure.

It is a naturalia of the insurance contract that the applicant for insurance must disclose material facts to the insurer. For a non-disclosure or a misrepresentation to be legally relevant it must be material. The test to establish whether something is material is whether a reasonable, prudent person would consider that the information constituting the representation (or non-disclosure) should have been disclosed to the insurer so that the latter could form its own view as to the effect of such information on the assessment of the relevant risk.

The court held that the insurer's application and proposal form was clearly worded and unambiguous. The failure to answer the relevant questions truthfully fell short of what was required to overcome the breach of the warranty pleaded by the defendant.

The court further rejected the plaintiff's submissions regarding the payment of the funeral cover costs, thus constituting an alleged waiver by the insurer of its rights to raise the defence of non-disclosure. In this regard the court held that it was only after payment of such proceeds that the defendant established that there were material non-disclosures and misrepresentations. The payment of the funeral costs was an *ex gratia* payment.

The claim was dismissed with costs.

Neighbour law

Duty of lateral support to neighbouring land and property when doing excavations: In *Dias v Petropulos and Another* 2018 (6) SA 149 (WCC); [2018] 4 All SA 153 (WCC) Dias (the plaintiff) alleged that the excavation of the property belonging to the first and second defendants (the defendants) resulted in damage to his own property. The plaintiff's case was that the damage to his property was caused by the mobilisation in June 2008 of the scree mountain slope on which it was located. That slope mobilisation, the plaintiff's case proceeded, was caused through breaches by the defendants of the duty of lateral support they owed to his property. The properties in question were adjacent properties in Camps Bay, Cape Town.

The first defendant disputed that she owed the plaintiff a duty of lateral support for a number of reasons, including that the plaintiff's property had previously been excavated and was no longer in its natural state and that the plaintiff had consented to the first defendant's excavation and thereby waived any right of lateral support it might otherwise have had.

Bozalek J held that there was no authoritative or binding decision in our law limiting a landowner's right of lateral support to the land in its natural state only, as was the case in English law. There were, furthermore, cases where it was held that the right extended to support to buildings on the land. However, where a property had been unduly or unreasonably loaded through the erection of disproportionately large or heavy structures, it would seem unfair that a neighbouring piece of land should attract an equivalently onerous duty of lateral support. The view that the duty of lateral support in relation to contiguous pieces of land was owed to buildings as well, was therefore, too broad a formulation of the right or duty of lateral support – particularly where the contiguous parcels of land were situated on a slope.

Our law in regard to the right of lateral support was squarely located within the law of neighbours in which one of the guiding principles was reasonableness. There was, therefore, no bar to the concept of reasonableness playing a role in determining the scope of the duty of lateral support, more particularly in determining whether a duty of lateral support extending to buildings could be limited where the property damaged by a breach of this duty had been unreasonably loaded by artificial constructions. Therefore, the appropriate approach was to hold that the scope of duty of lateral support extended not only to land but also to buildings, save where such land had been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land. On the evidence, there was no basis to find that the plaintiff had unreasonably loaded his property.

On the evidence, plaintiff's dwelling was properly constructed, and in excellent condition, structurally and otherwise. This changed soon after the excavations started in 2008. Soon thereafter the plaintiff's property started showing serious defects. First, furrows started appearing in the plaintiff's lawn. Secondly, the plaintiff's pool began to detach itself from the house. Thirdly, large cracks appeared in the plaintiff's newly built garage floor. The plaintiff then evacuated his property. From this point on extensive damage began to manifest in the plaintiff's property in the form of cracked tiles, cracks in concrete slabs, shifting doorframes, cracks in the wall, and windows being twisted out of place. The lounge had 100 cracks and the dining room 52. On the expert evidence and on the probabilities, it was the excavations done by the defendant which resulted in the damages to the plaintiff's property.

The plaintiff's claim thus succeeded with costs and the court confirmed the defendant's duty to provide lateral support to the plaintiff's property. The amount of the plaintiff's damages was reserved for determination by the trial court.

Finally, the court also made a ruling on the question whether the plaintiff was allowed to unilaterally withdraw his claim against one defendant. The outcome of this falls outside the scope of the present discussion.

Set-off

Requirement of reciprocity of debts: The parties in *Bannister's Print (Pty) Ltd v D&A Calendars CC and Another* 2018 (6) SA 77 (GJ) were involved in complicated and protracted litigation. It resulted in a large costs order being granted against Bannister's Print (the applicant) in favour of D&A Calendars (D&A) and Darryl Bannister (Darryl) who were the joint respondents in the matters.

The respondents obtained a writ of execution against the applicant for payment of the costs orders. The writ was executed by the Sheriff who attached the applicant's business machinery. The applicant brought an application to have the writ of execution stayed pending an action that it (the applicant) has instituted against the respondents.

The applicant argued that the costs order debt was extinguished by set-off of the claims it had against D&A and/or Darryl.

Meyer J held that the facts of the present case did not establish grounds of justice and fairness on which the court could have exercised its wide discretion to stay the execution of the costs orders in favour of the respondents. The

applicant was responsible for its own misfortune.

There was no explanation before court as to why the applicant has not satisfied the writs of execution by payment.

The four conditions for set-off to operate are that both debts must be –

- of the same nature;
- liquidated;
- fully due; and
- payable by and to the same persons in the same capacities.

In the present case the three debts were all of the same nature or kind, money. It was also trite that any kind of debt, including a judgment debt, may be extinguished by way of set-off. A party may thus rely on set-off against a judgment debt and, if necessary, apply to stay execution on it.

However, the obstacle to the applicant's claim to set-off is the requirement that for set-off to occur there must be reciprocity of debts (both debts must be 'payable by and to the same persons in the same capacities').

The loan debt in question was a debt which, according to the applicant's particulars of claim, was only due and owing by Darryl in his personal capacity. However, the taxed costs constituted a claim which D&A and Darryl (the respondents) indivisible co-creditors had against the applicant.

The respondents had a 'simple joint entitlement' to an 'indivisible performance' by the applicant. They were solidary co-creditors. They were together entitled to the whole performance; one on its or his own was not entitled to demand that the applicant performed to it or to him.

Furthermore, the court was in doubt on the scant facts before it whether the applicant's debt was liquidated in the sense that it was capable of speedy and easy proof.

The application was thus dismissed with costs.

Water law

Use of groundwater: The dispute in *Witzenberg Properties (Pty) Ltd v Bokveldskloof Boerdery (Pty) Ltd and Another* 2018 (6) SA 307 (WCC) was between neighbouring commercial farming enterprises in a winter rainfall area in the Prince Alfred Hamlet. The applicant (Witzenberg) sought an interdict against the first respondent (Bokveldskloof) to prevent the latter from taking water from three boreholes on Bokveldskloof's property, which are situated in close proximity to one of Witzenberg's dams, for any purpose other than the uses permissible under sch 1 of the National Water Act 36 of 1998 (the NWA).

During argument the Minister of Water Affairs and Sanitation (the second respondent) came out with a ruling that caused Witzenberg to narrow down the relief sought to an interdict directing Bokveldskloof to stop abstracting groundwater except as permitted under the NWA. The minister's ruling made under s 35 of the NWA, limited Bokveldskloof's groundwater use to 161 400 cubic metres per year.

Bokveldskloof appealed the minister's ruling to the Water Tribunal, which had the effect of suspending it pending the tribunal's decision. Witzenberg argued that the borehole issue was distinct from the issue of the validity of the minister's ruling and should be separately decided by the present court.

Cloete J pointed out that under the NWA water users were allowed to continue with the 'existing lawful use' of water that had occurred during the two years prior to its commencement (on 1 October 1998). In Bokveldskloof's case the minister determined such use to be the abovementioned 161 400 cubic metres per year. Witzenberg's argument was that Bokveldskloof was already extracting far more than this from the three boreholes. Bokveldskloof, in turn, argued that the limit determined by the minister had been calculated on the wrong basis.

The parties agreed that the NWA introduced a fundamental reform of water law by shifting away from the riparian principle of preferential and hierarchical water use rights to an administered system that operated in the interests of all water users. The NWA removed traditional water law from the domain of private law to that of public law.

The court then considered Witzenberg's standing. It held that the NWA was enacted for the benefit of the general public and not in the interests of a particular person or class of persons and, therefore, the harm required for Witzenberg's standing was not presumed. Witzenberg would have to show, as own-interest litigant, on a balance of probabilities, that it sustained or apprehended actual harm as a result of a breach of the NWA. Since it was not resolved that Bokveldskloof had acted unlawfully at all, the court's putative duty to uphold the doctrine of legality did not arise.

All Witzenberg had shown was a theoretical possibility that the three boreholes were syphoning water from the dam, not that it sustained or apprehended actual harm. Surface water and groundwater were always linked, and the mere fact of connectivity between the dam and the boreholes was of little, if any, assistance in this regard.

The application was dismissed with costs.

Wills

Outdated will cannot revive where testatrix gave clear instruction to destroy it: In *Roos v Saaiman NO and Others* 2018 (6) SA 279 (GP) the testatrix, per signed letter dated 5 December 2011 instructed her bank, which had a will of hers under safeguard, to cancel and destroy it. The letter stated that the 'outdated' will had already been cancelled back in 1999, but that the bank's records failed to reflect this. The bank, acting in accordance with internal policy, did not destroy the will but returned it to the testatrix. The testatrix passed away following a motor-vehicle accident on 4 December 2015. The applicant, the testatrix's spouse, sought an order declaring that the will was not the testatrix's final will and testament, and that she had in fact died intestate. The second respondent, the testatrix's mother and a potential beneficiary under the contested will, opposed the application.

Section 2A(*c*) of the Wills Act 7 of 1953 (the Act) provides that '[i]f a court is satisfied that a testator has ... drafted another document ... by which he intended to revoke his will ... the court shall declare the will ... to be revoked'.

While the second respondent accepted that s 2A(*c*) of the Act (which was inserted in the Act in 1992) did away with the requirement that the intention to revoke a will had to be embodied in a testamentary instrument, she argued that an act of destruction was nevertheless required for revocation by way of destruction.

Teffo J held that while the bank's policy not to cancel or destroy a will on a testator's instruction but to return it could not be faulted, this did not detract from the instruction contained in the deceased's letter. The letter contained a clear *animus revocandi*. Whether it has been destroyed or cancelled, that does not take away the instruction in the letter dated 5 December 2011.

The will was already outdated in 1999, and the keeping of an outdated will could not revive it where there had been a clear written instruction to cancel or destroy it. The deceased's intention with the letter of 5 December 2011 was merely to get the bank to update its records to reflect an earlier cancellation. The absence of destruction was immaterial, given that the letter constituted a valid revocation under s 2A(*c*) of the Wills Act.

The testator thus died intestate. The application was granted with costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, civil procedure, constitutional law, estoppel, housing, immigration, international law, judges, labour law, local authorities, minerals, pension funds, personal injury, trusts, vicarious liability and witnesses.

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December 2018 (6) South African Law Reports (pp 335 – 664); November [2018] 4 All South African Law Reports (pp 289 – 614); 2018 (10) Butterworths Constitutional Law Reports – October (pp 1179 – 1308); 2018 (11) Butterworths Constitutional Law Reports – November (pp 1309 – 1449)

Abbreviations

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LAC: Labour Appeal Court
LC: Labour Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Where PAJA is applicable, it should be the basis on which to review and set aside administrative action: In *Minister of Defence and Another v Xulu* 2018 (6) SA 460 (SCA) the respondent Xulu was a member of the Regular Force of the South African National Defence Force (SANDF) serving on a renewable fixed term contract of two years. The review board of the SANDF renewed the contract on three occasions but declined to do so on the fourth occasion. As a result, the respondent took the matter to the High Court for a review and setting aside of the decision of the review board, relying on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The GP, per Lephoko AJ, held that PAJA was not applicable and dismissed the application. On appeal to the Full Court Tolmay J (Raulinga and Khumalo JJ concurring) upheld the appeal, holding that it was not necessary to consider if PAJA applied as the matter could be disposed of on the legality principle in that in declining to renew the contract the review board did not follow the applicable Policy of the Department of Defence issued on 27 January 2010.

On further appeal the SCA granted the appellants, the Minister of Defence and the Chief of the SANDF, special leave to appeal, but dismissed the appeal itself. The order of the Full Court was changed from renewal of the contract from 2011 until July 2017 to compensation as that period had come and gone by the time of the SCA decision. The amount of compensation was to be as agreed between the parties, failing which to be determined by an arbiter to be appointed by the Chairperson of the Pretoria Bar.

Wallis JA (Lewis, Saldulker, Mocumie JJA and Pillay AJA concurring) held that the Full Court arrived at a correct decision for the wrong reasons. The decision not to renew the respondent's fixed-term contract as a member of the SANDF constituted an administrative action and, was therefore, subject to review in terms of s 6 of PAJA. The approach of the Full Court, in avoiding the question whether the case dealt with administrative action and by disposing of it on the basis of the principle of legality, was in principle incorrect and thus to be discouraged. The right to a just administrative action was the primary source of the power of courts to review the actions of the executive and the administration. Litigants and courts should not circumvent PAJA and the issues it raised by proceeding directly to questions of legality.

If action by the executive and administration constituted administrative action, the jurisdiction of the CC was clear in saying that such was the path that the litigation had to follow. The role of the principle of legality as developed and explained by the CC in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), was to provide a control over exercises of public power that did constitute administrative action.

When dealing with the conduct of the executive and administrative arms of government, the starting point was whether the conduct in question constituted administrative action. If it was the principle of subsidiarity demanded that it be dealt with under PAJA. If it fell outside PAJA then the principle of legality could come into play, bearing in mind that such was a threshold requirement and that the concept of rationality that it invoked was a narrow one and not necessarily the same as that applied in a review under s 6(2)(*f*)(ii) of PAJA. The development of a coherent administrative law demanded that litigants and courts should start with PAJA and only when it did not apply, could they look to the principle of legality and any other permissible grounds of review lying outside PAJA.

Civil procedure

Mortgage bond foreclosure: During April 2018 a number of mortgage bond foreclosure matters served in the GJ before Van der Linde J by way of application. Because of several judgments in various divisions of the High Court, including the instant division, in *Absa Bank Ltd v Mokebe and Related Matters* 2018 (6) SA 492 (GJ); [2018] 4 All SA 306 (GJ), Van der Linde J referred the matters to the Full Court for adjudication as provided for in s 14(1)(*a*) of the Superior Courts Act 10 of 2013. Subsequent thereto, the Judge President of the Division issued a directive setting out the issues that required determination. The main issues to be determined included, among others, whether the court had a discretion to grant a money judgment order while postponing the granting of the order for execution of the property involved; the circumstances under which the court should set a reserve price and how such price were to be determined; revival of the agreement after default by the debtor, as well as the contents of a document initiating proceedings.

The Full Court per Pretorius, Tsoka and Wepener JJ held that:

- In all matters where execution was sought against a primary residence the entire claim, including the monetary judgment, had to be adjudicated at the same time (and not piecemeal).
- Execution against movable and immovable property was not a bar to revival of the agreement until the proceeds of the execution had been realised.
- Any document initiating proceedings where a mortgaged property could be declared executable had to contain a statement made in a reasonably prominent manner and drawing the attention of the defendant/respondent to s 129(3) of the National Credit Act 34 of 2005 (the NCA) indicating that the debtor could pay to the credit grantor all amounts that were overdue, the credit grantor's permitted default charges and reasonable or agreed costs of enforcing the agreement prior to the sale and transfer of the property in order to revive the credit agreement.
- Save in exceptional circumstances, a reserve price should be set by a court, in all matters where execution was granted against immovable property, which was the primary residence of a debtor where the facts disclosed justified such an order.

Elaborating on the above principles the court held that it was both desirable and necessary for the *in personam* (money judgment) and *in rem* (execution order) claims to be heard simultaneously as envisaged in the Practice Manual of the Division. Judgments

to the contrary should not be followed as failure to do so resulted in consequences detrimental to debtors, which could be avoided by the simultaneous hearing of both issues. To that end, there was a duty on banks to bring their entire case, including the money judgment, based on a mortgage bond, in one proceeding simultaneously. Should the matter require postponement for whatever reason, the entire matter fell to be postponed as piecemeal judgments were not competent.

What prevented reinstatement of the agreement in terms of s 129(4)(*b*) of the NCA, in the event of default by the debtor, was only the sale in execution of the immovable property and realisation of the proceeds of such sale. Prior to realisation of the proceeds of the sale the mere attachment was no hindrance to the reinstatement of the agreement. The fact that the mortgaged property had been attached pursuant to default judgment and an order declaring the property specially executable was of no consequence. It was only when the mortgaged property had been sold and the proceeds of the sale had been realised that there could be no reinstatement. That was self-evident as there was nothing to reinstate, the agreement having come to an end.

Rule 46A(8)(e) of the Uniform Rules of Court, in operation since December 2017, empowered the court to set a reserve price for the property at the sale in execution. That price applied only to those properties, which were primary homes of debtors who were individual consumers and natural persons. Setting a reserve price depended on the facts of each case. It would not be possible to set out a *numerus clausus* of the factors to be considered in each case as the reserve price would depend on the facts of each case. That price should be based on all the factors placed before the court by both the creditor and debtor when an order declaring the property to be specially executable is granted.

- See also letters 'Full Bench judgment by Tolmay J (Ledwaba DJP and Mothle J concurring)' 2018 (Dec) *DR* 4.

Criminal law

Unconstitutionality of statutory provisions prohibiting possession, use and cultivation of cannabis by adults for personal consumption in private: Sections 4(*b*) and 5(*b*), read together with part III of sch 2 of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) make it an offence to use, possess or cultivate dependence-producing substance, such as cannabis, except for medicinal purposes. 'Cannabis' is commonly referred to as 'dagga' in South Africa (SA) and 'marijuana' elsewhere. In the same vein s 22A(9)(*a*)(i) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act) make it an offence to acquire, possess, use, manufacture or supply, among others, cannabis without permission of the Director-General, Department of Health. The constitutionality of the above provisions was contested in *Minister of Justice and Constitutional Development and Others v Prince and Others* 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC), where the respondents, Prince and others, alleged that the provisions violated their right to privacy, equality, human dignity and the like in that they criminalised the use, possession and cultivation by an adult for personal consumption in a private place. The WCC per Davis J (Saldanha and Boqwana JJ concurring) declared the impugned provisions unconstitutional and accordingly invalid for violation of the respondents' right to privacy. The operation of the order of invalidity was suspended for a period of 24 months to afford Parliament the opportunity to remedy the defect in the provisions.

The present proceedings before the CC were for confirmation of the order of the High Court. The applicant Minister of Justice and Constitutional Development applied for leave to appeal the High Court order. Such leave was granted but the appeal itself was dismissed. No order was made as to costs save payment by the minister of all disbursements and expenses incurred by the respondents. The court confirmed the order of invalidity regarding use, possession, and cultivation of cannabis by an individual for personal consumption in a private place. However, the court did not confirm the part of the High Court order which declared invalid the 'purchase' of cannabis. It was held that to do so would legalise the sale (dealing in) of cannabis, which was a serious problem in the country and was not permissible.

Reading a unanimous judgment of the court Zondo ACJ held that criminalisation of possession of cannabis by an adult in private for their personal consumption was quite invasive. The prohibition of the performance of any activity in connection with the use, possession and cultivation of cannabis by an adult for their personal consumption was inconsistent with the right to privacy as entrenched in the Constitution and was, therefore, invalid.

As a result of the reading-in approach followed by the court, the position was that –

- an adult person could use or be in possession of cannabis for their personal consumption in private;
- the use, including smoking, of cannabis in public or in the presence of children or non-consenting adult persons was not permitted;
- the use or possession of cannabis in private other than by an adult for their personal consumption was not permissible; and
- the cultivation of cannabis by an adult in a private place for their personal consumption in private was no longer a criminal offence.
- See law reports 'Constitutional law' 2017 (Sept) *DR* 40 for the WCC judgment.

Fundamental rights

Non-recognition of Muslim marriages for all purposes violates the rights of women and children in those marriages: There is currently no law in South Africa, which recognises Muslim marriages, meaning marriages solemnised according to the tenets of Islamic law (*Sharia* law), as marriages for all purposes. What the country has are a number of court decisions and pieces of legislation, such as the Criminal Procedure Act 51 of 1977, the Civil Proceedings Evidence Act 25 of 1969, the Child Care Act 74 of 1983, to name a few, which recognise Muslim marriages for particular purposes only and no more. In *Women's Legal Centre Trust v President of the Republic of South Africa and Others (United Ulama Council of South Africa and Others as* amici curiae) *and two related matters* [2018] 4 All SA 551 (WCC), 2018 (6) SA 598 (WCC) three related cases were consolidated and heard together. In the main case the applicant Women's Legal Centre Trust (WLC), the primary applicant, sought a declaration that the respondents, namely the President of the country, his Cabinet and Parliament (the state), have failed to fulfil an obligation imposed on them by s 7(2) of the Constitution to protect, promote and fulfil the rights contained in various sections of the Constitution by preparing and initiating, diligently and without delay, a Bill to provide for the recognition of Muslim marriages as valid marriages for all purposes in the country and to regulate the consequences of such recognition. Furthermore, the WLC sought an order directing the respondents to fulfil their relevant obligations within a period of 12 months from the granting of the order.

Subject to some amendments the orders sought were granted with costs. The court held that in the event that the contemplated legislation was not enacted within 24 months, and until that was done, the default position would be that:

- A union validly concluded as a marriage in terms of *Sharia* law and, which subsisted at the time of the order would, even after its dissolution in terms of *Sharia* law, would be dissolved in accordance with the Divorce Act 70 of 1979, all the provisions of which would apply to such a union.
- In the case of a husband who was a spouse in more than one Muslim marriage, the court would –

– take into consideration all relevant factors including any contract or agreement and should make any equitable order that was deemed just; and

– any person who, in the opinion of the court, had a sufficient interest in the matter could be joined in the proceedings.

• If administrative or practical problems arose in the implementation of the court order, any interested person could approach for a variation of the order.

Boqwana J (Desai and Salie-Hlophe JJ concurring) held that the continued non-recognition of marriages solemnised according to Islamic tenets infringed the rights to equality and dignity of women and children in those marriages. The right to have any dispute that could be resolved by the application of law decided in a fair public hearing before a court, as well as a child's right to have their interest treated as of paramount importance in every matter concerning the child, were also infringed by non-recognition. The absence of legislation to protect the rights of women and children in Muslim marriages amounted to a breach of a constitutional duty by the relevant arms of the state. Case-by-case and incremental development of the law was not entirely effective. Comprehensive legislation was required because it would provide effective protection of marriages concluded in terms of the tenets of Islamic law, while giving expression to Muslim persons' rights to freedom of religion.

Income tax

Damages for breach of contract is not deductible expenditure, especially if not paid in the production of the taxpayer's income: Section 11(*a*) of the Income Tax Act 58 of 1962, which deals with the general deduction formula, provides among others that: 'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –

(*a*) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature.'

In *Kangra Group (Pty) Ltd v Commission for the South African Revenue Service* [2018] 4 All SA 383 (WCC) the taxpayer, the appellant Kangra Group, had two contracts with AMCI, an American coal trader, to which it supplied coal at the rate of US$ 27,50 per metric ton. When the price of coal escalated to US$ 40,00 per metric ton on the open market the taxpayer was disadvantaged as it had to supply AMCI at the agreed low contract price. For that reason, the taxpayer stopped supplying coal to AMCI in order to sell it on the open market and fetch a better price. The dispute between the parties was referred to arbitration where the taxpayer was ordered to pay R 90 million to AMCI as compensation for breach of contract. Thereafter, the taxpayer sought to deduct the R 90 million in terms of s 11(*a*) as an expenditure incurred in the production of income. The respondent South African Revenue Service assessed the taxpayer for tax on the basis that the amount of R90 million was not deductible. The Tax Court dismissed the appeal against the assessment. A further appeal to the High Court was also dismissed but the respondent was granted only 50% of the costs as the taxpayer had achieved success on another issue, namely regarding reversal of interest charged by the respondent for late submission of tax returns.

Gamble J (Salie-Hlophe J and Thulare AJ concurring) held that the taxpayer, Kangra Group, had not established that the relevant expenditure resulted in it earning any income, either in that tax year or subsequent thereto. As a result of restructuring of the company group and diversion of coal business all income from sales of coal, after breach of contract with AMCI, accrued for the benefit of another company, namely Kangra Coal and not the taxpayer Kangra Group. It was evident, therefore, that any income associated with the alleged expenditure actually accrued for the benefit of Kangra Coal and not Kangra Group. Therefore, payment of the amount of R 90 million by the taxpayer could not be regarded as allowable expenditure under s 11(*a*) as it was not incurred in the production of the taxpayer's income.

The cost price of goods, and not the net realisable value (NRV), is the baseline against which diminution in the value of goods is measured: Section 22(1)(*a*) of the Income Tax Act 58 of 1962 (the Act) provides among others that the amount which shall, in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming) be taken into account in respect of the value of trading stock held and not disposed of by him at the end of such year of assessment, shall be the cost price to such person of such trading stock, less such amount as the commissioner may think is just and reasonable as representing the amount by which the value of such trading stock has been diminished by reason of damage, deterioration, change of fashion, decrease in the market value or for any other reasons satisfactory to the commissioner.

In *Commissioner for the South African Revenue Service v Volkswagen South Africa (Pty) Ltd* [2018] 4 All SA 289 (SCA) for the tax years 2008, 2009 and 2010 far from using the cost price as the value of trading stock not disposed of at the end of the tax year, the respondent taxpayer, Volkswagen, used the net realisable value (NRV), this being the probable future value of the trading stock. The NRV yielded an amount less than the cost price of the trading stock, the result of which was that the taxpayer claimed as a deduction the difference between the cost price and the NRV. The amounts claimed were substantial and reflected the figures of R 72 million, R 24,7 million and R 5,2 million for the respective years. The appellant South African Revenue Service rejected the deduction and after a lengthy audit of the taxpayer's tax affairs issued revised assessments and levied additional tax for the three years. An appeal to the Tax Court was upheld by Eksteen J and assessors who set aside the revised assessments. An appeal against the decision of the Tax Court was upheld by the SCA with costs.

Wallis JA (Mathopo, Navsa, Seriti, and Willis JJA concurring) held that the taxpayer was required to determine the value of its trading stock at a particular point in time, namely the end of the tax year. That was an exercise of looking back at what happened during the year in question. The language of s 22(1)(*a*) was couched in the past tense. Accordingly, the section was not concerned with what might happen to the trading stock in the future but with an inquiry as to whether a diminution in its value had occurred at the end of the tax year. All the instances expressly referred to in the section, namely damage, deterioration, change of fashion and decrease in market value, related to diminution of value occurring prior to that date. In other words, the events relied on as demonstrating a diminution in value of the trading stock should have occurred during the tax year, even though their impact could only be felt in the subsequent year.

The commissioner could only grant a just and reasonable allowance in respect of a diminution of value of the trading stock under s 22(1)(*a*) in two circumstances. The first was where some event had occurred in the tax year in question causing the value of the trading stock to diminish. The second was where it was known with reasonable certainty that an event would occur in the following year which would cause the value of the trading stock to diminish.

On a proper interpretation of s 22(1)(*a*) the cost price of goods, and not the actual or anticipated market value on their sale, was the benchmark against which any claimed diminution in value was to be measured. A claim for an allowance had to be based on events that were known at the end of the tax year for which the allowance was claimed or

the events that it was known would occur in the following year.

The use of NRV was inconsistent with two basic principles that underpinned the Act. The first was that taxable income was determined and taxation levied from year-to-year on the basis of events during each tax year. The commissioner was not concerned with the taxpayer's trading prospects in later years. By contrast NRV was explicitly forward looking. It was concerned with the amount that the trader was likely to receive when the goods were realised and for that reason it took account of expenses that would be incurred in future in making the sale. The second inconsistency with principle was that using NRV had the effect that expenses incurred in a future tax year in the production of income accruing to or received by the taxpayer in that future year, became deductible in a prior year. That was inconsistent with the basic deduction provision in s 11(*a*) of the Act that what could be deducted in any tax year in the determination of taxable income were expenditure and losses 'actually incurred' in the production of the income. Allowing the taxpayer to deduct in a current year expenses that would be incurred in the following year in earning income would fly in the face of that provision.

Labour law

When reinstatement of employees found guilty of racially offensive conduct is not unreasonable: In the case of *Duncanmec (Pty) Ltd v Gaylard NO and Others* 2018 (6) SA 335 (CC); 2018 (11) BCLR 1335 (CC), nine employees of the applicant Duncanmec, the employer, participated in an unprotected strike in the workplace at which they sang a song, which translated into: 'Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer'. Save for singing the song and dancing, the strike was otherwise peaceful without any threat of violence. Thereafter, the employees faced two charges of misconduct, namely participating in an unprotected strike and engaging in racially offensive conduct. The chairperson of the disciplinary hearing found the employees guilty on both charges. Regarding the first charge they were given final written warnings but were dismissed on the second charge as the singing and dancing was found to amount to racism.

The dismissal penalty was reversed at the bargaining council arbitration where the arbitrator, the first respondent Garlard, held that while the song was inappropriate and could be offensive and cause hurt to those hearing it, it nevertheless did not use a racist term. Therefore, the evidence did not demonstrate that the relationship of trust between the employer and employees had broken down. For that reason the employees were reinstated to their positions.

The LC dismissed the employer's review application and made the arbitration award and order of court. Leave to appeal was denied. Thereafter, the LAC dismissed the employer's application for leave to appeal, hence the present application to the CC for leave to appeal. The court granted leave to appeal, but dismissed the appeal itself with no order as to costs.

Reading a unanimous judgment of the court Jafta J held that the word to which the employer objected was not an offensive racist term. The only word used which referred to race was '*boer*'. Depending on the content that word could mean [commercial] 'farmer' or a 'white person' [of Afrikaner heritage]. None of those meanings was racially offensive, a fact, which was conceded by the employer's legal representative during arbitration hearing. As the trade union representing the employees, namely the National Union of Metal Workers of South Africa, did not take issue with the finding of the arbitrator that singing the song at the workplace was inappropriate and offensive in the circumstances, the court had to approach the matter on the footing that the employees were guilty of racially offensive conduct. However, the issue was whether the arbitration award, of reinstatement, was vitiated by unreasonableness.

The correct test was whether the award itself met the requirement of reasonableness. Even if the singing amounted to uttering racist words, dismissal of employees did not follow as a matter of course. There was no principle in South African law that required dismissal to follow automatically in the case of racism. What was required was that arbitrators and courts had to deal with racism firmly and yet treat the perpetrator fairly. The law did not support the proposition that every employee guilty of racism had to be dismissed. In the present case the arbitrator took into account the fact that while the singing of the song was inappropriate, it was nevertheless distinguishable from 'crude racism'. The arbitrator also paid attention to the context in which the misconduct was committed, namely that the strike was peaceful and of a short duration as it was limited to one afternoon as well as the fact that all the affected employees had clean records. Therefore, the reasonableness requirement had been satisfied.

• See employment law update 'Is dismissal the only appropriate sanction for acts of racism?' 2018 (Nov) *DR* 47 and Nadia Froneman '"*Mlungu*" v "*Boer*" – context is everything' 2018 (Dec) *DR* 34.

Road Accident Fund claims

Calculation of five-year prescription period: Section 23(3) of the Road Accident Fund Act 56 of 1996 (the RAF Act) provides, among others, that no claim that has been lodged with the Road Accident Fund (RAF) shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.

In *Road Accident Fund v Masindi* 2018 (6) SA 481 (SCA) the cause of action arose on 17 June 2009 when the respondent Ms Masindi and her minor child were injured in a motor vehicle collision. That had the result that the five-year period within which the summons had to be issued and served would end on 16 June 2014. However, that fell on a public holiday, which had a result that the court was closed and summons could not be issued and served. For that reason the summons was only issued and served a day late, namely on 17 June 2014. Inevitably the appellant RAF raised the special plea of prescription of the claim.

The GJ per Mbongwe AJ dismissed the special plea of prescription, holding that the strict and literal interpretation of s 23(3) of the RAF Act did not accord with justice and that it could not have been the intention of the legislature to deprive the respondent of her full prescription period of five years. The court also relied on s 4 of the Interpretation Act 33 of 1957, which provides, among others, that when any particular number of days is prescribed for the doing of any act or for any other purpose, that period shall be reckoned exclusive of a Sunday or public holiday if such is the last day. The court further relied on reg 1 of the regulations made under the RAF Act, which provides that a 'day' means any day other than a Saturday, Sunday or public holiday.

The SCA dismissed with costs an appeal against the decision of the High Court, albeit for different reasons. Mocumie JA (Shongwe ADP, Majiedt, Swain JJA and Rogers AJA concurring) held that it was trite that regulations were subordinate to an Act of Parliament. As a general rule, regulations could not be used to interpret any piece of legislation where there was ambiguity. In any event, in the instant case the regulations did not regulate how a 'day' had to be interpreted in any setting other than as provided for in the regulations themselves. The court was not concerned with any act performed in terms of the regulation but with the interpretation of s 23(3), a section which did not even use the word 'day'. The High Court should not have invoked s 4 of the Interpretation Act or the definition of a 'day' as given in reg 1 to come to the rescue of the respondent.

A strict and literal approach to interpreting the language of s 23(3) would defeat the very protection afforded by s 34 (access to courts) of the Constitution. On a proper in-

terpretation of s 23(3), where the five-year period for bringing a claim ended on a day when the court was closed, so that a summons could not be issued and served on that day, the five-year period would end on the next working day. To hold otherwise would deprive the respondent of her right to claim, an absurdity, which the legislature could not have contemplated. The consequences would be too harsh to the respondent as opposed to the appellant.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Adjusted variable import duty tariff, cancellation of registration of pension fund, collateral payment falling to be deducted from compensation for personal injury, condonation of failure to exhaust internal remedies before seeking review of administrative action, disgorgement of secret profits made by employee in breach of duty of good faith owed to employer, duty of motorist when overtaking a cyclist, infringement of copyright, joinder of parties, lawfulness of meeting of municipal council, non-appealability of interim interdict, requirements for interim interdict, right not to be evicted without court order, right to housing, shareholder consent before issuing shares, test for unlawful arrest and detention and universal partnership between cohabiting life partners. ❑

By Anthony Pillay

Cyber liability insurance

As recently as October 2018, the International Bar Association (IBA) published 'Cybersecurity Guidelines' (available at www.ibanet.org). The duty to safeguard the confidentiality of client information is as old as the legal profession. In processing both the client information and our own business information, the vast majority of which is in electronic form, legal professionals who chose to avail themselves of the undisputed advantages of information and communications technologies are duty bound to understand the risks of doing so and to establish and maintain safeguards against the risks that they may be exposed to. Against this background the Law Society of South Africa (LSSA) has for many years published guidelines on Information Security and Protection of Personal Information that have been available on its website at www.lssa.org.za. The guidance provided by the LSSA is confirmed in the Cybersecurity Guidelines and every legal professional who processes information electronically should – if they are diligent in discharging their duties – read and become familiar with these guidelines.

Use of the guidelines must be recognised for what they are. They provide assistance but are not definitive checklists. We all process different information, we use different technologies and have different perceptions as to how information should be processed and the security safeguards appropriate to the processing. This demands that legal professionals must devote time to understanding cyber risks and what cybersecurity is appropriate. It must also be accepted that the obligation that rests on legal professionals, because of the sensitivity of the information that they process and their professional duty, is onerous.

It is only once risks are understood that decisions may be taken as to whether the risk –

- is acceptable (the consequences may be insignificant or even if the consequences are significant the chances of the risk actually being realised are remote); and
- if unacceptable, what are the appropriate control measures that must be established, implemented and consistently maintained to protect client and business information?

If a risk assessment is properly considered, it will become evident that some risks are extremely difficult to protect against, despite the best endeavours of parties seeking to do so, therefore, cyber liability insurance may need to be considered to mitigate the financial and reputational impact of this risk. As an integral part of the Cybersecurity Guidelines, in ch 2 dealing with organisational processes and under the heading 'Consider cyber liability insurance', the guideline points out:

'• Even if law firms implement their best cybersecurity technologies and processes, firms will still have some level of risk exposure [residual risk].

• Law firms should assess their risk exposure as outlined and take out adequate cyber-insurance as part of the firm's overall cybersecurity risk mitigation strategy.'

The reality is that in South Africa (SA) cyber liability is expressly excluded from cover provided by the Attorneys Insurance Indemnity Fund NPC (AIIF). As a result, many legal professionals are not covered against cyber risks and, therefore, will be unable to recover from a serious breach resulting in significant financial exposure.

The risk to the legal profession in SA is exacerbated by our being the second most targeted country in the world with regard to cyberattacks. In the case of business e-mail compromises, the AIIF reported in August of 2018 that since the exclusion of cyber liability insurance with effect from 1 July 2016, the AIIF had been notified of over 110 cybercrime related claims with a total value of R 70 million.

In considering cyber liability insurance, it must be understood that – as with physical insurance – the insured has an obligation to establish and maintain appropriate security measures as a condition of the grant of insurance cover. In the same manner that unprotected physical premises will be either uninsurable, alternatively subject to extremely high premiums and excesses, so too will cyber insurers require that the insured fulfils certain minimum requirements. Where an insured has taken cognisance of the guidelines provided by the LSSA and the IBA it is highly likely that most of these boxes will be ticked.

As both cybersecurity and cyber liability insurance are a rapidly developing field, the LSSA Cybersecurity Helpdesk will, on a continuous basis, engage with information security professionals and cyber insurers in seeking to address issues which are specifically appropriate to the profession. In this regard, it is proposed that in the future a list of underwriters providing cyber liability insurance (listed by the South African Insurance Association) will be published on the LSSA website. This will provide contact information of underwriters or their accredited brokers, who legal professionals may be approached in addressing this critical aspect of legal professional's cybersecurity management (see www.lssa.org.za).

The Law Society of South Africa's Cybersecurity Helpdesk is headed by Anthony Pillay. Mr Pillay is currently the Acting Executive Director of the Law Society of South Africa. ❑

New legislation

Legislation published from 1 November – 28 December 2018

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

Bills

Foreign Service Bill B35A of 2015.
Foreign Service Bill B35B of 2015.
Administrative Adjudication of Road Traffic Offences Amendment Bill B38C of 2015.
Administrative Adjudication of Road Traffic Offences Amendment Bill B38D of 2015.
Civil Union Amendment Bill 11A of 2018.
Civil Union Amendment Bill 11B of 2018.
Performers' Protection Amendment Bill B24B of 2016.
Cybercrimes Bill B6B of 2017.
Traditional Leadership and Governance Framework Amendment Bill B8C of 2017.
Traditional Leadership and Governance Framework Amendment Bill B8D of 2017.
Copyright Amendment Bill B13B of 2017.
National Health Laboratory Service Amendment Bill B15C of 2017.
National Health Laboratory Service Amendment Bill B15D of 2017.
Road Accident Benefit Scheme Bill B17A of 2017.
Road Accident Benefit Scheme Bill B17B of 2017.
iKamva Digital Skills Institute Bill B10B of 2018.
National Gambling Amendment Bill B27B of 2018.
Child Justice Amendment Bill B32A of 2018.
Child Justice Amendment Bill B32B of 2018.
Science and Technology Laws Amendment Bill B42 of 2018.
National Sport and Recreation Amendment Bill B43 of 2018.
Civil Aviation Amendment Bill B44 of 2018.
Postal Services Amendment Bill B45 of 2018.
Carbon Tax Bill B46 of 2018.
Regulation of Gatherings Amendment Bill B47 of 2018.

Promulgation of Acts

Public Audit Amendment Act 5 of 2018. *Commencement:* See s 18 for commencement dates. GN1260 *GG*42045/20-11-2018 (also available in Afrikaans).

Extension of Security of Tenure Amendment Act 2 of 2018. *Commencement:* To be proclaimed. *GG*42046/20-11-2018 (also available in Afrikaans).

Labour Laws Amendment Act 10 of 2018. *Commencement:* To be proclaimed. GN1305 *GG*42062/27-11-2018 (also available in Afrikaans).

National Minimum Wage Act 9 of 2018. *Commencement:* 1 January 2019 (see below). GN R1303 *GG*42060/27-12-2018 (also available in Tshivenda).

Basic Conditions of Employment Amendment Act 7 of 2018. *Commencement:* The Act came into effect immediately after the National Minimum Wage Act 9 of 2018. GN1302 *GG*42059/27-11-2018 (also available in Afrikaans).

Labour Relations Amendment Act 8 of 2018. *Commencement:* To be proclaimed. GN1304 *GG*42061/27-11-2018 (also available in Afrikaans).

Commencement of Acts

Labour Relations Amendment Act 8 of 2018. *Commencement:* 1 January 2018. GN R1377 *GG*42103/12-12-2018 (also available in Afrikaans).

National Minimum Wage Act 9 of 2018 (except s 17(4)). *Commencement:* 1 January 2019. GN R1378 *GG*42104/12-12-2018 (also available in Afrikaans).

Selected list of delegated legislation

Allied Health Professions Act 63 of 1982
Fees payable by students, interns and practitioners. BN176 *GG*42068/30-11-2018.

Auditing Professions Act 26 of 2005
Amendment of the Code of Professional Conduct for Registered Auditors. BN171 *GG*42037/16-11-2018.

Basic Conditions of Employment Act 75 of 1997
Amendment of Sectoral determination 7: Domestic Worker Sector. GN1332. *GG*42077/3-12-2018 (also available in isiZulu).
Amendment of Regulations. GN1402 *GG*42124/19-12-2018.

Broad-Based Black Economic Empowerment Act 53 of 2003
Codes of good practice on Broad-Based Black Economic Empowerment: Defence Sector Code. GN1223 *GG*42021/9-11-2018.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Regulation on IOD/OD documents to be provided by employers to Compensation Fund. GN1217 *GG*42021/9-11-2018.
Employer registration form. GN1386 *GG*42113/14-12-2018.
Application for change of nature of a business. GN1387 *GG*42113/14-12-2018.
Audit of return of earnings. GN1385 *GG*42113/14-12-2018.
Annual increase in medical tariffs for medical service providers. GenN807 *GG*42112/14-12-2018.

Competition Act 89 of 1998
Amendment of the rules for conduct of proceedings in the Competition Commission (merger fees). GN1336 *GG*42082/4-12-2018.

Construction Industry Development Board Act 38 of 2000
Standard for minimum requirements for engaging contractors and sub-contractors on construction works contracts. GenN688 *GG*42021/9-11-2018.
Standard for health and safety plans and auditing requirements. GenN689 *GG*42021/9-11-2018.

Continuing Education and Training Act 16 of 2006
Conditions for the disposal of and alienation of movable assets by Technical and Vocational Education and Training Colleges. GN1368 *GG*42100/14-12-2018.

Electronic Communications Act 36 of 2005
Amendment of the Processes and Procedures Regulations for Individual Licences. GenN767 *GG*42087/5-12-2018.

Health Professions Act 56 of 1974
Amendment of the rules relating to the registration by medical practitioners and dentists of additional qualifications. BN172 *GG*42037/16-11-2018.

Higher Education Act 101 of 1997
Amendment of the minimum admission requirements for Higher Certificate, Diploma and Bachelor's Degree programmes requiring a National Senior Certificate. GN1309 *GG*42068/30-11-2018.

Minimum admission requirements for Higher certificate, Diploma and Degree programmes requiring a National Certificate (Vocational) at Level 4 of National Qualifications Framework. GN1345 *GG*42092/7-12-2018.

Amendment of the minimum admission requirements for entry into Bachelor's Degree Programmes for holders of the National Senior Certificate. GN1369 *GG*42100/14-12-2018.

Housing Consumers Protection Measures Act 95 of 1998

Owner builder exemption application form. BN174 *GG*42068/30-11-2018.

Immigration Act 13 of 2002

First Amendment of the Immigration Regulations, 2014. GN R1328 *GG*42071/29-11-2018.

Interim Protection of Informal Land Rights Act 31 of 1996

Extension of application of provisions to 31 December 2019. GN1384 *GG*42111/14-12-2018 (also available in Afrikaans).

Judges' Remuneration and Conditions of Employment Act 47 of 2001

Determination of salaries and allowances of judges. GN1379 *GG*42107/13-12-2018.

Labour Relations Act 66 of 1995

Rules for the conduct of proceedings before Commission for Conciliation, Mediation and Arbitration (CCMA). GenN776 *GG*42092/7-12-2018.

Picketing Regulations. GN R1393 *GG*42121/19-12-2018 (also available in Afrikaans).

Guidelines on balloting for strikes or lockouts issued in terms of s 95(9). GN R1397 *GG*42121/19-12-2018.

Repeal of the Code of Good Practice on the handling of sexual harassment cases. GN R1394 *GG*42121/19-12-2018.

Legal Practice Act 28 of 2014

Suspension of the code of conduct for legal practitioners, candidate legal practitioners and juristic entities. GenN703 *GG*42035/14-11-2018.

Amendment to rule 16 of the rules published in terms of the Act: Election of provincial councils. GenN812 *GG*42127/21-12-2018.

Local Government: Municipal Systems Act 32 of 2000

Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers. GN1224 *GG*42023/8-11-2018.

Mining Charter, 2018

Amendment of the Mining Charter. GN1398 *GG*42118/19-12-2018.

Implementation guidelines. GN1399 *GG*42122/19-12-2018.

Amendment of the Broad-Based Socio-Economic Empowerment Charter for Mining and Minerals, 2018. GN1421 *GG*42130/20-12-2018.

National Education Policy Act 27 of 1996

Approval of the policy on home education. GN1239 *GG*42037/16-11-2018.

National Environmental Management Act 107 of 1998

Department of Minerals and Energy Third Edition Environmental Management Plan (2016/2020). GN1192 *GG*42010/2-11-2018.

National Minimum Wage Act 9 of 2018

Regulations. GN1401 *GG*42124/19-12-2018.

National Road Traffic Act 93 of 1996

Exemption of motor vehicles (transporting ISO containers) that do not comply with height restriction from 2 January 2019 to 1 January 2020. GN1392 *GG*42120/19-12-2018.

Pharmacy Act 53 of 1974

Fees payable to the South African Pharmacy Council. BN170 *GG*42016/2-11-2018.

Project and Construction Management Professions Act 48 of 2000

Fees and charges. BN177 *GG*42081/4-12-2018.

Promotion of National Unity and Reconciliation Act 34 of 1995

Amendment of regulations relating to assistance to victims in respect of higher education and training. GN R1373 *GG*42101/14-12-2018.

Property Valuation Act 17 of 2014

Regulations. GN R1321 and GN R1322 *GG*42064/30-11-2018.

Protection of Personal Information Act 4 of 2013

Regulations relating to the protection of personal information, 2018. GN R1383 *GG*42110/14-12-2018 (also available in Afrikaans).

Public Finance Management Act 1 of 1999

Rate on interest on government loans from 1 January 2019 (10,25%). GenN817 *GG*42139/28-12-2018.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of deputy president, ministers and deputy ministers of 2018/2019. Proc37 *GG*42107/13-12-2018.

Determination of salaries and allowances of members of National Assembly and permanent delegates to the National Council of Provinces. Proc38 *GG*42107/13-12-2018.

Determination of upper limit of salaries of premiers, members of executive councils and members of provincial legislatures of 2018/2019. Proc39 *GG*42107/13-12-2018.

Determination of upper limits of salaries, allowances and benefits of different members of municipal councils. GN1426 *GG*42134/21-12-2018.

Rules Board for Courts of Law Act 107 of 1985

Amendment of the rules regulating conduct of proceedings of Supreme Court of Appeal (r 18). GN R1318 *GG*42064/30-11-2018 (also available in Afrikaans).

Skills Development Act 97 of 1998

Sector Education and Training Authorities (SETAs) Workplace Based Learning Programme Agreement Regulations, 2018. GN1241 *GG*42037/16-11-2018.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for Ngwelezane. GN1216 *GG*42021/9-11-2018.

Societies for the Prevention of Cruelty to Animals Act 169 of 1993

National Council of Societies for the Prevention of Cruelty to Animals: Amendment of Rules. BN182 *GG*42100/14-12-2018.

South African Police Service Act 68 of 1995

Amendment of regulations. GN1266 *GG*42053/23-11-2018.

South African Reserve Bank Act 90 of 1989

Amendment of the directive for conduct within National Payment System in respect of the collection of payment instructions for authenticated collections. GenN801 *GG*42100/14-12-2018.

Special Investigating Units and Special Tribunals Act 74 of 1996

Referral of matters to existing special investigating unit and special tribunal. Proc R36 *GG*42101/14-12-2018.

State Attorney Act 56 of 1957

Establishment of Mpumalanga Branch Office. GN R1429 *GG*42140/28-12-2018 (also available in Afrikaans).

Tax Administration Act 28 of 2011

Incidences of non-compliance by a person that are subject to a fixed amount penalty. GN1372 *GG*42100/14-12-2018 (also available in Afrikaans).

Tourism Act 3 of 2014

National Grading System for Tourism. GenN678 *GG*42010/2-11-2018.

Unemployment Insurance Act 63 of 2001

Amendment of the Unemployment Insurance Act Regulations. GN R1434 *GG*42140/28-12-2018.

Draft delegated legislation

National norms and standards for the Management of Elephants in South Africa in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GN1208 *GG*42015/2-11-2018.

Proposed amendment of regulations relating to farm feeds in terms of the Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. GN1213 *GG*42021/9-11-2018.

Draft International Mobile Telecommunication (IMT) Roadmap in terms

of the Electronic Communications Act 36 of 2005 for comment. GenN683 *GG*42021/9-11-2018.
Amendment of reg 15 of the Competition Commission Rules in terms of the Competition Act for comment. GN1227 *GG*42030/12-11-2018.
Addendum on the recognition of qualifications of asylum seekers and refugees in terms of the National Qualifications Framework Act 67 of 2008 for comment. GN1256 *GG*42041/16-11-2018.
Proposed Amendment of Regulations Relating to Farm Feeds Undesirable Substances in terms of the Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. GN1237 *GG*42037/16-11-2018.
Proposed Amendments to the Listing Requirements of ZAR X in terms of the Financial Markets Act 19 of 2012. BN173 *GG*42037/16-11-2018.
Revised fees for CIPC services in terms of the Companies Act 71 of 2008 for comment. GN1296 *GG*42053/23-11-2018.
Proposed levies on medical schemes in terms of the Council for Medical Schemes Levies Act 58 of 2000. GenN766 *GG*42084/5-11-2018.
Proposed repeal of staff regulations in terms of the Land Bank and Agricultural Development Act 15 of 2002. GN1348 *GG*42092/7-12-2018.
Proposed amendments to the listing requirements of Equity Express Securities Exchange (EESE) in terms of the Financial Markets Act 19 of 2012. BN181 *GG*42092/7-12-2018.
Veterinary Procedural Notice for African Horse Sickness Control in South Africa in terms of the Animal Diseases Act 35 of 1984 for comment. GenN770 *GG*42092/7-12-2018.
Proposed revised s 321 of the code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005. BN179 *GG*42092/7-12-2018.
Draft amendment of the regulations for matters relating to the functions of the National Consumer Tribunal and rules for conduct of matters before the Tribunal in terms of the National Credit Act 34 of 2005. GN1364 *GG*42092/7-12-2018.
Draft Conformity Assessment Framework for Equipment Authorisation in terms of the Independent Communications Authority of South Africa Act 13 of 2000. GN1381 *GG*42108/13-12-2018.
Draft ordering system specification for number portability in terms of the Electronic Communications Act 36 of 2005. GN1382 *GG*42109/13-12-2018.
Draft sports broadcasting services amendment regulations, 2018 in terms of the Independent Communications Authority of South Africa Act 13 of 2000. GN1388 *GG*42115/14-12-2018.
Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R1375 *GG*42101/14-12-2018.
Draft Price Discrimination Regulations in terms of the Competition Act 89 of 1998. GN1423 *GG*42133/21-12-2018.

Draft amended Code of conduct for legal practitioners, candidate legal practitioners and juristic entities in terms of the Legal Practice Act 28 of 2014. GenN813 *GG*42127/21-12-2018.

Draft regulations on the employment of foreign nationals in terms of the Employment Services Act 4 of 2014. GN R1433 *GG*42140/28-12-2018.
Draft regulations on the registration of private employment agencies and temporary employment services in terms of the Employment Services Act 4 of 2014. GN R1432 *GG*42140/28-12-2018.
Draft regulations on the registration of public employment agencies in terms of the Employment Services Act 4 of 2014. GN R1431 *GG*42140/28-12-2018.
Draft regulations on the registration of work seekers in terms of the Employment Services Act 4 of 2014. GN R1430 *GG*42140/28-12-2018.

Draft Bills

Draft Expropriation Bill. GN1409 *GG* 42127/21-12-2018. ❑

The battles of single and unwed fathers

By Marici Corneli Samuelson

Living in an era where many parents are not married, not living together or co-habiting, it is important for parents to know their rights and understand the Children's Act 38 of 2005 (the Children's Act).

It has been seen in the past that South African unmarried and divorced fathers have to battle to have contact or to maintain contact with their children.

Even after a divorce, the biological father of a child still has full parental rights to his child/children, unless a court orders otherwise. While married fathers automatically have these rights, unmarried fathers do not.

Chapter 3 of the Children's Act beginning with s 18, deals with parental responsibilities and rights. Section 19 deals with parental responsibilities and rights of mothers, s 20 deals with parental responsibilities and rights of married fathers, while s 21 specifically deals with parental responsibilities and rights of unmarried fathers.

There are mothers and fathers who are married and raising their child/children together. There are single mothers and fathers who are single because they never married or they were divorced. All these families have rights and responsibilities for their child/children. They do not always have the same rights and responsibilities and the Children's Act explains the differences.

Because the rights and responsibilities of parents can differ, it can become confusing trying to explain who has a right and who has not. We must distinguish between the different types of parents a child/children can have in order to explain the rights each of the parents have.

In order to compare the parental responsibilities and rights of different types of parents we can place the rights and responsibilities in four separate boxes, namely –

- guardianship;
- care;
- contact; and
- maintenance (financial support).

The number of rights and responsibilities a parent has depends on the type of relationship the parent has with the child/children and can be summarised as follows –

- married biological mothers and fathers;
- divorced biological mothers and fathers; and
- unmarried biological mothers have full parental responsibilities and rights, which includes contact and maintenance (financial support).

Unmarried biological fathers only have specified parental responsibilities and rights, which includes contact and maintenance (financial support). Unmarried father's parental responsibilities and rights do not include guardianship and care.

A court can give a parent more responsibilities and rights if their parental rights and obligations do not include all four bullet points.

Pertinent questions

Here are some important questions and answers pertaining to different parents and their rights and responsibilities:

When can an unmarried father obtain parental rights and responsibilities towards his child/children?

An unmarried father can obtain parental rights and responsibilities in the following circumstances:

- if he was living with the child/children's mother at the time of the child/children's birth; or
- if he, regardless of whether he has or is living with the mother of the child/children –
  - – consents or applies to be identified as the child/children's father, or pays damages in terms of customary law;
  - – contributes or has attempted in good faith to contribute to the child/children's upbringing for a reasonable period; and
  - – maintenance of the child/children for a reasonable period.

How can an unmarried father obtain parental rights and responsibilities?

Guardianship or contact and care can be assigned to an interested person by an order of the court if –

- the unmarried father only wants to apply for care and/or contact, he can do so in the Children's Court; or
- the unmarried father wants to apply for guardianship, an application must be made in the High Court.

The High Court is the only court that can give a person permission to become a guardian. A Children's Court can give a person permission to care and contact.

What factors will the court consider when an application for parental rights and responsibilities is lodged?

The court will consider:

- The best interests of the child.
- The relationship between the unmarried father and the child/children, any other person and the biological mother.
- The commitment the unmarried father has shown towards the child/children.
- Whether the unmarried father has contributed or attempted to contribute to the maintenance of the child.
- Any other factor the court considers to be relevant, such as –
  - – a history of violence towards child/children;
  - – the effect of separating the child from their mother; or
  - – the child/children's voice according to ss 7(*n*) and 10 and 31; in relation to the relief sought in the application.

Does an unmarried biological father have to pay maintenance towards his child/children?

Yes, an unmarried father has a duty to maintain his child/children and the child/children have a right to be maintained.

The unmarried father not only acquires the parental right to have contact with the child/children, but also acquire the parental responsibility to contribute towards the maintenance of his child/children.

It is important to note that maintenance and access are treated separately in terms of South African law. This means that both parents have a right to see their child/children regardless if maintenance is paid.

Does an unmarried father automatically have guardianship of his child/children?

No, as shown above only married biological mothers and fathers, divorced biological mothers and fathers and unmarried biological mothers have full parental responsibilities and rights, which includes guardianship.

What happens if the unmarried couple are both under the age of 18 and the girl falls pregnant? For s 19(2) to apply, both biological parents must be minors or mentally disadvantaged in some way. In such a scenario the guardian of the mother becomes the guardian of the child/children.

Must an unmarried father be considered when making important decisions regarding his child/children?

- Only a child's guardian can consent to –
  - – the child's adoption;
  - – the child's application for a passport;
  - – the departure or removal of the child from SA;
  - – the child's marriage; or
  - – the alienation or encumbrance of any immovable property of the child.

If a child has more than one guardian, the consent of all the guardians are necessary in respect of the matters listed above.

Legal guardianship can be acquired with a High Court application or in a parent's last will and testament.

If an unmarried father does not have guardianship, his consent in respect of the above matters is not required.

A good way forward is to consider parental responsibilities and rights agreements in terms of s 22

- The mother or any other person who has parental responsibilities and rights in respect of the child/children may enter into an agreement with the biological father who does not have s 20 and 22 parental responsibilities and rights.
- In the same manner any other person with an interest in the care, well-being and development of the child/children can also acquire these rights.
- More than one person may hold these rights to the same child/children.
- Examples include: Step-parents, siblings, grandparents, aunts and uncles and, even care-givers.
- Such a parental responsibilities and rights agreement (PRR) must be in the prescribed format with correct particulars, to take effect when registered with the Family Advocate's Office or made an order of the High Court, or the Children's Court on application by the parties to the agreement, if no specifics regarding guardianship is contained.
- Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.

A parenting plan or PRR agreement should exist whether or not you were married.

The parenting plan will outline which parent the child lives with, the amount of time the child will spend with each parent, how maintenance will be paid, how you will go about making major decisions about the child and how parents will work out any major disagreements.

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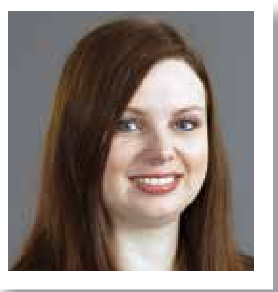
Employment law update



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Changes to retirement age

In *BMW (South Africa) (Pty) Limited v National Union of Metalworkers of South Africa and Another* [2018] JOL 40518 (LAC), an employee approached the Labour Court (LC) alleging that her dismissal was automatically unfair as the employer insisted that she retire on reaching the age of 60. The LC held that this was an automatically unfair dismissal in terms of s 187(1)(*f*) of the Labour Relations Act 66 of 1995.

The employer then appealed the LC's decision. The employee cross-appealed as she had claimed damages for loss of earnings that she would have earned had she worked until the age of 65 and this claim had been dismissed by the LC. The employer alleged that the employee had agreed to retire and, as such, her employment terminated automatically by the effluxion of time. The employer alleged in the alternative that in the event that the employee had not agreed, she had retired at the normal retirement age and thus this did not constitute a dismissal. The employee argued that she did not consent to a retirement age and that she had in fact elected in writing to preserve her vested right to retire at the age of 65.

The Labour Appeal Court (LAC) accordingly had to consider whether there was an agreed or normal retirement age of 60. The employee's letter of appointment was silent on retirement age. It did, however, incorporate a staff handbook by reference. At the time of the employee's appointment, this handbook referred to a retirement age of 65 but expressly provided that it could be varied unilaterally by the employer. The employer acknowledged that it did not have the power to unilaterally amend the employment contract. In about 1994, the employer changed its policy and the BMW pension fund rules to reflect a retirement age of 60. It was communicated to the employees that the retirement age had changed to 60. It also stated that those employees who wanted to retain a retirement age of 65 would be able to do so but would need to communicate this in writing by 31 May 1995, failing which the change in retirement age would be implemented.

The employer later realised that some employees had not exercised their rights in this regard as certain employees were of the view that the change did not impact them as they were members of a provident fund and not a pension fund. Thus, the employer sent another communication to the employees in 1997 referring them to the 1995 communication and stating that they had until 24 March 1997 to make their election should they wish to do so. The employee stated that she was aware of this communication and completed the form to preserve her right to a retirement age of 65. She alleges that she sent this form to the relevant person but did not retain a copy of the form. She also said that she followed up on the status of her election form but could not remember the name of the person she spoke to in this regard. She had no evidence that the election form was received by the employer.

In 2010 the employee noticed that her benefit statement recorded her retirement age as 60. She said that she went back through her benefit statements and the change to 60 appeared from 2000 onwards. She communicated with the relevant personnel. On investigation, she was informed that the employer had no record of an election form being submitted by her and thus the change in her retirement age was implemented. She was invited to provide proof that she submitted an election form. She did not respond to this but re-opened the matter about three years later as her 60th birthday was approaching. She stated that she did not accept the change to her retirement age and the onus was on the employer to prove that she had. She lodged a grievance stating that she was pressurised to retire. During this process she never alleged that she had submitted the election form preserving her rights. Instead, she said that the employer must prove that she had signed to accept the change. The first time that she raised the issue that she had submitted the election form was after she retired and instituted this claim. Thus, the LAC found that there were material inconsistencies in her version. Her demand that the employer provide proof that she accepted the retirement age of 60 is inconsistent with her later allegation that she had made an election for her retirement age to remain 65.

The LAC held that the probabilities were against the employee's version and the LC had misdirected itself by not engaging on these issues. It was found that given the delay between 1997 and 2010 and then the further delay from 2010 until 2014, it was improbable that the employee had completed the election form and preserved her right to retire at 65. Her employment accordingly terminated on the agreed or normal retirement age and she was not automatically unfairly dismissed. The appeal was upheld.

Dismissal for failing to obey an instruction to attend a performance meeting

In *TMT Services and Supplies (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others* [2018] JOL 40517 (LAC), the employee was dismissed for gross insubordination after failing to attend a meeting to discuss an audit report on her performance. When the employee's manager had phoned her the day before to schedule the meeting the employee advised that she felt uncomfortable about the meeting as she did not want the person who had conducted the audit on her performance to attend the meeting. Her manager stated that this individual needed to be in attendance as she was the author of the report on her performance. The employee sent an e-mail to her manager that night confirming that she was not comfortable in attending the meeting and asked to reschedule the meeting and be given an agenda. Her manager responded in the early hours of the morning stating that she needed to attend the meeting. She confirmed in an SMS that they would see each other at the meeting. She alleges that she did not receive these communications until much later as her phone battery was flat. When she did receive the communications, she responded to say that she was not nearby and asked if they could arrange the meeting for another day.

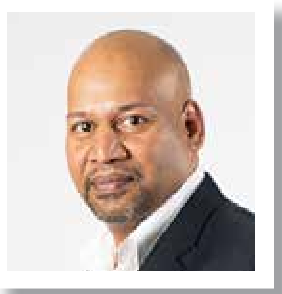
The employee was dismissed for gross insubordination for failing to obey an instruction. The employee had been engaged on a five-year fixed term contract and had three years remaining on the

contract at the time. The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the arbitrator found that the dismissal was fair. The matter was then taken on review to the Labour Court (LC). The LC found that the dismissal was unfair and ordered the employer to pay the employee the balance of the fixed term contract remaining from the date of dismissal.

On appeal, the Labour Appeal Court (LAC) had to determine whether the decision reached by the arbitrator was one that a reasonable decision maker could make. It was held that an arbitrator is afforded the power to exercise discretion and make a value judgment as to the severity of misconduct. Thus, the decision of the arbitrator must stand unless no reasonable arbitrator could have reached that decision. The LAC placed great emphasis on the fact that the employee made herself unavailable for the meeting before getting a response from the manager accepting her request for a postponement. It was found that she should have attended the meeting in the absence of being excused from it.

This said, the LAC considered whether progressive discipline should have been applied, particularly because the act of defiance was an isolated event and the defiance seemed to be triggered by apprehension instead of malice. It was held that the test to be applied is not whether a reasonable decision maker could have imposed a lesser sanction but rather whether no reasonable decision maker could have found dismissal appropriate. It is, therefore, a higher threshold. The arbitrator had found that the refusal to attend the meeting undermined the employment relationship and broke down the trust with her manager. Thus, the arbitrator was of the view that dismissal was appropriate. It was held that the arbitrator's decision was not one that no reasonable decision maker could make particularly when regard is had to the fact that the employee tried to manipulate a postponement.

The LAC found that the LC conflated an appeal with a review and the appeal was accordingly upheld.



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***NUMSA obo members v Transnet SOC Ltd* (LC) (unreported case no JS427/15, 31-10-2018) (Van Niekerk J)**

Under the heading 'Freedom of Association' s 4(2)(*a*) of the Labour Relations Act 66 of 1995 (the LRA) affords every employee the right to participate in lawful trade union activities. Section 5(2)(*c*)(iii) states that no person may prejudice or threaten to prejudice an employee or person seeking employment for past, present or anticipated participation in the lawful activities of a trade union.

Is the practice of employees wearing their trade union t-shirts at their workplace, considered a lawful trade union activity?

In October 2014 the employer Transnet adopted a clothing policy, which permitted employees wearing trade union t-shirts only if their trade union was a recognised union in the workplace. Employees were further advised that employees who breach this rule would be disciplined.

The applicant NUMSA was not a recognised union and sought to challenge the policy by way of launching an action at the Labour Court.

In June 2015 Transnet amended its policy to ban employees from wearing all trade union t-shirts irrespective of whether the union was recognised or not.

NUMSA amended its statement of claim and challenged the revised policy on various grounds, including the allegation that the policy breached its members rights as conferred by s 4(2)(*a*) and s 5(2)(*c*)(iii) of the LRA. NUMSA further argued that any disciplinary action taken against its members for breaching the policy, should be set aside.

Having heard the evidence of the party's respective witnesses, the court identified the issue as being whether or not the impugned policy was constitutional and lawful. This in turn begged the question 'whether the scope of protection in respect of participation in the lawful activities of a trade union can be said to extend to a right to wear a union t-shirt in the workplace.'

To answer this question the court turned to the Constitutional Court's (CC) decision in *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC) and an earlier decision in *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC).

In the *National Lotteries* case the CC held that the phrase 'lawful activities' as envisaged in s 5(2)(*c*)(iii) of the LRA should exclude any illegal activities and include any activity, which forms as a core function of a trade union.

In the earlier case of *Transnet* the CC, in giving meaning to the range of activities contemplated by the same phrase found that the right to freedom of association gave unions the right to recruit and organise its members.

Following these considerations, the court *in casu* held:

'In the present instance, the wearing of trade union t-shirts in the workplace would be encompassed by each of the above activities. Trade union members would wear their t-shirts in the workplace as a form of promotion, aimed at recruiting new members. Unions would manufacture and distribute t-shirts as a component of their organising activities. Minority unions would wear a t-shirt as a component of their efforts to challenge majority unions by seeking to persuade members to associate with the minority union, with a view to it ultimately attaining majority.

In those circumstances and having regard to the interpretation of s 5(2)(*c*)(iii) adopted by the Constitutional Court, in my view, the wearing of union t-shirts constitutes a lawful activity as contemplated by s 5(2)(*c*)(iii). The imposition of the union t-shirt ban, with its underlying threat of disciplinary action for an infringement of the ban, constitutes a form of prejudice proscribed by that provision. In short, the t-shirt ban is unlawful and invalid with reference to s 5(2)(*c*)(iii).'

The court did, however, state that there might well be grounds to justify a limitation of the right to freedom of association by wearing union t-shirts, for example where wearing the t-shirts might instigate violence among employees from competing unions. However, Transnet did not make out an argument justifying a limitation to the right of freedom of association; its reference to 'risk management' was not made to justify the policy but rather was a motive for the rule.

In light of the above the court ordered that Transnet's clothing policy, and in particular the portion prohibiting the use of trade union t-shirts in the workplace, was in breach of ss 4(2)(*a*) and 5(2)(*c*)(iii) of the LRA and thus set aside. Furthermore, that any disciplinary action taken by Transnet against employees in breach of this specific portion of the policy, was in breach of s 5 and thus set aside. No order as to costs was made. ❑

By Charné Dunn

Limitation of police powers on search and seizure

Minister of Police and Others v Grace Kunjana 2016 (9) BCLR 1237 (CC)

In the case of *Minister of Police and Others v Grace Kunjana* 2016 (9) BCLR 1237 (CC) the Constitutional Court (CC) confirmed the Western Cape Division of the High Court's declaration of constitutional invalidity of s 11(1)(*a*) and (*g*) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act).

The constitutionality of s 11(1)(*a*) and (*g*) of the Drugs Act was assessed by weighing the reasonableness and justifiability of the limitation in terms of the limitation clause.

In order to understand why the respondent in this matter argued that the limitation of s 11(1)(*a*) and (*g*) of the Drugs Act infringes on their constitutional right to privacy, it is important to consider the nature and extent of the limitation.

The nature and extent of the limitation imposed by s 11(1) of the Drugs Act

At para 20 of the *Kunjana* case, the judge held that the primary purpose of s 11(1) of the Drugs Act seeks to prevent and prosecute any criminal offences under the Drugs Act.

As the South African Police Service (SAPS) is the primary custodian of executing such crime prevention strategy, the duty falls on it to ensure that all persons comply with the relevant legislation.

Section 11(1), therefore, gives SAPS officials a broad scope of powers to maintain law and order. This includes and condones warrantless searches and seizures of private property.

The shortfall of s 11(1), as lamented by Mhlantla J, is that it does not make provision for the 'time, place nor manner in which the searches and seizures can be conducted'.

By contrast, a valid search warrant sets out the specific details pertaining to the scope of any search and seizure operation.

National Instruction 2/2002 of the SAPS regarding search and seizure

Section 3 of the National Instruction sets out as a general rule that 'any article that is in some way connected to an offence, may be seized'.

Section 3(2) deals with the general exception to the rule, however, this is limited to documents, which are subject to legal privilege only.

The general rule is exceptionally broad and must be tempered by having consideration of the prevailing circumstances and context within which a search and seizure is conducted.

Section 5(1) of the National Instruction provides a better and more concise rule applicable to all search and seizure operations and states that:

'Whenever it is practically possible, a search and seizure must only be conducted after a search warrant has been obtained. A member may only deviate from this rule when all the requirements laid down in legislation authorising a *search without a warrant*, have been complied with' (my italics).

Section 5(2) lists the exceptions to the general rule and lists legislation, which empowers the SAPS to legally conduct warrantless searches. Of these exceptions, we will focus only on s 11(1) of the Drugs Act.

The relation between the limitation of the right to privacy and its purpose of the limiting provision

In the *Kunjana* case, the applicant submitted that a correlation does exist between the purpose of s 11(1)(*a*) and (*g*) of the Drugs Act and the limitation, which it imposes.

As previously stated, the purpose of the Act is to prevent and prosecute offences under the Drug Act.

The harmful effect of the use and dealing in drugs is far reaching and far encompassing as it often affects not only the individual, but the community at large.

In a recent Western Cape Division review judgment, the judge confirmed that the use of drugs should be seen as an illness as opposed to a form of criminal conduct (*S v Frederick and Another* 2018 (2) SACR 686 (WCC)). However, despite this, the possession of an undesirable controlled substance is still considered as a contravention of the Drugs Act and is duly treated as such.

The enforcement of s 11(1) of the Drugs Act read together with ss 20 to 22 of the Criminal Procedure Act 51 of 1977 (the CPA), falls largely to members of the SAPS.

Where the empowering provision is circumvented or, as in the *Kunjana* case, is declared constitutionally invalid, the SAPS has to address the shortfall in its National Instruction so as to continue with its purpose of serving and protecting the community.

The gap in literature: The shortfall of the SAPS' National Instruction

As of the date of print of the National Instruction, no further instruction has been issued regarding search and seizure by the SAPS.

This dilemma needs urgent attention as the National Instruction is seen as the founding document regulating police conduct.

While s 22(*a*) and (*b*) of the CPA seeks to remedy the gap in literature between the constitutional ruling in the *Kunjana* case and the National Instruction, it still sets out requirements, which needs to be complied with.

Section 22 of the CPA provides two grounds on which a warrantless search and seizure may be conducted, namely –

- the person concerned consents to such a search and seizure; and
- where the SAPS member believes that a search warrant will be issued if applied for, but that the delay in obtaining the warrant would defeat the object of the search.

As submitted by Mhlantla J it is important to note that the refusal by a person to a warrantless search and seizure does not escalate it to being a reasonable ground to believe that the person is in the possession or control of a dependence-producing or other substance.

Practical application of the National Instruction

Section 29 of the CPA read with s 16 of National Instruction requires that a search be conducted in a decent and orderly manner.

Section 16(3) of National Instruction further requires that:

'Due respect for the belongings of other persons must be shown at all times while a *search* is being conducted, and a member must –

(a) not cause unnecessary disorder or damage; and

(b) always treat the possessions of others like he or she wants others to treat his or her possessions.'

A recent look at the Western Cape Police Ombudsman 2017/18 Annual Report, indicates that there is a sure and steady rise in complaints against the SAPS for misconduct arising from members' conduct during search and seizure operations. These complaints concern the damage caused by members of the SAPS during these operations and that no warrant was made available to the complainant.

Where it is found that the conduct of such members during the carrying out of such warrantless search and seizure operations is *ultra vires*, such conduct will lend itself to a civil claim being lodged against the Minister of Police.

Conclusion

In view of the above submissions, it is evident that the outdated literature of the SAPS' National Instruction, which relates to warrantless search and seizure operations in terms of the Drugs Act, needs to be amended so as to comply with the current legal dispensation offered by the CC.

As is pointed out in the *Kunjana* case: 'The fundamental problem in section 11 (1)(*a*) and (*g*) is that it allows police officials to escape the usual rigours of obtaining a warrant in all cases.'

In addressing the conduct of the SAPS, it is imperative that the upper echelons pay greater heed to updating its National Instructions in an effort to keep the SAPS conduct in line with this prevailing legislation.

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By Natasha Naidoo

Is it safe to rely on a court to draw an adverse inference from the absence of a witness?

Manzi v King's College Hospital NHS Foundation Trust [2016] EWHC 1101 (QB)

The judgment handed down in *Manzi v King's College Hospital NHS Foundation Trust* [2016] EWHC 1101 (QB) is a clear indication that the absence of a witness does not automatically lead to an adverse inference being drawn by the courts.

This is evident from the Appeal Court's dismissal of the matter.

The claimant alleged that the defendant, an obstetric registrar, breached his duty by failing to detect that a sizable amount of placental tissue had failed to expel itself after she had given birth. The claimant said that she was informed by the defendant that the placental tissue should pass naturally, but that she was in immense pain following her discharge from the hospital. This resulted in her undergoing surgery to have the placental tissue removed, following which she suffered a haemorrhage.

The parties disagreed about the size of the placental tissue in question. The claimant maintained that the placental tissue was larger than 7cm. The defendant argued that an ultrasound revealed that it was 2cm in size and that there is a noticeable difference between 2cm and 7cm. The defendant argued further that the placental tissue would have been removed together with blood clots, which form by gradual accumulation around it. The claimant based her contentions on the report of a doctor who she consulted following her surgery to have the placental tissue removed. The doctor's report said that 8cm of 'products' had been removed and that it was likely to be a piece of placenta, but that she was not 100% sure. The claimant's doctor was not called as a witness by the claimant and the histopathology report was unconvincing because it merely confirmed that blood clots and partly necrotic placental tissue was seen.

The issue to be determined by the court was the size of the placental tissue, which had remained in the claimant.

The trial court, in arriving at a decision, relied on the report and on oral evidence of experts in gynaecology and obstetrics. The experts were in agreement that it was not possible to tell from a histological report what proportion of the products removed constituted placental tissue and what percentage blood clots. It was held in court *a quo* that there was no negligence on the part of the obstetric registrar and that it was competent to conclude that the retained piece of placenta was small. The court accepted that a failure to recognise the vast difference in size between 2cm and 7cm was unlikely. The court refused to draw an adverse inference from the defendant's refusal to call the claimant's doctor as a witness for the following reasons:

- The claimant's doctor did not measure the placental remains herself and gave a rough estimate of what she believed to be the size of the placental tissue. She referred to what was removed as 'products' and that it had amounted to placenta. However, one could not interpret her report in an overly legalistic manner.
- The defendant doctor's role was incidental to the issue before the court and the claimant's doctor had no first-hand knowledge of the size of the placental tissue. Her role in the case was, therefore, tangential.
- The claimant's doctor was not alleged to have caused the harm suffered by the claimant.

The claim was dismissed and the claimant appealed on various grounds. The Appeal Court, in analysing the grounds of appeal, considered whether the trial judge was incorrect in his evaluation of the evidence of the claimant's doctor and the sonographer responsible for the ultrasound. The second issue concerned the trial judge's refusal to draw an adverse inference against the defendant for not adducing the evidence of the claimant's doctor.

In dealing with the first ground of appeal, the court held that clinical records, such as the report of the claimant's doctor, did not create a legal presumption that the report is accurate. The circumstances in which the report was prepared had to be considered together with all evidence led.

The claimant's doctor was not responsible for performing the operation and she was not present during the procedure. The experts agreed that it would have been very difficult to differentiate between placental tissue and other products by means of mere visual inspection. The claimant's doctor did not analyse

and measure the placental tissue herself.

Regarding the second issue, the claimant relied on the judgment in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 CA where it was held that a court – in certain circumstances – may draw an adverse inference from the absence or silence of a witness who might have material evidence, which may be relevant to a case.

If a court draws such an inference, the evidence may be strengthened or weakened by a party's failure to adduce such evidence where the party may, reasonably, have been expected to call the witness. There must have been some evidence, irrespective of its strength, before the court can draw the inference. If the reason for the witness's absence or silence satisfies the court, then an adverse inference cannot be drawn.

The claimant was of the view that these principles had been satisfied. The appeal court dismissed the appeal and upheld the decision of the trial court.

It is trite that evidence is evaluated in a multifactorial manner, taking into account the circumstances surrounding a case. An Appeal Court will rarely intervene with the findings of a trial court, which has had the advantage of directly considering and evaluating the evidence of witnesses.

The claimant relied, to a large extent, on the report of her doctor but was unable to rely on it in court. The trial court was swayed by the evidence of the defendant and considered various other factors in arriving at the decision not to draw an adverse inference from the defendant's refusal to call the claimant's doctor as a witness.

It is, therefore, relevant for a party who intends to rely on expert evidence to ensure that the report of the expert is filed in terms of the relevant rules of court. The oral evidence of such expert witness, especially where the claimant has founded her claim based on the findings of expert, is crucial. A failure to do so could prove to be detrimental to a party's case since a court's power to draw an adverse inference is not mandatory but rather discretionary.

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Recent articles and research

By Meryl Federl

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Abbreviation	Title	Publisher	Volume/issue
EL	Employment Law Journal	LexisNexis	(2018) 34.5
JJS	Journal for Juridicial Science	Free State University, Faculty of Law	(2018) 43.1
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2018) 15.3 October (2018) 15.3 November
Obiter	Obiter	Nelson Mandela Metropolitan University	(2018) 39.2
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) October (2018) November
SLR	Stellenbosch Law Review	Juta	(2018) 29.2

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Education law

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Environmental law

Paterson, A 'Mining in nature reserves – providing partial legal certainty where ambiguity prevailed' (2018) 29.2 *SLR* 199.

Family law

Bonthuys, E 'A duty of support for all South African unmarried intimate partners part 1: The limits of cohabitation and marriage based models' (2018) 21 October *PER*.

Bonthuys, E 'A duty of support for all South African unmarried intimate partners Part 2: Developing customary and common law and circumventing the *Volks* judgment' (2018) 21 October *PER*.

Batchelor, B 'The reasonableness and effectiveness of the amendment to section 26 of the Maintenance Act 99 of 1998' (2018) 39.2 *Obiter* 439.

Freedom of expression

Botha, J 'Of semi-colons and the interpretation of the hate speech definition in the Equality Act – *South African Human Rights Commission v Qwelane (Freedom of Expression Institute as* amici curiae*) and a related matter* [2017] 4 All SA 234 (GJ)' (2018) 39.2 *Obiter* 526.

Human rights

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Van Eck, S 'Vonnisbespreking – arbeidsmakelaars: Enkelwerkgewer, twee kontrakte en talle onbeantwoorde vrae' (2018) 15.3 October *LitNet*.

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Mining law

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Chauhan, R 'Social justice for miners and mining-affected communities: The present and the future' (2018) 39.2 *Obiter* 345.

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Practice of law

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State liability

Okpaluba, C 'State liability for mutinous acts of police and military officers: A critique of Lesotho and Zimbabwe cases in light of the modern test for vicarious liability in South Africa' (2018) 39.2 *Obiter* 317.

Tax law

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Trade law

Vinti, C 'The case for "sufficient science": *South African Poultry Association v The Minister of Agriculture, Forestry and Fisheries* Case Number: 39597/2016 (21/9/2016) (Gauteng Division, Pretoria)' (2018) 39.2 *Obiter* 508.

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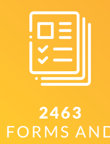

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