

IS THE ROAD ACCIDENT FUND'S LITIGATION IN URGENT NEED OF REVIEW?

Trust account advocates – can they
be admitted to the roll of notaries
and conveyancers?

Is the state obliged to provide
Internet access to detainees?



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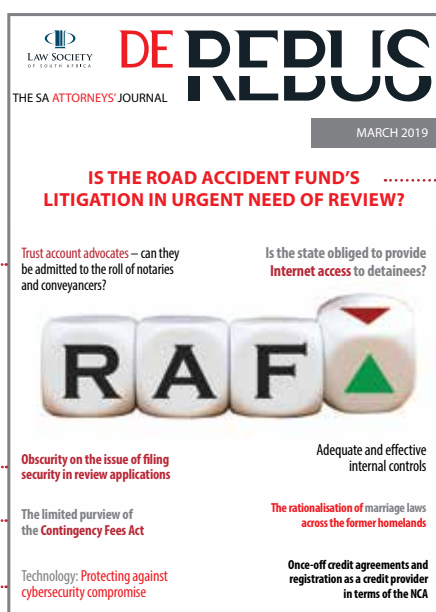


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FEATURES

10 Is the Road Accident Fund's litigation in urgent need of review?

Professor **Hennie Klopper** writes that the Road Accident Fund (RAF) regularly laments its precarious financial position and has consistently blamed legal practitioners for this. One of the RAF expenses that had alarmingly burgeoned, is the amount spent by the RAF on litigation. The question is far more complex and cannot possibly be due only to the actions of legal practitioners. One obvious fundamental issue is the unacceptably high incidents of motor vehicle accidents generating approximately 92 000 compensation claims per annum. Prof Klopper gives insight into the statistics and sheds some light on the problem.

13 Obscurity on the issue of filing security in review applications

The Labour Relations Act 66 of 1995 was amended to include subs (7) and (8) into s 145, with effect from 1 January 2015. These subsections require applicants in a review application to the Labour Court (LC) to file security in order to suspend the operation and execution of an arbitration award that is being subjected to review. Government, being an employer, is often confronted with review applications or initiating them. Legal practitioner, **Vishal Ramruch**, writes that the focus of this article is the effect of aforementioned subsections on government/state departments, mindful that labour law litigation is a *sui generis* field. He adds that the issue at hand is whether government departments should be required to file security in order to suspend the operation of an arbitration award when it brings a review application in the LC. Previously, lodging a review application suspended the operation of an arbitration award.

16 Is the state obliged to provide Internet access to detainees?

Persons who are detained or arrested have certain rights under the Constitution. One such right is the right of an arrested and/or detained person to consult with a legal practitioner of their choice and to be informed of this right promptly in terms of s 35(2)(b) of the Constitution. Moreover, in terms of s 35(2)(c), if a person cannot afford legal representation and the lack of legal representation will cause substantial injustice, the state has to assign a legal practitioner of its choice to the arrested and/or detained person at state expense. On arrest, it is often the case that the arrested and/or detained person is afforded an opportunity to contact a legal representative. Legal practitioner, **Daniël Eloff**, presents the notion that the rights to legal representation need to be reconsidered with reference to the ways in which legal representation is sought and obtained. The article also problematises the notion of the right to Google a legal practitioner, in terms of the Constitution.

19 Trust account advocates – can they be admitted to the roll of notaries and conveyancers?

It may be unusual to suggest that it is time to have advocates practicing for the first time in South Africa (SA) as notaries and conveyancers. In SA, admission into the professions of notaries and conveyancers is limited only to persons who are admitted and enrolled as attorneys. This makes admission as an attorney a requirement for entry into the professions of notaries and conveyancers. This is both in terms of the Legal Practice Act 28 of 2014 (LPA) and the repealed Attorneys Act 53 of 1979 and other legislation. This article, written by law student, **Sydney Mosoane**, seeks to establish whether the new category of advocates with a trust account, under the LPA, can qualify as notaries and conveyancers owing to the nature of their practice.

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Show me the money: A discussion on access to justice v legal fees

The Law Society of South Africa (LSSA) held a meeting in February to discuss the International Conference on Access to Justice, Legal Costs and Other Interventions, which was hosted by the South African Law Reform Commission (SALRC) in 2018. The aim of the meeting was to tackle issues connected with legal costs, particularly in view of s 35 of the Legal Practice Act 28 of 2014 (LPA). Below is a summary of what was discussed at the meeting.

A while ago, the LSSA wrote to the Justice Minister requesting the suspension of subss 35(1), (2), (3) and (7) up to and including (12), which deal with fees for legal services until the SALRC has completed its investigation on legal fees and there has been proper consultation. This means that only subss (4), (5) and (6) of s 35 have come into operation.

During the meeting, the view that the suspended subsections may potentially be implemented before the expiry of the two-year period after the LPA came into operation was expressed. The LPA refers to the 'desirability' of establishing a mechanism, which will be responsible for determining fees and tariffs payable to legal practitioners. This begs the question whether the mechanism proposed by s 35 is desirable. Diverse views were expressed as to whether it is reasonable or practically possible to provide a client with a cost estimate or indication of fees.

According to the LPA, the purpose of s 35 is to increase access to justice. It appears that the state has interpreted this as the legal profession being obligated to provide such access to justice, whereas this is primarily a government function.

Legal Aid South Africa (Legal Aid SA), the biggest provider of legal services to indigent persons in the country has undergone budget cuts, which will impact on access to justice. Legal Aid SA should also expand access to justice in civil matters. The LSSA should advocate for increased focus on civil matters and appropriate allocation of resources to fulfil this expanded mandate.

The meeting also highlighted the fact that s 35 should be considered within the context of competition legislation. If tariffs are set through legislation, it should not create a problem because litigious tariffs have, through legislation, been in existence for some time.

Another point that was highlighted during the meeting is the fact that the independence of the legal profession must be maintained while the profession contributes to access to justice. The legal profession must express its commitment to access to justice, but also take into account that access to justice might be unattainable due to macro-economic and structural problems. Neither government nor the legal profession can independently solve socio-economic problems.

On the issue of community service, it was noted that community service presents a great opportunity to facilitate access to justice, if compensation is reasonable. The state has a role to play in facilitating access to justice by supporting skills development for junior legal practitioners who carry out community or *pro bono* services. It will be important to consider the potential consequences and impact, which proposed measures aimed at improving access to justice may have on the legal profession and the practice of law as legal practitioners are also subject to resource constraints. South Africa's (SA's) attorney-citizen ratio should be considered in considering measures to increase access to justice. Comparative research on the legal profession should compare SA in the context of other African countries.

In conclusion, it was proposed that the LSSA should engage with the SALRC and the Department of Justice in addressing the relevant factors identified above and re-affirming the profession's commitment to facilitate access to justice. The legal profession and state should jointly confront the challenge of access to justice and the legal profession should not be seen to shift this challenge to the state. The LSSA



Mapula Sedutla - Editor

should advocate for Legal Aid SA to be funded appropriately to comply with its mandate, with particular reference to an expanded mandate on civil matters. Most importantly s 35 of the LPA requires revision in order for access to justice to become a reality.

• Send us your views on s 35 of the LPA at derebus@derebus.org.za.



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• Please note that the word limit is 2000 words.

• Upcoming deadlines for article submissions: 23 April, 20 May and 17 June 2019.

By
Terrence
Davis

The limited purview of the Contingency Fees Act

This article expounds on the limited purview of the Contingency Fees Act 66 of 1997 (the Act). This Act has been used incorrectly by certain legal practitioners and judges to invalidate common law contingency agreements, despite these agreements not being tainted by the mischief of champerty.

The South African Law Commission Project 93 titled 'Speculative and Contingency Fees' November 1996 made the recommendation that contingency fee agreements should be legalised and that common law prohibitions on such fees should be removed. It was stated that a system of contingency fees 'can contribute significantly to promote access to the courts' and 'such a system is desirable'. This resulted in the promulgation of the Act.

The Act is an enabling statute in that it enables legal practitioners to enter into certain contingency agreements with their clients, which agreements were previously unlawful in terms of the common law on account of them facilitating gambling in law suits. These agreements are known as '*pactum de quota litis*' and are called maintenance and champerty.

The Act is not a constraining statute in that it does not prohibit any contingency agreement. The purview of the Act is limited to those contingency agreements, which are unlawful in terms of the common law. The Act does not affect lawful 'common law' contingency agreements. This is confirmed in the case of *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA). At para 32, Zondi JA (Theron JA and Van der Merwe JA concurring) held 'that it is *incorrect* that the Act prohibits the conclusion of a "common law" contingency fees agreement. The Act permits the parties to conclude such agreement. It in fact allows them to do something that would otherwise be un-

lawful under the common law. In other words, the Act was enacted to overcome the prohibition, which existed under the common law [*Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para 41]' (my italics).

Further the judgment of Zondi JA clarifies the often misconstrued statement of Southwood AJA in the matter of *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) 66 (SCA) at para 41G that '[a]ny contingency fee agreement between such parties [the legal practitioners and their clients] which is not covered by the Act is therefore illegal.' The statement of Southwood AJA is restricted to the unlawful 'common law' contingency fee agreements, as it is only these agreements, which come within the purview of the Act. The Act does not cover lawful common law contingency fee agreements, which therefore remain legal.

In other words, the Act neither prescribes contingency fee agreements, which are legal under the common law, nor creates a new category of illegal contingency fee agreements. This view is confirmed by Willis JA in the minority judgment in the case of *Mostert and Others v Nash and Another* 2018 (5) SA 409 (SCA) at para 145 where he held that '[t]here was *no* blanket prohibition on remuneration being dependent on the outcome of an uncertain future event. To the extent that certain other cases decided in the High Court may have suggested that any agreement between an attorney and client that made fees payable on the happening of an uncertain future event were "unlawful contingency fees," these cases were *wrongly* decided' (my italics).

The Act deals only with unlawful 'common law' contingency fee agreements, and legitimises these agreements by regulating the terms and conditions, which must be introduced into the agreements.

If the Act were not followed strictly, the unlawful contingency agreements would remain unlawful. (The form and content of contingency agreements legitimised by the Act are set out in ss 2 and 3 of the Act.)

The investigation of a contingency fee agreement is a two-step procedure, namely –

- to establish that the agreement is void in terms of the common law on account of it being champertous (gambling in lawsuits); and
- to ascertain whether the champertous agreement has been permitted by the Act.

Resort to the Act is only required if the first step establishes the existence of champerty.

The fact that payment of an attorney's fee is made subject to the happening of a future uncertain event, does not in itself constitute a champertous arrangement. Financial assistance given in good faith to help a litigant prosecute an action in return for a reasonable recompense or interest in the suit has, for a very long time, not been regarded as unlawful. This was held to be the case by Kotze CJ in *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* [1894] 1 OR 336 at 339 – 341 (which is quoted by Southwood AJA in *Price Waterhouse Coopers Inc* at para 27). This judgment justifies the exclusion of the aforesaid financial arrangement from the purview of the Act; it is not an unlawful common law contingency agreement requiring legitimisation under the Act.

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Repetition in order to support a reasonable apprehension of harassment in the Domestic Violence and Protection from Harassment Acts

By Leon
Ernest
Rousseau

The Domestic Violence Act 116 of 1998 and the Protection from Harassment Act 17 of 2011 each essentially, in respect of harassment, require that the conduct complained of should be of a repetitive nature. Unless and as submitted in the alternative in *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) at para 68, the singular conduct is of such an overwhelmingly oppressive nature that it has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.

The element of repetition or course of conduct, in its critical well-reasoned analysis of the Protection from Harassment Act, was confirmed in the *Mnyandu* case. In *Silberberg v Silberberg, Silberberg v Silberberg and Another* (WCC) (unreported case no A603/2007, 4581/2008, 29-1-2013) (Cloete AJ), the court also highlighted the various provisions of the Domestic Violence Act emphasising that there needs to be a pattern of past conduct or repetition in order to conclude that there is a reasonable apprehension of such conduct occurring in the future.

It must be remembered that both acts serve to 'interdict' behaviour and not punish past conduct, regardless of how unattractive the behaviour may seem. The conduct, viewed reasonably, must not merely be unattractive or even unreasonable, but rather it needs to be oppressive and unacceptable in which the harm is serious enough to cause fear, alarm or distress (see the *Mnyandu* case).

Within the context of the submission that its purpose is not to punish, but rather to protect against the potential of future harm, I refer to *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at para 17 wherein the court held: 'The principal objective of granting an interdict is not to solve domestic problems or impose punishments, but to provide a breathing-space to enable solutions to be found; not to punish past misdeeds, but to prevent future misconduct.'

Determining whether the past conduct complained of is able to lead the trier of the facts and evidence to the conclusion on a balance of probabilities that a rea-

sonable apprehension exists, is at times a vexing question, which confronts the courts on a regular basis.

The purpose of this article is not intended to explore those obvious cases of domestic violence or harassment, but rather to explore those borderline cases against the cases mentioned.

The gap between over-caution and being dismissive is at times narrow, as both have the potential to impugn rights and it is not uncommon. It is also not uncommon to encounter instances where ulterior motives exist.

However, it remains necessary to carefully consider each matter on its own merits and within the context of the particular complainant's circumstances and experience in order to ensure that the wheat is separated from the chaff.

It is necessary, to consider the context within which the incident(s) occurred, the nature of the conduct, its impact on the complainant within their circumstances and subjective experience and then to determine within that particular matrix the possibility of it being repeated.

Socio-economic factors can also play a role. To this end and given the lack of access to adequate or suitable housing, parties are more often than not forced into such close proximity to each other that conflict inevitably arises. In this context a certain measure of tolerance is required and expectations of absolute peace and harmony require tempering.

Conflicts arising from human interaction are in itself unavoidable, it may even elevate to unattractive levels. However, when the dust settles around the conflict, it is more often than not how the parties continue to engage each other thereafter, which may serve as an indicator.

One should also consider the *de minimis* principle in assessing the conduct, as was held in *S v Visagie* 2009 (2) SACR 70 (W), quoting *R v Maquire* 1969 (4) SA 191 (RA) at 193:

'It seems to me that, wherever the defence of *de minimis non curat lex* is raised, the court has to consider all the circumstances under which the blow which is said to be trivial was delivered. In some circumstances, a blow may be considered so trivial as to justify the

court ignoring it altogether, in different circumstances, a similar blow might be a relatively serious assault; for example, *slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of de minimis non curat lex whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored*' (my italics).

As pointed out, this does not mean that all minor conduct must be tolerated or that victims should be obliged to endure discomfort, but rather in certain instances the conduct should be recognised for what it is.

I pause to distinguish assault within the context of the respective Acts, and submit that neither specifically refers to assault, except in s 2(1)(b) of the Protection from Harassment Act where it is mentioned in the context that complainants are to be informed of their right to also lodge a criminal complaint for assault.

While the Domestic Violence Act refers to 'physical abuse' and the Protection from Harassment Act 'harm or accosting', they remain forms of conduct in which the former constitutes an element of domestic violence and in the latter harm of a physical nature.

Notwithstanding that such conduct remains distasteful and unacceptable, it remains assault in the criminal context until it too takes on a repetitive form, or is of such a nature, that the singular incident could lead to the reasonable apprehension of future harm.

If for example, a respondent approaches a complainant aggressively, assaults them and further promises to return, then it could in those circumstances be inferred that the assault may be repeated in which case protection should be granted.

Similarly, if on periodical occasions of overindulgence or otherwise a spouse becomes aggressive and physically abusive, then the assault crosses the line into the sphere of domestic violence.

Therefore, not all incidents of assault are necessarily matters requiring protection under the respective Acts, however, such incidents do not lose their criminal element even if it lacks repetition and

may still be investigated within the criminal procedure context.

Having regard to the extract from the *Maguire* case, it is not uncommon during hearings to uncover evidence that the applicant is equally to blame for the incident, or at least served as a catalyst in unleashing the unattractive tirade causing the storm in the tea cup to overflow.

In circumstances such as these, while the conduct in itself may be unattractive, it does not necessarily lead to the conclusion that relief should be granted without it having an element from which it could be inferred that there exists a reasonable apprehension that it may repeat in the future.

I hasten to add that caution must be applied at all times to ensure that victims receive the protection deserved. The obvious cases go without saying and I in no way intend to downplay those.

It is in those other instances, where I submit that some evidence must exist to infer such a conclusion, it cannot alone be inferred on the subjective belief held by the applicant that it could occur in the future, and, therefore, 'just in case' the interdict should be granted.

The author CB Prest SC *The Law and Practice of Interdicts* (Cape Town: Juta 1996), submits that a reasonable apprehension of harm is one which a reasonable person might entertain on being faced with the facts, which the court finds to exist on a balance of probabilities. The author goes on to point out at p 45 that:

'The test for apprehension is an objective one. The applicant must therefore show objectively that his apprehensions are well grounded. Mere assertions of his fears are insufficient. The facts grounding his apprehension must be set out in the application to enable the court to judge for itself whether the fears are indeed well grounded.'

In *Gouws v De Lange and Another* (ECP) (unreported case no 2842/14, 3449/14, 3450/14, 11-12-2014) (Revelas J) the court found that the conduct complained of had been repeated at various stages over a period of approximately 18 months and that this demonstrated that the respondent was unable to restrain himself. It also found that the conduct went far beyond freedom of expression and opinion and was intended to inflict harm.

The case illustrated that to a certain extent, conduct could be expected to be tolerated, but when it is repeated a line is crossed, at which point s 10 of the Constitution, which provides that everyone has inherent dignity and the right to have their dignity respected and protected, is infringed.

It further impugns the right of freedom and security of the person, which provides at s 12(1)(c) of the Constitution that – everyone has the right to freedom and security of the person, which includes the right – to be free from all forms of violence from either public or private sources.

The challenge, therefore, remains to ensure that the maximum protection is afforded to those deserving of protection without in the process placing undue restrictions on others. The balance of probabilities should in all circumstances receive careful consideration.

Leon Ernest Rousseau *BProc LLM (Unisa)* is an Acting Magistrate in Cape Town. □



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By
Anthony
Pillay

Technology: Protecting against cybersecurity compromise

In previous articles published in *De Rebus*, the potential liability of attorneys for business e-mail compromises (2018 (Sept) *DR* 35) and cyber liability insurance (2019 (Jan/Feb) *DR* 42) were discussed. In the former, the potential for the attorney being guilty of contributory negligence for failing to establish appropriate security measures was highlighted. In the latter, the importance of the well-understood protections afforded by appropriate insurance was emphasised as an integral part of cybersecurity management. In both articles the issue of ensuring that appropriate technology is implemented was touched on. This article highlights a few of the important issues in considering the technology or technology services that are used by legal professionals.

At the outset a misunderstanding that seems to arise repeatedly in the illusion that technology is the 'silver bullet' to cybersecurity. Indeed, appropriate technology is a very important component of cybersecurity, but cybersecurity is by its nature multifaceted and seen by many experts in the area as being predominantly a 'people' rather than a 'technology' issue. Thus, while it is important that the appropriate technology is used, the processes governing the use of the technology must be properly documented to enable the consistent understanding of behaviour promoting security by users. The processes in turn can be used to educate users in the appropriate use of the technologies and security measures that they are obliged to discharge to promote the secure processing of information and the mitigation of cyber-risk.

It is beyond the scope of this article to address all of the technology security issues. Readers are referred to the International Bar Association's 'Cybersecurity Guidelines' that are available at www.ibanet.org and the Law Society of South Africa's (LSSA's) Guidelines on Information Security for South African Law Firms - LSSA Guidelines January 2018 at www.lssa.org.za.

The following important points, which are specific to protecting against business e-mail compromises are highlighted:

- As the name suggests, business e-mail compromises are an impersonation fraud that is perpetrated by intercepting and changing e-mails. One of the primary considerations is the reputation and se-

curity provided by the e-mail host. It is recommended that preference is given to a company that hosts your e-mail has a proven track record, as they are most likely to maintain superior security. The recommendation of experts in this field is that smaller providers be avoided unless they provide appropriate guarantees of security. Where the e-mail host is selected purely on price it is possible and most likely probable that the cost saving that is passed on to the client is at the expense of security and will expose the client to greater risk.

- In selecting web browsers and e-mail applications care should be taken to choose secure mail client software. These applications should be configured for secure use as opposed to convenience and must have built in and automatically updated junk e-mail and spam filters. It is also important that the granting of access to e-mail boxes is subject to appropriate access control. If a person to whom an e-mail address has been assigned leaves the legal practitioner's employ, access to the e-mail box must immediately be revoked.

- It must be recognised that the use of outdated technology creates security risks. Outdated technology is likely to be more vulnerable and if it is used beyond its end of life will most likely be updated with security updates and patches to protect against vulnerabilities. Malware, spyware and anti-virus software as well as e-mail filtering software must, as described in the Cybersecurity Guidelines, be of a 'business grade'. Free versions of software are unlikely to provide the level of security that is necessary for the sensitive information that is processed by legal professionals. It is also important that care be taken to properly secure the applications that may be used in a practice and that mail servers are configured to protect the transmission of e-mails between the professional's mail-servers and its service provider.

- Care must be taken when communicating sensitive information. It is suggested that any important information communicated by e-mail is in PDF (which should also be password protected) and not in MS Word. There are other simple mechanisms of protecting important information. One of these is using passwords communicated out of band (if the communication is made by e-mail the password should be made by SMS or WhatsApp) that protect the information.

There are also more sophisticated mechanisms that should also be considered, such as the use of digital signatures, which irrefutably identify the signatory and any change to either the signature or the data to which it is associated is immediately detectable. If configured correctly the e-mails signed using digital signatures will be encrypted and render it impossible to intercept the text of the message (and therefore change it) during its communication. In certain instances, the use of advanced electronic signatures may be a statutory requisite. In this regard readers are referred to 'Electronic Signatures for South African Law Firms: LSSA Guidelines' available at: www.lssa.org.za.

- Care also needs to be taken of remote e-mail use from devices that may not be protected by firewalls or the configuration of e-mail servers. Practitioners should, therefore, be circumspect when using 'open or free WiFi' for business communication.

- User awareness: Ultimately, while the choice of appropriate technology and maintaining the appropriate safeguards may significantly enhance the security that is sought to be implemented, unless this is well-understood by users the security measures, which is typically by nature an inconvenience, will be disregarded by users. Users must be trained to identify bogus e-mails, phishing exploits, and other mechanisms of social engineering that underpin business e-mail compromises. They need to understand how important their role is in fulfilling the responsibility of the secure processing of information, which is the legal professional's indisputable obligation. Many guides are available that will assist legal practitioners in ensuring appropriate awareness of this important aspect of e-mail use. A simple Google search will direct you to appropriate information.

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.



By
Simthandile
Kholelwa
Myemane

Adequate and effective internal controls

The Rules formulated as per ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014, and published on 28 July 2018, require of legal practices to have internal controls in place and state under r 54.14.7 as follows:

'A firm shall ensure: **Internal Controls**

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

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

54.14.7.1.2 that the internal controls have been implemented as designed;

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

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

Right from the outset, I encourage readers to read this article together with 'Find the problem before it finds you' 2015 (July) *DR* 29.

The Internal Control-Integrated Framework published by the Committee of Sponsoring Organisations of the Treadway Commission (COSO) is the recognised standard for establishing internal controls. (When referring to an organisation, it includes legal practice.) COSO defines internal control as:

'[A] process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

- Effectiveness and efficiency of operations.
- Reliability of financial reporting.
- Compliance with applicable laws and objectives.'

Under the COSO model a system of internal controls is a process that is made up of five interrelated components, to which COSO has added 17 principles to support each of the components. These five components are aimed at achieving one or more of the objectives listed below:

Control environment

- Demonstrate commitment to integrity and ethical values.
- Exercise oversight responsibility.
- Establish structure, authority and responsibility.
- Demonstrate commitment to competence.
- Enforce accountability.

Risk assessment

- Specify suitable objectives.
- Identify and analyse risk.
- Assess fraud risk.
- Identify and analyse significant change.

Control activities

- Select and develop control activities.
- Select and develop general controls over technology.
- Deploy through policies and procedures.

Information and Communication

- Use relevant information.
- Communicate internally.
- Communicate externally.

Monitoring

- Conduct ongoing and/or separate evaluations.
- Evaluate and communicate deficiencies.

Five components of internal controls

• Control environment

The control environment is the 'tone' of the organisation and is the foundation for all other controls. One of the largest factors influencing the control environment in an organisation is the 'tone at the top'. This is a term used to define management's leadership and commitment towards openness, honesty, integrity, and ethical behaviour.

• Risk assessment

All organisations and levels within an organisation face a myriad of operating risks. Risks affect the organisation's ability to survive, successfully compete, maintain financial strength and positive public image, and to maintain the quality of services and products. This component, therefore, deals with the organisation's ability to set clear operating goals and objectives, identify risks that could impede achievement of those objectives, and to mitigate exposure to those risks to acceptable levels.

• Control activities

These are policies and procedures that have been put in place to ensure that management's directives are carried out. This is the component that most people consider when they think of 'internal controls'.

• Information and communication

This component concerns the way in which information is communicated throughout the organisation. Communication is essential for achieving all three of the objectives identified under the definition for internal controls.

• Monitoring

All internal control systems and processes change over time. Some controls continue to evolve. However, some may lose effectiveness because they are no longer performed, are not consistently applied, or are applied incorrectly. This may be the result of training, staff turnover, lack of management response and attention to violations of control, time or resource constraints, or any number of other reasons. Because of this, controls must be monitored. This is typically done in two ways, on an ongoing basis and on a periodic basis. Ongoing monitoring is typically done during regular operations. Separate monitoring is typically performed by auditors, peer reviewers, or through self-assessments.

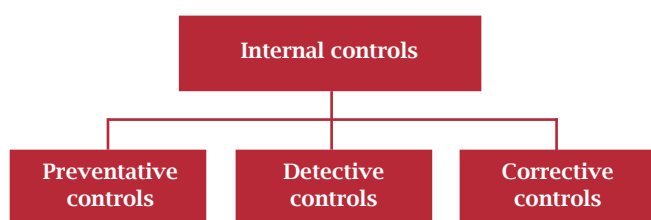
It is important that as a legal practice internal controls are established and that these are adequate and effective. Adequacy of controls refers to their design, a design that ensures that they are appropriate and good enough to assist the legal practice in its quest to achieve its objectives. Internal controls are adequate if they reduce either the likelihood or the impact of a negative event happening, or both. A control that neither reduces the likelihood of a negative event from happening, nor the impact of that event on the legal practice, should it occur, is as good as being absent.

The effectiveness of controls considers if the implemented controls achieve the purpose for which they were designed, as well as if they are consistently and correctly applied, and remain effective throughout the period. It should, however, be noted that ensuring consistent application of controls throughout the period, while their design is not adequate, will not assist the legal practice in its quest to achieve its objectives. Ensuring adequacy of controls, therefore, is key before ensuring their consistent and correct application.

Perhaps at this stage I need to remind readers that designing and having controls in place is but one of the risk responses that a legal firm may employ, this response being to mitigate against a threat. Other risk responses available to a legal practice are to avoid, transfer, or accept a risk. The decision on the risk response is influenced by various elements, including but not limited to cost benefit analysis. For instance, if a control to be implemented costs a legal firm R 20 million, but it effectively mitigates a risk of R 1 million, it would make sense to explore other alternatives to respond to the risk.

Internal controls

There are three types of controls that legal practices can have, and these are illustrated and discussed below:



• Preventative controls

Some preventative controls are very basic and include the physical protection of facilities and assets. Other examples of preventative controls are segregation of duties (ie, separation of incompatible functions) especially within the finance environment, proper authorisations, adequate documentation, etcetera. With segregation of duties, legal practices are encouraged to vest the responsibilities for receiving of money and the recording thereof to different personnel. Proper authorisations refer to ensuring that transactions are properly authorised before they are effected, for instance when making withdrawals out of the trust and business bank accounts, these should follow certain laid down procedures for authorisation before a withdrawal is made. Adequate documentation ensures that transactions are properly recorded and can be easily traced. Preventative controls, when applied consistently, also tend to deter individuals from planning mischievous actions against the legal practice, as they will fear being caught, thus protecting the legal practice from attempts.

• Detective controls

Unlike the preventative controls, which are used as deterrents, detective controls do not prevent an act from happening, but can detect it once it has happened. They are backup procedures that are designed to catch items or events that have been missed by the first line of defence. Examples of detective controls are review of reconciliations by management. Detective controls are also audit oriented, for example, one may audit

the legal practice's assets by taking stock of the available assets against purchasing records of the legal firm. A further example of detective controls is setting up an anonymous tipoff where known or suspected acts of dishonesty are reported and brought to the attention of those who should know. As can be seen, this type of control is applied after the fact, but is no less important and is necessary.

• Corrective controls

Internal controls do not exist just to discover fraud, but to also identify errors and other unintentional irregularities that require remedial action. At times corrective actions may also involve additional training of an employee and/or disciplinary action. It should be noted though that following discovery of fraud, corrective controls are developed to counter the particular scheme employed by the perpetrator. Corrective actions, also being after-the-fact controls, therefore, also tend to respond to and redress those areas that may not have been identified as requiring preventative controls from the onset or strengthening already existing controls.

From the foregoing, it becomes clear that strong internal controls can help keep a legal practice healthy. Strong controls help achieve at least four key objectives:

– **Safeguarding of assets:** Physical and financial assets from fraud, theft, errors and irregularities.

– **Ensuring reliable financial reporting:** Strong internal controls ensure validity of financial data, thus helping management to make more informed decisions.

– **Maintaining compliance:** Credible data enables legal practices to meet their regulatory and statutory filing and reporting requirements.

– **Accomplishing operational efficiency:** A strong internal control environment can foster efficiency through removing unnecessary or duplicative steps in a process, or even combining certain functions in a cost-effective manner. While internal controls can be expensive, properly implemented internal controls can help streamline operations and increase operational efficiency, in addition to preventing fraud.

Conclusion

In conclusion, legal practitioners are encouraged to ensure that risk responses employed at their legal practices are informed and reduce either or both the likelihood and/or impact of negative events that have been identified during the risk identification and risk assessment stages. A risk response to mitigate against a negative event should pass the cost benefit analysis test and should not be viewed as the only available response. All staff and management at the legal practice are responsible for internal controls. They are responsible to ensure that there are necessary controls in place in their respective areas of responsibility, and that everyone in the legal practice adheres to those controls. Not only should a legal practice put controls in place, but individuals responsible for ensuring application and monitoring of the controls should be identified.

The value of enterprise risk management is truly derived once the components of the enterprise risk management process are embedded throughout the legal practice, and everyone understands what the legal practice seeks to achieve, and how each person contributes to the achievement or non-achievement of the legal practice's objectives.

Overriding of internal controls should be authorised at a very high level within the legal practice but should be an exception and not a norm, otherwise the very existence of the controls are worthless.

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By Prof
Hennie
Klopper

Is the Road Accident Fund's litigation in urgent need of review?

The Road Accident Fund (RAF) regularly laments its precarious financial position and has consistently blamed legal practitioners for this. One of the RAF expenses that had alarmingly burgeoned, is the amount spent by the RAF on litigation. The following table based on RAF annual reports shows a phenomenal increase of 120% from 2005 to 2017.

Year	Number of claims	Legal costs
2005	185 773	R 941 million
2006	190 468	R 1,3 billion
2007	107 418	R 1,7 billion
2008	267 133	R 2,1 billion
2009	166 146	R 2,5 billion
2010	85 397	R 2,7 billion
2011	74 162	R 3,5 billion
2012	52 445	R 3,5 billion
2013	47 159	R 3,7 billion
2014	53 230	R 4,6 billion
2015	62 436	R 5,5 billion
2016	71 664	R 6,6 billion
2017	73 860	R 7,9 billion
2018	92 101	R 8,8 billion

In the same period claims lodged have decreased by 40% from 185 773 claims to 92 101 (2017/2018 RAF Annual Report). During this time the tariff of legal fees increased by 8% in 2015 and an approximate 11% from 1 November 2017. According to the RAF this extraordinary expenditure is caused by legal practitioners who are: 'dragging the claims process through court' (Bongani Fuzile 'RAF blames lawyers for leeching system' *Daily Despatch* 22-9-2018). Apart from some R 8 billion spent on litigation, the RAF's delayed claims payment scheme cost an approximate R 1,8 billion in 2017 (2017/2018 RAF Annual Report). The combined expenditure of approximately R 10 billion per annum represents about 25% of the RAF annual budget and translates to a fuel levy of 50 cents per litre.

Reasons

Quite clearly, blaming legal practitioners for the situation is an oversimplification. The question is far more complex and cannot possibly be due only to the actions of legal practitioners. One obvious fundamental issue is the unacceptably high incidents of motor vehicle accidents generating approximately 92 000 compensation claims per annum.

The 2017/2018 annual report of the RAF sheds little light on the problem. Meetings between regional managers and the Judge Presidents and Deputy Judge Presidents of the Eastern Cape, Limpopo, Gauteng, Northern Cape and Free State Divisions, as well as the police's provincial commissioners of the Eastern Cape and the Free State are mentioned as part of improved case and litigation management. Issues raised by Judge Presidents, included -

- continued last-minute settlements or using trial dates to trigger settlements;
- postponing of cases, not giving instructions to Senior Counsel; and
- defending cases without presenting evidence or calling own witnesses.

The RAF also needs to monitor court orders and adverse comments on the litigation process. These matters are similarly mirrored in recent case law, which is critical of RAF litigation and a governmental body with the constitutional duty of upholding: 'the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms' of road accident victims (*Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) at para 78; *Daniels and Others v Road Accident Fund and Others* (WCC) (unreported case no 8853/2010, 28-4-2011) (Binns-Ward J) at para 55).

RAF litigation judicially characterised: Cash flow management and 'tactical pleading'

In the *Daniels* case Binns-Ward J after reviewing some 17 cases where the RAF was rebuked by judges for their handling of claimants' claims and litigation states at para 23 and 58:

'A depressing feature of all of the aforementioned judgments is that they instance examples of cases in which the Fund must have incurred substantial legal expenses in taking to trial, or on appeal, claims which it had no basis to responsibly contest. In the context of the evidence before us that legal expenses constitute a very significant component of the Fund's overall expenditure, this is an aspect of the Fund's conduct which is demanding of conscientious attention by the responsible authorities, including the second and third respondents.

The evidence, judged in historical context, suggests that the delays in conceding liability in principle are a means by the Fund to manage cashflow issues. The Fund admits as much. This is unacceptable. A state of affairs in which an organ of state is unable to discharge its statutory objects because of inadequate funding is inimical to the rule of law and deserves urgent and appropriate attention from the executive and the legislative arms of government. The recent amendments to the Act are, no doubt, a manifestation of such attention, but it seems that more might be required. Financial constraints on the Fund's ability to pay claims as immediately as it should afford no excuse, however, for the failure to administer the claims received efficiently, or for drawing out litigation and driving up legal costs by what is sometimes euphemistically described as "tactical pleading".'

Recent judicial comment

The RAF's approach to litigation appears from *Hlalele v Road Accident Fund* (FB) (unreported case no 5668/2016, 18-10-2017) (Daffue J) where it is said that the RAF's legal teams come to court, not to settle, but to throw in the proverbial towel. In most cases the outcome can be predicted: The merits are settled 100% in favour of the plaintiff. Counsel (if one is appointed) is not instructed to conduct a defended trial but receives instructions in respect of settlement only.

In *Friedemann v Road Accident Fund* (KZD) (unreported case no 2459/12, 13-12-2017) (Henriques J) Henriques J stated that the RAF constantly seeks additional funds from Parliament but nonetheless acts wastefully when litigating matters that could have been easily settled long before trial – the RAF remaining passive and failing to properly instruct its legal practitioners. The court warned RAF officials that they may be ordered to pay costs out of their own pockets.

RAF litigation was severely criticised by Legodi J's punitive cost order made in *Mathebula v Road Accident Fund* (Mpumalanga Circuit Court) (unreported case no 734/2016, 15-11-2017) (Legodi J). The Registrar was ordered to bring this matter

under the attention of the RAF's Chief Executive Officer and the RAF officials requested to file reasons why they should not together with the RAF be ordered to pay the wasted costs.

In *Mashigo v Road Accident Fund* (GP) (unreported case no 2120/2014, 13-6-2018) (Davis J) the court held that:

'2.6 During court terms this division of the High Court entertains no less than between 45 and 60 pre-trial conferences per week dealing with claims against the Fund. In addition, the daily civil trial roll of this division carries on average no less than 100 trials relating to actions against the Fund. There is a disconcerting number of these trials where the facts pertaining to the merits are either common cause or undisputed but, in any event, would in all probability result in 100% liability of the Fund, yet the merits remain contested until the last moment. Many of these include claims on behalf of minor pedestrians or passengers. In an equally disconcerting number of these cases the answer to the question by the court as to why merits had not been settled or conceded is given by counsel or attorneys representing the Fund as being a lack of instructions from the Fund. Often, if a pre-trial is postponed for a week or two for the securing or obtaining of such instructions, merits are suddenly conceded, again routinely without explanation for why it had not been done earlier. I dealt with eight trials against the Fund in the same week as this trial and in one of [their] merits were only conceded a month prior to trial but some six years after the accident, again without explanation why this could not have taken place earlier.

2.8 The large number of applications to compel activity on the part of the Fund which also regularly feature in this division in unopposed motion court rolls is a further testimony of the difficulties experienced by Plaintiffs in having procedural matters timeously attended to. In many instances, it is only after the delivery of applications to compel that the Fund is spurred into action resulting in yet further unnecessary costs, fruitless expenditure and waste of court time.

2.9 It is a matter of public record that the Fund's liquidity is under constant threat and any attempts at curtailment of expenses should hardly expect opposition. In many if not all of the instances referred to above, the plaintiffs are fighting a faceless foe and an unidentified cause of their frustration and delay as their opposing counsel and attorneys are often equally embarrassed or find their hands bound by the lack of instructions from "the Fund".'

(See also *Nthabiseng and Others v Road Accident Fund* (GP) (unreported case no 3492/2016, 19-6-2018) (Legodi JP); *Topper v Road Accident Fund* (GP) (unreported case no 52212/2016, 17-5-2018) (Pretorius J) and *Kgasi v Road Accident Fund* (GP) (unreported case 4582/2016, 14-5-2018) (Davis J) where the RAF was criticised as litigant.)

Litigation settlements

Most cases are settled with the RAF and, therefore, the RAF has some control over settlement amounts. The question of settlements was highlighted in *Mzwakhe v Road Accident Fund* (GJ) (unreported case no 24460/2015, 26-10-2017) (Weiner J) the court held:

'Our courts are inundated with matters relating to the RAF and the Minister of Law and Order (in re unlawful arrest claims). The settlement agreements reached often bear no association to the damages actually suffered. The reasons for this are not apparent, although speculation is rife in regard to the motives behind such settlements. For these reasons, our courts have to be vigilant when dealing with State funds. The court can take judicial notice of the fact that the RAF claims that it is bankrupt. It is the court's duty to oversee the payment of public funds. The applicant must prove its claim with reliable evidence. The claim is for a substantial sum. The RAF, for reasons known only to it, has agreed to pay out this sum without any investigation into its validity. A court cannot allow

RAF v Other civil matters and RAF cases actually heard:

Month	RAF cases	Other cases	Total civil cases	RAF %	Days	RAF per day	Heard	RAF on Roll %
January	299	60	359	83,29%	22	14	1	0,33%
February	2 414	451	2 865	84,26%	21	115	16	0,66%
March	1 898	389	2 287	82,99%	20	95	19	1,00%
April	1 477	192	1 669	88,50%	18	82	7	0,47%
May	3 092	397	3 489	88,62%	21	147	8	0,26%
June	2 197	283	2 480	88,59%	21	105	9	0,41%
July	563	111	674	83,53%	22	26	6	1,07%
August	3 461	431	3 892	88,93%	21	165	7	0,20%
September	1 340	242	1 582	84,70%	17	79	10	0,75%
October	1 584	265	1 849	85,67%	20	79	1	0,06%
November	3 280	420	3 700	88,65%	21	156	1	0,03%
December	761	123	884	86,09%	18	42	1	0,13%
Average	1 864	280	2 144	86,15%	20	92	7,2	0,45%

that, when, on the face of it, the claim is based upon contradictory and flimsy evidence.'

In *Vand der Hoeck and Another v Road Accident Fund* (GNP) (unreported case no 17884/07, 1-10-2010) (Mavundla J) at para 13 the court intervened in a settlement and reduced general damages (see also *Webb v Road Accident Fund* (GP) (unreported case no 2203/2014, 14-1-2016) (Mabuse J)).

Unwarranted RAF litigation has an exponential effect on quantum of damages and other litigants. In the *Mashigo* case, Davis J points out that:

'... a substantial portion of the plaintiff's damages related to the scarring and disfigurement suffered by her as a result of the [burn] wounds which she has sustained. The extended period which the plaintiff had to endure without the scarring receiving treatment or remedial medical intervention such as reconstructive surgery has increased her pain and suffering. This increase will also lead to an increase in the award for general damages for which the fund will be liable. By its own inaction the fund has therefore not only increased the pain and suffering of an innocent plaintiff but also increased the amount of public funds to be paid in respect thereof. In all probability this will be the same consequence in the other cases where similar delays occur. The unsatisfactory manner in which the Fund conducts its litigation in this court, therefore, has a public interest element. Where this court is overburdened by the total number of Road Accident Fund trials on its rolls, meritorious claims by plaintiffs and trials where merits are genuinely and on reasonable grounds in dispute or issues of apportionment or *locus standi* cannot be resolved other than by trial and a decision by a court should not be delayed or prejudiced by actions which could (and should) be resolved by responsible litigation and timeous consideration of the issues of merits.'

Litigation statistics

A study of the 2018 Gauteng Division of Pretoria's Court Roll, which is the largest court jurisdiction in our country reveals the information in the table above.

From the 2018 Gauteng Division of Pretoria's Court Roll, it is quite apparent that in 86% of cases on the roll the RAF is the defendant and that less than 1% of cases defended by the RAF ultimately proceed to trial. Stated differently, 99,56% of all cases defended by the RAF are settled and are probably capable of early settlement without litigation.

Conclusion

The RAF's legal bill emanates principally from the high number of annual claims and the RAF's litigation policy and practice. It is not simply the RAF being dragged to court by legal practitioners but based on recent judicial pronouncements, largely the RAF's approach to claims handling and litigation, which is and remains in urgent need of review because it is costing motorists and our country approximately R 10 billion per annum. The RAF can substantially curtail litigation (as is clearly intended by the Act) by astutely and effectively making use of s 17(3) (b) of the Road Accident Fund Act 56 of 1996, which reads: 'In issuing any order as to costs on making such award, the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served.'

Should the RAF properly deal with claims and make reasonable offers within 120 days from date of lodging as determined by the Act, litigation will due to the consequences of s 17(3) (b) be so fraught with substantial adverse risk for lawyers that litigation will become unpalatable and reduced to acceptable levels with concomitant substantial cost saving. Not only will costs be reduced, but, as intended by the legislator, the interests of road crash victims will be properly served.

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Picture source: Gallo Images/Getty

Obscurity on the issue of filing security in review applications

By
Vishal
Ramruch

The Labour Relations Act 66 of 1995 (LRA) was amended to include subs (7) and (8) into s 145, with effect from 1 January 2015. These subsections require applicants in a review application to the Labour Court (LC) to file security in order to suspend the operation and execution of an arbitration award that is being subjected to review. Government, being an employer, is often confronted with review applications or initiating them. The focus of this article is the effect of aforementioned subsections on government/state departments, mindful that labour law litigation is a *sui generis* field.

The issue at hand is whether government departments should be required to file security in order to suspend the operation of an arbitration award when it brings a review application in the LC. Previously, lodging a review application suspended the operation of an arbitration award.

Effect of arbitration awards

An arbitration award is akin to a court order. Section 143 of the LRA states that:

'(1) An arbitration award issued by a commissioner is final and binding and it may be enforced *as if it were an order of the Labour Court* in respect of which a writ has been issued, unless it is an advisory arbitration award.

...
(4) *If a party fails to comply with an arbitration award* certified in terms of subsection (3) that orders the performance of an act, other than payment of an amount of money, *any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.*

(5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or *executing that award as if it were an order of the Magistrate's Court* (my italics).

Failure to comply with it can resort in either contempt of court proceedings or a writ of execution against property.

Review application and security

Section 145(7) and (8) states as follows:

'(7) The institution of review proceedings *does not suspend the operation of an arbitration award, unless the applicant furnishes security* to the satisfaction of the Court in accordance with subsection (8).

(8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must –

(a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or

(b) in the case of an order of compensation, be equivalent to the amount of compensation awarded' (my italics).

The Act is clear – a review application does not suspend the operation of an arbitration award, unless the applicant files security to the satisfaction of the court.

In practice, while a review application is unfolding, the other process of certifying the award occurs from the employee side. The department is thereafter met with either contempt of court proceedings or a writ of execution. Both processes require departments and State Attorneys to act on an urgent basis. It requires the State Attorney to bring an urgent application to stay the enforcement of the arbitration award.

This in turn implies that for every review application brought by the State Attorney, there may very well be an urgent application to stay the enforcement of an award.

Some employees may opt to move via the contempt of court proceedings. A contempt of court application requires the receiver of same to act expeditiously as well. Lack of resources and incurrence of legal costs seems to be at the fore in these applications.

Filing of security

The matter that seems to have first spoken directly on the issue is *Free State Gambling and Liquor Authority v Commission for Conciliation, Mediation and Arbitration and Others Free State Liquor and Gambling Authority v Motake NO and Others* (2015) 36 ILJ 2867 (LC). The applicant therein was a regulator of the gambling and liquor industries and was accountable to the responsible Member of the Executive Council (MEC) of the province. The applicant sought to stay the certification and/or enforcement of two arbitration awards pending the outcome of its review applications. The applicant went further and requested that it be absolved from furnishing security and alternatively, declaring that s 145(8) of the LRA is in conflict with the Public Finance Management Act 1 of 1999 (the Act), specifically s 66. It also requested the court to deal with the constitutionality of s 145(8) of the LRA as a further alternative; the court, however, did not entertain this aspect.

The court accepted the applicant's argument and essentially ruled that to file security, to comply with s 66 of the Act and Treasury Regulations 'would mean that a notice would have to be gazetted by the Minister of Finance each time such a "borrowing" is permitted. It is submitted that this is impractical. I would add that it is also unnecessary.' The judge went further and stated that in applications such as these, where the applicant's budget and financial management is governed by the Act and Treasury Regulations, and duly authorised averments are made to this effect, the object of providing security is satisfied. The application to stay the enforcement of the award was, therefore, granted.

The approach adopted by Rabkin-Naicker J appears to be one that is more understanding of government protocols.

This judgment demonstrates a measure of insight into the differences between a private applicant in a review application and that of a government department.

In *National Department of Health v Paredesi and Another* (LC) (unreported case no J1978/2016, 12-9-2016) (Van Niekerk J) delivered on 12 September 2016, there was an urgent application by the National Department of Health to stay the execution of a writ.

The applicant submitted that in terms of the *Free State Gambling* case, it was not required to furnish security. While

van Niekerk J did not 'express a view on the correctness or otherwise of the decision in *Free State Gambling*', he pointed out that in terms of the *Free State Gambling* matter, the applicant ought to have made duly authorised and necessary averments in its papers to this effect – why it should be exempted from filing security. The judge went further in stating that the *Free State Gambling* matter is not authority for the proposition that all departments of state or other entities subjected to the Act do not have to furnish security and that facts must be before the court to enable the court to exercise a discretion as to whether security should be furnished or not. The application to stay the writ was refused.

Judgment was handed down in the matter of *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others* [2017] JOL 39124 (LC). Once again, the facts were similar. The award was certified and the Sheriff appeared at the offices of the applicant. This prompted the applicant to bring an application to stay that writ, pending the outcome of the review application.

The applicant relied on the Local Government: Municipal Finance Management Act 56 of 2013 (MFMA) in that s 29 of the MFMA places an impediment on access to funding in respect of issues not budgeted for or approved in terms of the financial systems in place. It contended that payment of security is, therefore, not budgeted for and it could not provide same. The applicant, therefore, argued that it should be exonerated from filing security. The applicant also relied on the *Free State Gambling* matter.

The court, essentially, reasoned as follows:

- A proper case must always be made out by the applicant in seeking to dispense with the requirement of providing security, which would form the basis on which such discretion might be exercised.
- Insofar as the *Free State Gambling* case is concerned, to the effect that public service entities subject to the provisions of the Act or related legislation are exempt/exonerated from providing security under s 145(7) and (8), it is 'clearly wrong'. There is no reason why all employers, whether in the public service or private sector, should not be subject to the same requirement.
- Where there is a conflict between the Act and the MFMA, the LRA must prevail.
- The provisions of the Act and MFMA cannot serve as a basis to exonerate any government departments from having to file security.

The judge drew no distinction between any type of employer. Equating a government department as a litigant to a private sector/individual litigant, with

respect, may be problematic. Government departments operate on a different scale to that of a private litigant.

For a private litigant to file a review application, with security, will simply mean depositing the security amount into their legal practitioner's trust account who can thereafter do the necessary to file the security. For a government department, however, this is not so simple. It must follow various processes in order to justify the amount needed, acquire the necessary official approvals and then make the security amount available. This process, although may seem bureaucratically challenged, is necessary. A government department is accountable to Parliament and the public. A private litigant is not; and if it is, not to the extent as which a government department is. By the time this process unfolds, it is possible that the six-week period to lodge the review application would have passed.

The *Free State Gambling* matter recognises the differences between a government department and the private sector. Government departments are, nonetheless, recognised in the legislature to operate in a different manner to that of private litigants. In, for example, the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002,

this Act recognises that, since an organ of state is different to that of a private litigant, certain procedures must be followed prior to instituting action against the state. If there is no proper compliance in terms of s 3 therein, the action becomes premature and dismissible. Another example of the recognition of government departments being treated differently is noting the *dies* required for it to act in response of a summons.

Government departments should not be treated the same as a private entity when it comes to filing security. To do so, would be contradictory to the purpose and intent of legislation already in place. The problem, in my view, not only lies in the *Rustenburg Local Municipality* matter, but in the legislature. Perhaps the legislature should have gone further in either exempting government departments from filing security or placing a precondition (such as time limits) on it in filing a review application and/or how it deals with review applications.

I understand the rationale for the introduction of ss 145(7) and (8) – to prevent or discourage review applications that have little prospects of success. It is true that s 210 of the LRA states that '[i]f any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law

save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.' On the other hand, I am of the view that ss 145(7) and (8) are in direct conflict with ch 13 of the Constitution, specifically ss 215 and 216 (National, provincial and municipal budgets and Treasury control). The Act is the core Act that speaks to these sections of the Constitution, and thus is in conflict with the LRA.

Sections 38(2), 66 and 70 do pose difficulties in complying with ss 145(7) and (8) of the LRA for any government department. Since these Acts are in conflict with each other, this conflict surely should not continue indefinitely. Sections 145(7) and (8) can not only discourage a government department in lodging review applications; it, in effect, can disable them. Thus, legislative or precedent setting intervention is required.

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Is the state obliged to provide Internet access to detainees?

By
Daniël
Eloff



Persons who are detained or arrested have certain rights under the Constitution. One such right is the right of an arrested and/or detained person to consult with a legal practitioner of their choice and to be informed of this right promptly in terms of s 35(2)(b) of the Constitution. Moreover, in terms of s 35(2)(c), if a person cannot afford legal representation and the lack of legal representation will cause substantial injustice, the state has to assign a legal practitioner of its choice to the arrested and/or detained person at state expense.

Legal representation is an important aspect of South African criminal law. Most often, arrested and/or detained persons may not be qualified or trained in the law, which might in turn mean that they are not aware of the full implications if they respond to the police's request for cooperation and assistance at any time after an arrest. The presence of a legal practitioner is crucial in ensuring

that this right, among others, is adhered to and protected during this time.

On arrest, it is often the case that the arrested and/or detained person is afforded an opportunity to contact a legal representative. The person may be given a landline at the police station to contact a family relative who in turn contacts a legal representative or alternatively the person could phone a criminal defence attorney directly themselves.

This article presents the notion that the rights to legal representation need to be reconsidered with particular reference to the ways in which legal rep-

resentation is sought and obtained. The article also problematises the notion of the right to Google a legal practitioner, in terms of the Constitution.

Comparison

The Canadian Charter of Rights and Freedoms is a bill of rights that is entrenched in the Constitution of the country and it guarantees certain political and civil rights to every person in Canada. Rights in terms of the Charter may only be limited by law as can be demonstrably justified in a free and democratic society.

Section 10(b) of the Canadian Charter of Rights and Freedoms states that every Canadian citizen has the right to retain and instruct counsel without delay and to be informed of that right on arrest.

The South African Constitution in s 35(2)(b) states that every South African has the right to choose, and to consult with, a legal practitioner, and to be informed of this right promptly. This right is subject to s 36(1) that states that all rights including s 35 may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

Furthermore, s 73(1) of the Criminal Procedure Act 51 of 1977 (CPA) provides that: 'An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the

management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.'

The wording of both the rights of the arrested and/or detained person in the two jurisdictions are quite similar and its limitations in both instances are in wording at least, comparable.

R v McKay

In a 2013 Provincial Court of Alberta, Canada decision (*R v McKay* 2013 ABPC 13) a (at the time) 19-year-old was arrested and charged with driving while under the influence of alcohol. When the police arrived with the arrested person at the police station his personal belongings, including his cell phone, were locked away at the station.

The arrested person was then afforded the opportunity to consult a telephone directory (an equivalent of the South African Yellow Pages) and to dial a toll-free number in order to practise his right to contact counsel. It became clear from the testimony of the accused that he was under the impression that he only had a single opportunity to attempt to contact a legal representative. After making his 'one call' the accused had not received any helpful legal advice yet abided with the outcome thereof.

At the trial the accused testified that he used Google (the online search engine) as his main source of information and that he did not consider the toll-free number as a viable option to search for legal representation. The court then dealt with the question of whether access to the toll-free number and the Canadian Yellow Pages equivalent amounted to a reasonable opportunity for the accused to contact counsel. The Canadian court held that reasonable opportunity is contextual and fact specific. *In casu* the court held that by not providing Internet access to the person arrested and/or detained the right in terms of s 10(b) of the Canadian Charter of Rights and Freedoms is violated.

The Crown (state) successfully appealed this decision by the Provincial Court of Alberta finding that it was not for the lower Canadian courts to 'reassess social and technical conditions and change the law accordingly' especially when taking into consideration that there was at the time binding precedent from higher courts. The appeals court held that given the contextual circumstances and particular set of facts in the Canadian court *a quo* that the police were not required to go beyond the steps that were required to provide an arrested and/or detained person with the reasonable opportunity to contact counsel. In the end the higher court held that the police fulfilled their obligations in terms of s 10(b) of the Charter despite not giving

the accused the opportunity to conduct a Google search.

Nonetheless, the case poses an interesting question that is bound to become increasingly relevant as our lives become ever more interconnected and based online.

Right to Google an attorney in South Africa?

The *R v McKay* case poses the question (albeit theoretical for now) of whether, in the South African context and within our constitutional framework, arrested and/or detained persons enjoy the right to Google an attorney in terms of s 35(2)(b). To answer this question constitutional interpretation is vital. The court held in the well-known case of *S v Makwanyane and Another* 1995 (3) SA 391 (CC) that the provisions of the Constitution (at the time when the case was decided the Interim Constitution was enacted) should not be construed in isolation, but in context, which includes the history and background of the adoption of the Constitution. The court further held that interpretation of rights and freedoms must be construed in such a manner that 'secures for "individuals the full measure" of its protection'.

Furthermore, the interpretation clause of the Constitution in s 39 states that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

In order for the right of the arrested and/or detained to choose, and to consult with, a legal practitioner to be construed in a manner that 'secures for "individuals the full measure" of its protection' the person should surely be able to make an informed decision when exercising their right in terms of s 35(2)(b).

For many people, when they are arrested it is the first time that they ever require the assistance of a legal practitioner. Many South Africans, therefore, do not know any legal practitioners to contact should they ever be arrested. To further complicate matters, many attorneys are not specialists in criminal law and do not have experience in this very specific field of law. It is, therefore, beneficial for persons to be able to not only contact a legal practitioner but for them to be able to do a quick Internet search to find a criminal defence legal practitioner. This manner of inquiry also enables persons to decide on which particular legal practitioner to approach, while taking into consideration the information available on the Internet. This could have cost saving implications to the arrested and/or detained person.

The vast majority of South Africans and especially South African youth grow up without knowing the existence of



the Yellow Pages and/or the purpose it serves. For many South Africans Google or other search engines are the only viable way of searching for information. The Internet is used for almost all aspects of our lives. South Africans search for medical treatment, educational institutions, housing, governmental information and everything in between by using the Internet and particularly through search engines. The same could apply for arrested and/or detained persons when they wish to exercise their right in terms of s 35(2)(b).

Challenges facing the right to Google a legal practitioner

There are, however, a number of major matters to consider the question of whether or not arrested and/or detained persons should have the right to Google a legal practitioner.

The first hereof is obviously the budgetary challenges and restraints on resources that our country faces. Unlike the rights secured in terms of ss 26 and 27 of the Constitution, s 35 does not state that: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right' due to the fact that s 35 is not a so called socio-economic right. It would seem that

to find that s 35 includes the right to Google a legal practitioner, would be resource intensive in our resource-scarce country, simply because of the equipment required to fulfil such a hypothetical right.

The second matter relating to the right to Google a legal practitioner is to consider what 'happens' to that right when it is not physically or practically possible to provide for the realisation of that right? In this context how do we deal, for example, with the practical issue of when electricity and hence access to the Internet is unavailable at that specific time? Does this then entail that the right is not fully realised and, therefore, violated? Without delving too deeply into legal philosophy and the nature of rights, it is obvious that a right cannot exist subject to certain conditions. Rights should either exist by their very nature or they should not at all.

It could be argued that the right to Google a legal practitioner should not be considered a fundamental right in terms of the Constitution, but that it should rather be added as a legal right in terms of legislation with very specific qualifying wording and requirements.

Conclusion

Hypothetically to be able to Google a legal practitioner may enhance the principle that the right to legal representation

also entails representation of a certain standard (*S v Chabedi* (SCA) (unreported case no 497/04, 3-3-2005) (Brand JA)). By being able to search with keywords for legal representation on arrest, legal practitioners who are familiar with the field of criminal law will be approached by the accused person.

Although the right to choose a legal representative is a fundamental right as enshrined in the Constitution 'it is not an absolute right and is subject to reasonable limitations' (*Halgryn v S* [2002] 4 All SA 157 (SCA)). It would seem that it is, therefore, required to find a balance between fulfilling this right to its fullest possible means while still adhering to reasonable and realistic limitations.

It would seem that, for now and in the rare instance that these circumstances ever happen, the courts would approach the matter on a case by case instance by taking the particular context and facts into consideration.

Just as the Internet is shaping how the rights to freedom of expression and access to information is practically exercised, so too will the Internet shape how our criminal law systems function.

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Trust account advocates – can they be admitted to the roll of notaries and conveyancers?

By
Sydney
Mosoane

In terms of the Legal Practice Act 28 of 2014 (LPA) both advocates and attorneys are referred to as legal practitioners. For the purposes of this article, the old terms advocates and attorneys will be used. – Editor

It may be unusual to suggest that it is time to have advocates practicing for the first time in South Africa (SA) as notaries and conveyancers. In SA, admission into the professions of notaries and conveyancers is limited only to persons who are admitted and enrolled as attorneys. This makes admission as an attorney a requirement for entry into the professions of notaries and conveyancers. This is both in terms of the LPA and the repealed Attorneys Act 53 of 1979 and other legislation. This article seeks to establish whether the new category of advocates with a trust account, under the Legal Practice Act, can qualify as notaries and conveyancers owing to the nature of their practice.

One of the purposes of the LPA is to provide a legislative framework for the transformation and restructuring of the legal profession, in line with constitutional imperatives, so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics SA – bearing in mind that access to legal services is not a reality for most South Africans and to remove any unnecessary or artificial barriers for entry into the legal profession.

The requirements for admission and enrolment as a notary and conveyancer

Section 1 of the LPA defines a ‘conveyancer’ as ‘any practicing attorney who is admitted and enrolled to practice as a conveyancer in terms of this Act’. The definition is the same in the case of a notary.

In terms of s 26(2) and (3), an attorney qualifies to be enrolled as a conveyancer and as a notary if they have passed the competency-based examination or assessment of notaries and conveyancers (as the case may be).



Picture source: Gallo Images/Getty

It is clear from these provisions that one must have first been admitted as an attorney before applying to be admitted as either a notary or a conveyancer. In terms of r 12.2 of the rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA (as amended), the candidate's application for admission and enrolment as either a notary or conveyancer must be accompanied by an affidavit by the applicant containing a confirmation that the applicant has been admitted as an attorney.

There are, therefore, two requirements for admission into the professions of notaries and conveyancers, namely –

- admission as an attorney; and
- successful completion of the competency-based examinations for notaries and conveyancers.

The want of qualification of advocates in general for admission and enrolment as notaries and conveyancers

Advocates in general cannot practice as notaries and conveyancers as they do not conduct any trust banking accounts to administer clients' money. The profession of a conveyancer is one that requires the practitioner to keep a trust account, the purpose of which is to protect clients from appropriation and loss. The Supreme Court of Appeal (SCA) in *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at paras 8 to 10 has shown that clients who instruct an advocate directly have no protection against attachment by creditors and cannot recover a shortfall in a trust account from the Legal Practitioners Fidelity Fund.

For both these reasons stated, advocates are not included in the definition of a notary and a conveyancer.

Trust account advocates and the elimination of the want of qualification

In terms of s 1 of the LPA, a 'trust account practice' means a practice conducted by –

'(a) one or more attorneys who are; or
(b) an advocate referred to in section 34(2)(b) who is, in terms of this Act, required to hold a Fidelity Fund Certificate.'

Advocates with a trust account are the new category of advocates established by s 34(2). The nature of the practice of an advocate with a trust account is one of a trust account practice in terms of s 1 and is the same in many respects to that of an attorney as these advocates are required to keep a trust account and to hold a Fidelity Fund Certificate (FFC). A client may approach a trust account without the fear of appropriation or loss, as the client's money is administered through a trust account.

The nature of the practice of an advocate referred to in s 34(2), therefore, in all reasonableness eliminates the lack of qualification for advocates to be admitted as notaries and conveyancers.

Because these advocates hold a FFC in terms of ss 34(2)(a) and 84(1), and because they are required in terms of s 85(1)(b) to complete a practice management course, they are without doubt equally fit to be admitted as notaries and conveyancers as attorneys are, provided of course that they pass the competency-based examinations that notaries and conveyancers are required to pass.

A constitutional challenge

While there is a need to regulate the profession in terms of s 22 of the Constitution, such regulation must be fair, reasonable and in line with constitutional imperatives. Where there is a change in policy and practice in the profession, regulations ought to change where necessary to meet the needs and challenges of the present policy and practice. This does not seem to be the case now in this matter. Schippers J in *Noordien v Cape Bar Council and Others* (WCC) (unreported case no 9864/2013, 13-1-2015) (Schippers J) correctly held in para 26 when dealing with the constitutionality of the referral rule that the differentiation between attorneys and advocates bears a rationale connection to a legitimate government purpose, the need to regulate the professions and to

protect the public. Now that things have changed, is the protection of the public in the case of trust account advocates still a concern as it was with traditional advocates without a FFC? If not, would the differentiation between attorneys and these trust account advocates still bear a fair and legitimate government purpose in as far as the profession of notaries and conveyancers is concerned? I think not.

Sections 1 and 26(2) and (3) of the LPA may be found wanting of constitutional validity to the extent that it does not allow trust account advocates into the profession of notaries and conveyancers when they are in fact and in law equally fit and qualified as attorneys are to provide notarial and conveyancing services. The bottom line would be that the differentiation between attorneys and trust account advocates for purposes of the said professions of notaries and conveyancers is one that is unfair and discriminatory if the need to make such differentiation does not bear a legitimate government purpose.

Conclusion

I submit that advocates practising in terms of s 34(2) of the LPA equally fit as attorneys are to practice as notaries and conveyancers. This shift is important for the realisation of transformation in the legal profession.

Recommendations

I recommended that the LPA be amended to the extent that it includes trust account advocates in the definitions of a notary and a conveyancer in s 1 and s 26(2) and (3) of the LPA. The Legal Practice Council as the single regulatory body of the legal profession should engage with all stakeholders to take views and comments on the matter and to find the possibility and practicality of allowing trust account advocates to practice further as notaries and conveyancers for the first time in SA.

Sydney Mosoane is an LLB student at the University of Limpopo.



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THE LAW REPORTS

January 2019 (1) South African Law Reports (pp 1 – 326);
[2018] 4 All South African Law Reports December (pp 615 – 919);
[2019] 1 All South African Law Reports January (pp 1 – 289)

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

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Company law

Requirements of application for orders declaring dissolution of company void: The appellants in *De Villiers and Others v GJN Trust and Others* 2019 (1) SA 120 (SCA) were De Villiers; the Cape Veterinary Wholesalers CC (the CC), of which De Villiers was the sole member; and the Francois de Villiers Share Trust (the Share Trust), of which De Villiers was a trustee. De Villiers and the CC were creditors of the company Cape Animal Health Brokers (Pty) Ltd (the company). The Share Trust was the sole shareholder of the company. De Villiers successfully applied for the liquidation of the company. The company was afterwards dissolved in terms of s 419 of the Companies Act 61 of 1973 (the Act).

Subsequently, the first respondent, the GJN Trust, also a creditor of the company, successfully sought an order in the WCC declaring the dissolution of the company to have been void in terms of s 420 of the Act, on the grounds of impropriety on the part of the appellants. In the court *a quo* the appellants sought the setting aside of the s 420 order, in terms of r 42(1) (a), on the grounds that it had,

erroneously, been made without any notice to any of them. The court *a quo* refused the rescission application.

On appeal to the SCA against the refusal the critical question for decision was whether the appellants had established *locus standi* to bring an application under the rule. Thus, did the appellants have a legal interest in the subject-matter of the action or application, which could be prejudicially affected by the order in that action or application? In answering this question, Van der Merwe JA considered the relevant background, in particular the ambit of s 420 of the Act, and the purpose and effect of an order granted in terms of s 420 of the Act. The court referred with approval to the decision in *Ex parte Liquidator Natal Milling Co (Pty) Ltd* 1934 NP 312 in concluding that s 420 of the Act provided a court with the discretion to avoid the dissolution of a company in any circumstances where the interests of justice warranted such a cause. The discretion was wide, and defied precise definition.

It further held that the effect of an order under s 420 was to revive the company and to restore the position that existed immediately prior to its dissolution. Thus, the company was recreated as a company in liquidation, with the rights and obligations that existed on its dissolution. Property of the company that passed to the state as *bona vacantia* was automatically reinvested in the company by operation of law. An order un-

der s 420 was only retrospective in this sense and did not validate any corporate activity of the company, which may have taken place during the period of its dissolution. The effect of an order in terms of s 420 had, therefore, to be contrasted with the effect of the reinstatement of a company in terms of s 82(4) of the (new) Companies Act 71 of 2008 after its deregistration by the Companies and Intellectual Property Commission in terms of s 82(3) thereof. The steps taken during the prior liquidation, up to the time of dissolution, remained in place.

As a result, so the court reasoned, it had to reject the appellants' argument that the s 420 order adversely affected their interests in that they were not afforded the oppor-

tunity to respond to the serious allegations of impropriety that had been made in the s 420 application. The prosecution of these claims would take place by due process, during which the appellants would be afforded the full opportunity to protect their rights.

The appeal was thus dismissed with costs.

Civil procedure law

Consumer foreclosure debts must be lodged in local magistrate's or regional court: *In re: Nedbank Limited v Thobejane and related matters* [2018] 4 All SA 694 (GP) involved a number of cases where banks lodged their claims for foreclosure on mortgage agreements subject to the National Credit Act 34 of 2005 with the GP, even

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though the quantum of the claims fell within the jurisdiction of either the magistrate's court or regional court. The Judge President became concerned about the court rolls of the GP becoming clogged up with matters, which properly belonged elsewhere and caused delays in matters that properly belonged before the High Court and denying the litigants involved proper access to justice.

The Judge President issued a directive for the following issues to be addressed:

First, why should the High Court entertain matters falling within the jurisdiction of the magistrate's court? Secondly, is the High Court obliged to entertain such matters because it has concurrent jurisdiction? Thirdly, is the Provincial Division obliged to entertain matters falling within the jurisdiction of a Local Division, that is, the GJ? Finally, is there an obligation on financial institutions to consider the implications of and access to justice of financially distressed consumers when considering which forum to use?

Appearing before the Full Court were the financial institutions that brought the default applications. The court requested the Pretoria Society of Advocates to assist the unrepresented defendants. The South African Human Rights Commission (SAHRC) and the Department of Justice and Constitutional Development were granted leave to be admitted as *amici curiae*.

Tolmay J pointed out that the financial institutions raised a number of arguments on why they choose to lodge matters with the High Court instead of the magistrates' court, mostly dealing with the inefficiency and uncertainty experienced in magistrates' courts and their reluctance to order properties specially executable.

The SAHRC highlighted the plight of distressed impecunious consumers who stood to lose their homes, often on the basis of small defaults and their inability to properly defend these actions. The Minister of Justice, in turn, highlighted the lack of designated interpreters in

the High Court, in contrast to the magistrates' courts where there are sufficient numbers and the denial of justice this may cause in the High Court. Statistics show that there has been an enormous increase in the number of matters lodged in Pretoria. The extra workload makes it difficult for judges to write judgments, causing delays in matters being finalised, delaying justice even further for the litigants.

Due to the new Uniform Rule 46A, foreclosure matters require a lot more scrutiny, further adding to the workload of the judges.

The current practice poses a threat to the right of access to justice and the sustainability of the workload of the GP.

In principle, a plaintiff has the right to choose any court, which has jurisdiction in the dispute, but this choice should not be at the expense of access to justice. Courts should not be overburdened where matters can conveniently be dealt with by other courts as it impacts on the access to justice and may be an abuse of process. If impecunious litigants are denied proper access to justice and the High Court is unnecessarily overburdened, it constitutes an abuse of process.

The High Court has the discretion to regulate its own processes and even if this discretion is to be used sparingly, this is a matter where the principle of access to justice requires it. In terms of Uniform Rule 39(22) a High Court may transfer a matter on its own account to an appropriate court, either the magistrate's court or a Local Division.

The most practical way to discourage the current practice is to require a plaintiff in a matter properly belonging in a magistrate's court to make a formal application providing reasonable grounds why the matter should be heard in the Provincial Division. Inefficiency of the magistrates' court or the convenience of the plaintiff does not constitute such grounds. The court confirmed that litigants in all matters have an obligation to consider the question of access to justice when exercising

their right to choose the court within which to litigate.

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

No costs order was made.

• See 'Letters to the Editor' 2018 (Dec) DR 4.

Constitutional law

Equality – objective test for hate speech: In *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ); [2019] 1 All SA 254 (GJ) the applicant (the SAHRC) instituted proceedings in the High Court, sitting as an Equality Court, against the respondent (Khumalo) following complaints that his social media posting, that 'we [black people] must act [against white people] as Hitler did to the Jews', constituted hate speech. However, this happened only after a different complaint relating to the same media posting had already been heard by a magistrates' court sitting as an Equality Court, and that court had made an order after settlement was reached between the complainant in that case and Khumalo. Khumalo subsequently made further, and even more abusive comments on social media, which allegedly amounted to hate speech. The present case in the GJ concerned a number of procedural aspects, including that of *res judicata* and estoppel. The question in this matter was whether Khumalo's comments constituted hate speech as contemplated by s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

Sutherland J held that in order to achieve alignment with s 16(2)(c) (which provides for freedom of expression) of the Constitution, s 10(1) of the Equality Act must be read conjunctively rather than disjunctively. As a result, the factor of 'incitement' must be present in the prohibited utterances.

The test for hate speech was whether Khumalo's utterances 'could be reasonably construed to demonstrate a clear intention to incite harm'. It postulated what a reasonable reader could think about the speech. If a reasonable person reading the text could understand it to mean an incitement to cause harm, the test was met. And because the objective test of the reasonable reader applied, it was the effect of the text and not the intention of the author that was assessed. It must, therefore, be asked if 'harm' could be incited by the effect of the utterances on readers.

The 'harm' envisaged derived from interracial hostility and was not to be limited to physical harm to the category of persons against whom the hatred was directed. The risk of harm existed in several forms, including conduct that would harm social cohesion, and so undermining the nation-building project.

Khumalo's comments aimed to repudiate whites as unworthy and that they ought deservedly to be hounded out, marginalised, repudiated and subjected to violence in the eyes of a reasonable reader. This comment could indeed incite the causation of harm in the form of reactions by blacks to endorse those attitudes, reactions by whites to demoralisation, and ratchet up the invective by responding in like manner. Thus, by such developments, on a large enough scale, the transformation of South African society may be derailed.

The court made the following order: First, that Khumalo's utterances be declared hate speech in terms of s 10(1) of the Equality Act. Secondly, that he be interdicted from repeating the utterances. Thirdly, he had to remove all references to the utterances from any social media or other form of public communication. Fourthly, he had to publish a written apology, within 30 days of the court's order being made, directed at all South Africans in which he acknowledges that the utterances were hate speech, that he was wrong to utter them, and undertakes

never again to utter any remarks prohibited by s 10(1) of the Equality Act.

Khumalo was ordered to pay the costs of the SAHRC.

Defamation

Mere listing as a 'politically exposed person' does not constitute defamation: The facts in *Kassel v Thompson Reuters (Markets)* 2019 (1) SA 251 (GJ) were as follows: The applicant (Kassel) was listed as a 'politically exposed person' (PEP) in Thompson Reuters World-Check, a subscription-based database. Politically exposed persons are persons who perform prominent public functions. The listing is intended to warn financial institutions of the enhanced due diligence many countries, including South Africa, require when business dealings with PEPs are scrutinised. It forms part of the efforts of the Financial Action Task Force on Money Laundering (the Task Force) to combat money-laundering and the financing of terrorism. The Task Force is an international organisation of which South Africa is a member. The Task Force publishes a loose definition of PEPs to include senior politicians, judicial and military officials and managers of state-owned enterprises. World-Check listed Kassel as a PEP because he had, until October 2014, been an official of a Zimbabwe state-owned diamond-mining company. Kassel argued that his continued listing was defamatory because it conveyed the implication that he was someone to whom an enhanced risk of involvement in money-laundering and the financing of terrorism still attached. He approached the court for an interdict directing Thompson Reuters to delist him.

Unterhalter J held that the mere listing of someone as a PEP did not constitute defamation. The World Check is a highly specialised publication. The reasonable reader of the World-Check would understand the regulatory purpose behind the listing and that it did not imply corruption or wrongdoing, but occupancy of high office, which was a wide class which

included the good and the great.

Neither was the post-2014 retention of Kassel's listing defamatory, while those who vacated their offices became less exposed over time, the diminishing utility of their listing did not render it defamatory. If the occupation of high office by a PEP, for all the risks of exposure, is not defamatory of the person who occupies that office, how does vacating that office and still referencing their exposure to risk become defamatory? The answer appears to be that Kassel, on resigning his directorship, was not politically exposed. Assuming that is so, why is it defamatory to say of Kassel that he was once a director of a state-owned enterprise and remains a PEP? The mere listing of someone as a PEP entails no attribution of wrongdoing. To continue to be listed as such, after vacating an office of state, adds nothing that would now give rise to such an attribution. At worst, the continued listing of Kassel was an incorrect assessment of political risk, which was a matter of judgment.

The application was dismissed with costs.

Eviction – employee

Termination of employment does not automatically terminate the right to housing: In *Monde v Viljoen NO and Others* [2018] 4 All SA 665 (SCA) Viljoen applied for an eviction order in the magistrates' court. He averred that Monde derived his right to residence exclusively from his employment in terms of a contract. Monde was dismissed from his employment when he was found guilty of being absent from work without permission. Viljoen claimed that his right of residence terminated on the date his employment terminated.

Monde alleged that he was employed in 1988 and was given a single room on the farm in 1992, which he still occupied. He denied that he concluded the employment contract and said that it was never shown to him. He alleged that he had worked on

the farm in terms of an oral employment contract; and he had not waived or limited his right of residence. He also denied that the respondents had adopted a policy that only workers who worked on the farm could reside on it. The court of first instance found that on the facts this was unlikely. Monde asserted that he also occupied the house based on the connection to his mother, who was an occupier with a right of residence.

Schippers JA held that Monde had a negative impact on the occupiers on the farm, and his employment record was poor. There had been a fundamental breach in the working relationship. But, there are still provisions in the Extension of Security of Tenure Act 62 of 1997 (ESTA) that must be complied with before a person can be evicted.

The termination of the employment was fair, but the right of residence did not flow from the employment contract. The clause that linked the housing and employment was struck through and initialled by the party. The contract also provided that benefits existing before the signing of the contract would continue thereafter. The parties, therefore, did not have any intention to agree that the right of occupancy flowed from the contract.

ESTA does not require a person to occupy the land in terms of a contract, it merely requires consent by the owner, which consent is assumed if a person lives on the land for more than one year. Consent in this case also has a wider meaning than a person being a direct party to an agreement (that is, tacit consent).

In this case the right to occupy existed independently from the contract and was established prior to the contract. The right to residence must be terminated separately from the termination of employment and a case must be made for eviction. When making a case that eviction is just and equitable, the probation officer's report required in terms of s 9(3) of ESTA is mandatory. Viljoen failed to

show that the termination of Monde's right of occupancy was just and equitable.

The appeal was upheld. No costs order was given.

Legal practice

Validity of contingency fee agreements: In *Mathimba and Others v Nonxuba and Others* [2018] 4 All SA 719 (ECG) the first applicant (Mathimba) instituted two actions for damages against the Road Accident Fund and the Member of the Executive Council for Health, Eastern Cape. The second respondent (Nonxuba Inc) represented by the first respondent (Nonxuba) acted as attorney of record for Mathimba in both actions. The third respondent (Dutton) was the first applicant's counsel in one of the matters. It was common cause that Nonxuba Inc financed the entire cost of both actions.

After receipt of the amounts awarded to Mathimba in both matters, Nonxuba Inc deducted the fees and disbursements that it considered due to it. Mathimba disputed that the fees and disbursements deducted were reasonable. He alleged further that it came to his knowledge that first and second respondents were claiming fees based on a contingency agreement. He contended that the alleged contingency agreement concluded with Nonxuba Inc was invalid for want of compliance with the Contingency Fees Agreements Act 66 of 1997 (the Act).

The first issue for determination by the court was whether a settlement agreement was concluded between the applicants and first and second respondents concerning all disputes between them. The settlement agreement was disputed by the applicants, who claimed that interest should have been included therein.

Lowe J held that the evidence suggested that interest was never discussed during the negotiations preceding the agreement. The applicants attempted to rely on *iustus error* in that regard, but the facts did not support that

contention as it could not be found that the inclusion of interest had been contemplated but erroneously omitted.

Secondly, regarding the validity of the contingency fee agreement, the applicants relied on a number of grounds. Essentially, Mathimba sought an order that the agreement be declared invalid and void. In the event that such relief were granted, he sought an order that the total fees of first and second respondent together with the fee of third respondent should not exceed 25% of the capital amount awarded in the action. The court found that there were two contingency fee agreements in the matter. One was for the attorney's fees and the other for Counsel's fees. That was impermissible. The Act makes no provision for an advocate to sign a contingency fee agreement separately from the attorney; and it is not proper for an advocate to conclude a contingency agreement directly with a client. Matters with both an attorney and counsel on contingency, the globular fee must be assessed to see whether the agreement complies with the statutory 25% cap.

The agreement in this case did not comply with the Act in various respects, and was set aside. The respondents were ordered, jointly and severally, to pay first applicant's costs on a party and party scale.

Payments – tender

Whether tender of payment amounts to performance in terms of a contract: The crisp question in *Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd* 2019 (1) SA 267 (GJ) concerned the validity and legal effect, in a contractual setting, of a tender to pay in lieu of actual payment. The facts were as follows: The parties had entered an agreement in terms of which the respondent (Smeg) appointed the applicant (Origo) as its exclusive retailer in respect of certain of its products. Smeg later demanded from Origo payment of the sum of R 419 000 (in respect of goods sold by the latter), which

in terms of the agreement had become due and owing. The letter of demand added that, failing payment by the specified date, the agreement would be cancelled. Origo's response was to write a letter to Smeg in which it disputed the correctness of the amount claimed. It acknowledged that it was indebted to Smeg for a lesser amount based on its own reconciliation which it attached; and tendered to pay such lesser admitted amount, 'which payment would be effected upon confirmation [by Smeg] of this amount constituting full and final settlement of the dispute'. Smeg subsequently cancelled the agreement (not receiving the payment demanded by the specified date), and instituted action (which was pending) against Origo for the amount originally claimed.

In the present application Origo sought an order declaring Smeg's purported cancellation as invalid. Origo argued that the tender in lieu of payment was properly made, and that Smeg was not entitled to cancel the agreement. Smeg, in turn, disputed that a proper tender had been made, and that, in any event, a tender for payment did not constitute payment, which was what Origo was required to do in order to avoid cancellation of the agreement pursuant to the demand.

Van Oosten J held that in order to qualify as a proper tender for payment, a tender must be unconditional, for the full amount owing, and made '*met openbeurs en klinkende munt*'. The present tender was unconditional. It could not, however, be conclusively said, on the papers, that it was 'for the full amount owing'. In *Nkengana and Another v Schnetler and Another* [2011] 1 All SA 272 (SCA) the court held that a tender for payment of money must be for payment of the full amount owing. Here the quantum was still in dispute and would only be finally determined in the pending action instituted by the respondent.

The court further held that the tender did not constitute performance in terms of the

contract: The agreement required a payment; the tender was merely an undertaking or promise to pay.

However, the tender was not without legal effect. Should it be found in the pending action that the admitted amount (or the lesser amount subsequently paid) was in fact the true amount owing, Origo would be protected from the consequences of non-compliance set forth in the demand for payment, which was cancellation of the agreement. In this regard the court referred with approval to *National Bank of SA Ltd v Leon Levson Studios Ltd* 1913 AD 213, where the lessee's tender for payment of rental due, in the circumstances of that case, was held sufficient to prevent cancellation of the lease.

As a result, the court granted no order in respect of the Origo's application. The costs of the present application and counter-application would be costs in the action.

Practice – access to information by third parties

Preconditions for order that third parties must provide information about crime being committed: The application in *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd and Others* 2019 (1) SA 257 (GJ) was novel. The applicant (Nampak) sought the assistance of the court to gain access to information, held by third parties (the respondents), in advance of any litigation having been instituted, in order to determine the identity of prospective defendants. There was a robbery at Nampak's premises. Nampak approached the court for an order that a number of cellular telephone operators (the respondents) provide it (Nampak) with information regarding cellular telephone records of some of their (the respondents') clients. Nampak did so on the basis that access to this information will permit it to identify wrongdoers who committed the robbery, and then take appropriate legal action against the perpetrators. The cellphone opera-

tors did not oppose the relief sought.

Unterhalter J pointed out that in *House of Jewels & Gems and Others v Gilbert and Others* 1983 (4) SA 824 (W) an application for an order similar to the present one, was dismissed. However, *House of Jewels* was decided before the Constitution came into force. The Constitution introduced a Bill of Rights, including the right to access to the courts. There is also a constitutional imperative to develop the common law. If a person has been harmed by another whose identity is unknown, that harm cannot be remedied by the application of law until the defendant is identified. As a matter of principle, it is hard to see why procedures (including common-law procedures) should not be adopted to assist in identifying the defendant because such procedures serve to make it possible to bring the claim of the injured person before the courts so as to have the dispute resolved.

The court held that the relief in question should be recognised. It reasoned that it would seem a matter of common sense that there may be circumstances in which an applicant needs the assistance of the courts, not simply to preserve evidence, but to obtain information for the purposes of determining the identity of wrongdoers so that proceedings may be brought against them. In granting the order the court listed a number of preconditions before such order could be granted –

- the order was needed to enable an action to be brought against the wrongdoers;
- a wrong must have been committed; and
- the third party against whom the order was sought must be mixed up in the wrongdoing so as to have facilitated it; and must be able or likely able to provide the information.

However, even where these preconditions are met, it (the court) retains a discretion to refuse the order, or to grant it on certain terms.

The order was granted.

Tax law

Effect of change in shareholding does not postpone tax liability: In *Commissioner for the South African Revenue Service v Digicall Solutions (Pty) Ltd* [2018] 4 All SA 647 (SCA) the facts were as follows: In March 2003, the respondent (Digicall) was purchased by Sell-direct Marketing (SDM). At that time Digicall suffered an assessed loss. This loss was not utilised by SDM. On 25 November 2003, Digicall was transferred to Nutbridge Investments. A portion of the consolidated assessed losses was set-off against Digicall's income during the 2004 year of assessment. The balance was set-off against Digicall's income during the 2005 to 2008 years of assessment. The commissioner raised additional assessments in terms of s 103(2) of the Income Tax Act 58 of 1962 (the Act) in which the set-off of the assessed losses was denied.

Both the Tax Court and the High Court ruled in favour of Digicall in that s 103(2) did not find application. This is so because the second change in shareholding served as an intervening event breaking the chain of events. The income against which the assessed losses were set-off was not income deriving from the first change in shareholding but the second change in shareholding.

It was against these judgments that the commissioner appealed.

Swain JA pointed out that s 103(4) of the Act provides that when it is proved in terms of s 103(2) that a change in shareholding has occurred which results in the avoidance, or the postponement of liability for payment of any tax, or its reduction, it will be presumed that the change in shareholding was entered into, or effected solely or mainly for the purpose of utilising the assessed loss, in order to avoid liability for the payment of any tax on income. Accordingly, the onus rests on the taxpayer (Digicall) to show that it was not the main purpose of the change in shareholding to utilise an assessed loss.

On the facts, Digicall was unable to show that its main purpose was not to utilise the assessed losses. Both the Tax Court and the High Court incorrectly applied the rules of the law of delict in taxation. Section 103(2) is clear that it prohibits the set-off of any assessed losses against any income. The direct or indirect receipt of income by Digicall does not have to occur in the same year as the change in shareholding. It may occur in any year of assessment, provided it results directly or indirectly from the change in shareholding. The commissioner was correct to disallow the set-off of the assessed losses.

The appeal was thus allowed with costs.

Trade marks

Protection of well-known trade mark: The facts in *Truworths Ltd v Primark Holdings* 2019 (1) SA 179 (SCA) were as follows: The appellant (Truworths) was a long-established and well-known fashion retailer in South Africa (SA). It wished to register the mark PRIMARK in class 25 (clothing, boots, shoes and slippers) of the Trade Marks Register. Primark Holdings (Primark), an international discount fashion retailer had registered the same mark in the same class in SA in 1976 but had never since opened a store here. Truworths brought an application for the removal of Primark's mark from the register on the grounds of non-use in terms of s 27(1)(a) and (b) of the Trade Marks Act 194 of 1993 (the Act). It was unsuccessful in the GP. It appealed to the SCA. Primark's principal defence was that PRIMARK was a trademark entitled to protection under the 'Paris Convention' as a 'well-known mark' (in SA) as intended in s 35(1) of the Act. This meant that, in terms of s 27(5) of the Act, Truworths could not rely on the ground of 'non-use' for the mark's removal from the register.

The crisp question in the SCA was whether PRIMARK was a 'well-known mark' in SA.

Wallis JA noted that the mark

in question as per s 35(1A) did not need to be known among the whole population of SA, but merely in the 'relevant sector', that is, the sector of the public interested in the goods or services to which the mark related. The task of the court was to identify the relevant sector or sectors of the public and to determine whether the mark was well-known within those sectors. In doing so it considered the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks of the World Intellectual Property Organisation (WIPO). Article 2(2)(a) of WIPO provided that relevant sectors of the public shall 'include, but shall not necessarily be limited to:

- (i) actual and/or potential consumers of the type of goods and/or services to which the mark applies;
- (ii) persons involved in channels of distribution of the type of goods and/or services to which the mark applies;
- (iii) business circles dealing with the type of goods and/or services to which the mark applies.'

Truworths identified the only relevant sector of the public in SA as 'all South Africans interested in clothes and accessories', which it regarded as being the 'actual and/or potential consumers of the type of goods and/or services to which the mark applies' as per art 2(2)(a)(ii) of the Recommendation. It submitted that the mark was not well-known in this group. Primark argued that potential customers were instead limited to the better educated and more affluent of society, who would have been familiar with the mark. It introduced a further relevant sector of the public, that is, those people involved in the design, distribution, marketing and retail of inexpensive fashion clothing, among whom, it insisted, the PRIMARK mark was well-known.

The court held that in terms of art 2(2)(b) of the Recommendation, that if a party established that its mark was well-known in any relevant sector of the public, the mark had to be taken to be a well-known mark entitled to protection. The fact that it was

not well-known in other relevant sectors was irrelevant.

The court further held that when dealing with a mark applied to goods, such as fashionable but relatively inexpensive clothing, sold in the retail market to a wide body of consumers, those potential consumers would constitute one relevant sector of the public. The relevant market would comprise much of the middle-to-lower-income groups. In such groups, the evidence did not suggest that the mark PRIMARK was well-known.

Suffice it to mention here that Primark's reliance on ss 35(1) and 27(5) of the Act had thus to fail because its mark was not well-known in the only relevant sector of the public.

The appeal was thus upheld with costs. The court granted an order expunging PRIMARK mark from the register.

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, advocates, civil procedure, company law, constitutional law, criminal justice system, criminal law and procedure, environmental law, immigration, labour law, land ownership, local authorities, motor-vehicle accidents, practice and reviews.



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By
Rebecca
Walton

Once-off credit agreements and registration as a credit provider in terms of the NCA

Du Bruyn NO and Others v Karsten (SCA) (unreported case no 929/2017, 28-9-2018) (Nicholls AJA) (Shongwe ADP, Makgoka, Schippers JJA and Mokgohloa AJA concurring)

In the recent judgment of *Du Bruyn NO*, the Supreme Court of Appeal (SCA) was tasked with determining whether a credit provider to a once-off credit transaction – who is not a regular participant in the credit industry – is obliged to register as a credit provider in terms of the National Credit Act 34 of 2005 (the NCA).

Facts

In 2013, the respondent sold his interest in three entities (two private companies and a close corporation) in terms of the three sale agreements for a globular amount of R 2 million. The purchaser in terms of the first and second agreements was DBF Trust, and the purchasers in terms of the third agreement were Vaal Steam Black Empowerment Trust and one other person.

The same terms of payment were applicable to all three agreements: A deposit of R 500 000 was to be paid, with instalments of R 30 000 to be paid on a monthly basis, subject to identical amortisation table for a period of five years and interest to be levied on the deferred amount.

At the date of conclusion of the sale agreements, the respondent was not registered as a credit provider, however, he was successfully registered some eight months later.

The appellants ultimately defaulted on the instalment payments, and the respondent successfully applied to the Gauteng Division of the High Court for payment of the balance of the purchase price in the sum of R 1 133 169,39. Leave to appeal this decision was granted by the court *a quo*, and came before the SCA in the case under discussion.

Issue

It is common cause that the three sale agreements were agreements in terms of s 8 of the NCA and fell within the ambit of application of the NCA. The issue before the SCA was whether the respondent was obliged to register as a credit provider in terms of the NCA in light of the fact that he was not a regular participant in the credit industry and that

the agreements in question constituted a once-off transaction.

Judgment

The court *a quo*'s decision was one in a string of conflicting judgments following the decision in *Friend v Sendal* 2015 (1) SA 395 (GP). In the *Friend* case, the court held that the requirement to register as a credit provider in terms of s 40(1) of the NCA was directed only at regular participants in the credit industry, and did not apply to single transactions where credit was provided, notwithstanding the fact that such an agreement may be a credit agreement in terms of the NCA.

The court *a quo* found itself bound by the ratio in the *Friend* case but granted leave to appeal. The SCA found itself enjoined with the correct interpretation of s 40(1) of the NCA.

The court in the *Friend* case relied on the purpose of the NCA, which is 'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.'

The SCA found that, while the approach in the *Friend* case was pragmatic and sensible, it was difficult to marry the interpretation with the unambiguous text of the NCA. The SCA followed the approach to interpretation of statutes clarified by *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), which cautioned judges against the temptation to substitute what they regarded as reasonable, sensible or business-like for the words actually used. The point of departure was always the language of the provision itself.

Section 40(1) of the NCA provides that '[a] person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)'.

The SCA held that it is difficult to reconcile the interpretation of the court in the *Friend* case with the language, con-

text and purpose of the provision. The legislature has set thresholds that trigger the obligation to register where a single transaction is in excess of the prescribed amount. To conclude that the NCA did not apply to a once-off transaction or to those who were not regular participants in the credit industry conflicts with a plain reading of the text of the statute.

The SCA held that the only possible conclusion, which could be drawn is that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction.

At the time of conclusion of the agreement, the applicable threshold in terms of s 42(1) of the NCA was R 500 000. The amount in terms of the credit agreements exceeded the prescribed threshold, and the respondent was, therefore, obliged to be registered as a credit provider at the time of conclusion of the agreements. Due to the respondent's non-compliance with the NCA's requirement to register, the agreements were null and void, and the appeal succeeded.

Conclusion

As of 11 November 2016, the threshold prescribed by the Minister of Trade and Industry in terms of s 42(1) is nil. This means that currently every person who provides credit in terms of a credit agreement, which is not excluded from the application of the NCA by any other provisions thereof, must register as a credit provider. Such an interpretation, although correct, arguably widens the scope of application of the NCA beyond what is practical. The SCA itself acknowledged in the final remarks of its judgment that this is an 'imperfect solution' to problematic legislative drafting, which it is up to the legislature to remedy.

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By
Ropafadzo
Maphosa

The rationalisation of marriage laws across the former homelands

Holomisa v Holomisa and Another (CC) (unreported case no CCT146/17, 23-10-2018) (Froneman J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J and Theron J concurring))

The Constitutional Court (CC) has often expressed its abhorrence for discriminatory legislation, most of which reared its ugly head during South Africa's (SA's) Apartheid history. It is unfortunate that such legislation still exists in our legislative framework, many years after the dawn of the constitutional dispensation. As a result the promise of the new era has not been fulfilled for all. The recent case of *Holomisa v Holomisa and Another* (CC) (unreported case no CCT146/17, 23-10-2018) (Froneman J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J and Theron J concurring)) highlights the effects of the 'tangled net of post-Apartheid legislation.'

In this case, the CC tackled the discriminatory oddity stemming from s 7(3) of the Divorce Act 70 of 1979, which precludes women married out of community of property under the Transkei Marriage Act 21 of 1978 from the protection of this provision.

Facts and findings

The applicant and the first respondent concluded a civil marriage, which was duly solemnised under the Transkei Marriage Act on 16 December 1995. The marriage took place in Mqanduli, Transkei. The first respondent instituted an action for divorce in the Mthatha Regional Court, averring that the marriage was out of community of property. The applicant denied this in her plea and maintained that her marriage to the first respondent was in community of property.

Both the Mthatha Regional Court and the Eastern Cape Local Division of the High Court, held that the marriage between the parties was in community of property. However, on further appeal, the Supreme Court of Appeal overturned these decisions. It held that the marriage was out of community of property and substituted the order of the Regional Court to the limited extent that the order of division of the joint estate be deleted and that the applicant's counterclaim was dismissed.

The applicant applied for direct access to the CC for relief, which included, *inter alia*, the constitutional invalidation of s 7(3) of the Divorce Act to the extent that it does not allow a spouse married

out of community of property without having entered into an antenuptial contract (as contemplated in the now repealed s 39 of the Transkei Marriage Act), the right to claim a redistribution of property when the parties divorce.

Section 7(3) read together with s 7(4) and 7(5) empowers a court granting a decree of divorce between persons married out of community of property:

'(a) ... before the commencement of the Matrimonial Property Act [85 of] 1984, in terms of an antenuptial contract by which community of property, ... profit and loss and accrual ... are excluded; or

(b) ... before the commencement of the Marriage and Matrimonial Property Law Amendment Act [3 of] 1988, in terms of section 22(6) of the Black Administration Act [38 of] 1927,' to order a redistribution of assets where it considers it just and equitable to do so, taking into consideration the contribution, monetary and otherwise, of the parties to the marriage. These provisions were enacted to protect women - married out of community of property - from the potential harsh consequences flowing from such a proprietary regime. However, marriages concluded under the Transkei Marriage Act were precluded from the ambit of s 7(3); thus the court found this differentiation to be irrational and discriminatory as there is no legitimate governmental purpose for the distinction drawn between women in this position in the Transkei and those in the rest of SA.

Several legislative provisions and amendments were passed to ensure that the default proprietary regime for all marriages in 'South Africa', regardless of race, would be in community of property, unless an antenuptial contract was entered into. However, due to Transkei's independence under South African and Transkeian law, such changes were not mirrored in Transkei. The Recognition of Customary Marriages Act 120 of 1998 expressly repealed s 39 of the Transkei Marriage Act, however, the Recognition of Customary Marriages Act only came into operation on 15 November 2000 and moreover, it did not purport to invalidate s 39 of the Transkei Marriage Act retrospectively.

As a result, it is common cause that the marriage in question was indeed out

of community of property. Section 39(1) of the Transkei Marriage Act provided that the default proprietary regime for civil marriages solemnised in terms of the Act was out of community of property unless excluded by an antenuptial contract or there was an express declaration in terms of s 39(2) of the Transkei Marriage Act. At the time that the matter was argued, all the parties accepted, that there was no exclusion of the default regime and that the marriage between the applicant and the first respondent was out of community of property.

In the CC judgment, Froneman J observed that the discrimination in this case is a historical remnant from the Apartheid-era, which sought to disadvantage women on the basis of gender, race, ethnicity, marital status, geographic location and socio-economic status. The court held at para 29 that: 'The intersectional nature of this discrimination compounds the gravity of Parliament's failure to rationalise the Transkei Marriage Act. Although Parliament did not seek intentionally to continue to discriminate against women in the former Transkei, the effect of its failure to remedy the situation is that the discrimination continues.' Therefore, direct access was granted to declare s 7(3) constitutionally invalid to the extent that it excludes women in the applicant's position.

The court ordered that s 7(3) of the Divorce Act be declared constitutionally invalid to the extent that it excludes a spouse married out of community of property who has not entered into an antenuptial contract or an express declaration in terms of s 39(2) of the now repealed s 39 of the Transkei Marriage Act, from its ambit. Furthermore, the declaration of constitutional invalidity was suspended for a period of 24 months to allow Parliament to remedy this defect. During the period of suspension, s 7(3) of the Divorce Act must be read to include marriages entered into under the Transkei Marriage Act without antenuptial contracts as s 7(3)(c).

Ropafadzo Maphosa LLB (UJ) is a Senior Tutor at the University of Johannesburg.



By
Mohammed
Moolla

Major breakthrough in foreclosure applications in respect of primary residences

Absa Bank Ltd v Mokebe and Related Cases
2018 (6) SA 492 (GJ)

On 12 September 2018 the Full Bench of the Gauteng Local Division in Johannesburg handed down a judgment in the case of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) as premised by s 26 of the Constitution guaranteeing everyone the right to adequate housing.

The judgment commences with the recognition that ordinary citizens are unable to pay cash for immovable property and acquire property by way of home loans from the banks who register a bond over the property purchased. When the home owner defaults on the repayment of the loan, which is secured by the mortgage bond, the bank invariably exercises its right in terms of the loan agreement and forecloses by seeking to execute against the property. The rights are varied, but include the right to call up the loan, accelerate payment and claim execution against the property.

Since the right to adequate housing is a fundamental human right enshrined in our Constitution, the orders to levy execution against property, which are primary residences, are required to be in harmony with the Constitution. Taking someone's home equity is arbitrary deprivation of property and, therefore, a violation of the Constitution.

The court has ruled that reserve prices must be applied in all but exceptional circumstances. 'Save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify

such an order'. This is to prevent unjust and inequitable outcomes. It is incumbent on the bond creditor to include all the relevant documentation. The reserve price will be strictly at the discretion of the court.

The court was unequivocal on the issue that if the home owner caught up with their arrears, the mortgage bond would be automatically reinstated. Once the arrears and 'reasonable' legal and administrative costs are settled, the mortgage bond automatically reinstates, up to the point at which the property is transferred. Even if the property has been auctioned but not transferred, one can stop the process. The banks tried to bend s 129 of the National Credit Act 34 of 2005 (the NCA) to suit themselves. The effect of s 129 is that if the home owner reinstates the agreement, the judgment is no longer alive. In terms of s 129(3) of the NCA, a debtor may reinstate a credit agreement where they have fallen in arrears, 'by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.'

The bank cannot use that judgment and will have to approach the court afresh with a new order based on default. The power has been shifted to the lender. The bank will be acting in bad faith if they cancel the mortgage bond and claim damages from the home owner.

Previously the banks would often approach the courts twice, one for the monetary judgment (accelerated or full amount of loan outstanding) and again for the sale in execution (which is nec-

essary for the property to be sold at auction). The banks have demonstrated in the past that they are less interested in selling the house at auction and have sold homes at meagre sums. The monetary judgment and sale in execution must now be adjudicated at the same time. The court held that the monetary judgment is 'inextricably linked' to the application for an order of execution. If it were not for the monetary judgment, a bond creditor cannot obtain an order for executability and it is, therefore, desirable that both issues be resolved by the same court at the same time. The court further held that no prejudice would ensue to the bond creditor in the event that the monetary judgment and order for execution are granted simultaneously. The banks – as bond creditors – therefore, have a duty to bring the entire case, including the monetary judgment based on the mortgage bond in one application simultaneously. Thus, a piecemeal adjudication of the matter will not be entertained.

The banks must now arrive at court with all the relevant facts typically required for a sale in execution order including, who lives in the house, their ages, number of dependents, the value of the property, and whether it is a primary or secondary residence. If all this information is in their possession, then only may they get judgment.

Mohammed Moolla *BProc (UKZN)* is a senior magistrate at the Wynberg Magistrate's Court in Cape Town. □



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

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By
Rebecca
Walton

Once-off credit agreements and registration as a credit provider in terms of the NCA

Du Bruyn NO and Others v Karsten (SCA) (unreported case no 929/2017, 28-9-2018) (Nicholls AJA) (Shongwe ADP, Makgoka, Schippers JJA and Mokgohloa AJA concurring)

In the recent judgment of *Du Bruyn NO*, the Supreme Court of Appeal (SCA) was tasked with determining whether a credit provider to a once-off credit transaction – who is not a regular participant in the credit industry – is obliged to register as a credit provider in terms of the National Credit Act 34 of 2005 (the NCA).

Facts

In 2013, the respondent sold his interest in three entities (two private companies and a close corporation) in terms of the three sale agreements for a globular amount of R 2 million. The purchaser in terms of the first and second agreements was DBF Trust, and the purchasers in terms of the third agreement were Vaal Steam Black Empowerment Trust and one other person.

The same terms of payment were applicable to all three agreements: A deposit of R 500 000 was to be paid, with instalments of R 30 000 to be paid on a monthly basis, subject to identical amortisation table for a period of five years and interest to be levied on the deferred amount.

At the date of conclusion of the sale agreements, the respondent was not registered as a credit provider, however, he was successfully registered some eight months later.

The appellants ultimately defaulted on the instalment payments, and the respondent successfully applied to the Gauteng Division of the High Court for payment of the balance of the purchase price in the sum of R 1 133 169,39. Leave to appeal this decision was granted by the court *a quo*, and came before the SCA in the case under discussion.

Issue

It is common cause that the three sale agreements were agreements in terms of s 8 of the NCA and fell within the ambit of application of the NCA. The issue before the SCA was whether the respondent was obliged to register as a credit provider in terms of the NCA in light of the fact that he was not a regular participant in the credit industry and that

the agreements in question constituted a once-off transaction.

Judgment

The court *a quo*'s decision was one in a string of conflicting judgments following the decision in *Friend v Sendal* 2015 (1) SA 395 (GP). In the *Friend* case, the court held that the requirement to register as a credit provider in terms of s 40(1) of the NCA was directed only at regular participants in the credit industry, and did not apply to single transactions where credit was provided, notwithstanding the fact that such an agreement may be a credit agreement in terms of the NCA.

The court *a quo* found itself bound by the ratio in the *Friend* case but granted leave to appeal. The SCA found itself enjoined with the correct interpretation of s 40(1) of the NCA.

The court in the *Friend* case relied on the purpose of the NCA, which is 'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.'

The SCA found that, while the approach in the *Friend* case was pragmatic and sensible, it was difficult to marry the interpretation with the unambiguous text of the NCA. The SCA followed the approach to interpretation of statutes clarified by *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), which cautioned judges against the temptation to substitute what they regarded as reasonable, sensible or business-like for the words actually used. The point of departure was always the language of the provision itself.

Section 40(1) of the NCA provides that '[a] person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)'.

The SCA held that it is difficult to reconcile the interpretation of the court in the *Friend* case with the language, con-

text and purpose of the provision. The legislature has set thresholds that trigger the obligation to register where a single transaction is in excess of the prescribed amount. To conclude that the NCA did not apply to a once-off transaction or to those who were not regular participants in the credit industry conflicts with a plain reading of the text of the statute.

The SCA held that the only possible conclusion, which could be drawn is that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction.

At the time of conclusion of the agreement, the applicable threshold in terms of s 42(1) of the NCA was R 500 000. The amount in terms of the credit agreements exceeded the prescribed threshold, and the respondent was, therefore, obliged to be registered as a credit provider at the time of conclusion of the agreements. Due to the respondent's non-compliance with the NCA's requirement to register, the agreements were null and void, and the appeal succeeded.

Conclusion

As of 11 November 2016, the threshold prescribed by the Minister of Trade and Industry in terms of s 42(1) is nil. This means that currently every person who provides credit in terms of a credit agreement, which is not excluded from the application of the NCA by any other provisions thereof, must register as a credit provider. Such an interpretation, although correct, arguably widens the scope of application of the NCA beyond what is practical. The SCA itself acknowledged in the final remarks of its judgment that this is an 'imperfect solution' to problematic legislative drafting, which it is up to the legislature to remedy.

Rebecca Walton BA Law LLB (Stell) is a legal practitioner at Veronica Douglas Inc in Cape Town. □

By
Ropafadzo
Maphosa

The rationalisation of marriage laws across the former homelands

Holomisa v Holomisa and Another (CC) (unreported case no CCT146/17, 23-10-2018) (Froneman J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J and Theron J concurring))

The Constitutional Court (CC) has often expressed its abhorrence for discriminatory legislation, most of which reared its ugly head during South Africa's (SA's) Apartheid history. It is unfortunate that such legislation still exists in our legislative framework, many years after the dawn of the constitutional dispensation. As a result the promise of the new era has not been fulfilled for all. The recent case of *Holomisa v Holomisa and Another* (CC) (unreported case no CCT146/17, 23-10-2018) (Froneman J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J and Theron J concurring)) highlights the effects of the 'tangled net of post-Apartheid legislation.'

In this case, the CC tackled the discriminatory oddity stemming from s 7(3) of the Divorce Act 70 of 1979, which precludes women married out of community of property under the Transkei Marriage Act 21 of 1978 from the protection of this provision.

Facts and findings

The applicant and the first respondent concluded a civil marriage, which was duly solemnised under the Transkei Marriage Act on 16 December 1995. The marriage took place in Mqanduli, Transkei. The first respondent instituted an action for divorce in the Mthatha Regional Court, averring that the marriage was out of community of property. The applicant denied this in her plea and maintained that her marriage to the first respondent was in community of property.

Both the Mthatha Regional Court and the Eastern Cape Local Division of the High Court, held that the marriage between the parties was in community of property. However, on further appeal, the Supreme Court of Appeal overturned these decisions. It held that the marriage was out of community of property and substituted the order of the Regional Court to the limited extent that the order of division of the joint estate be deleted and that the applicant's counterclaim was dismissed.

The applicant applied for direct access to the CC for relief, which included, *inter alia*, the constitutional invalidation of s 7(3) of the Divorce Act to the extent that it does not allow a spouse married

out of community of property without having entered into an antenuptial contract (as contemplated in the now repealed s 39 of the Transkei Marriage Act), the right to claim a redistribution of property when the parties divorce.

Section 7(3) read together with s 7(4) and 7(5) empowers a court granting a decree of divorce between persons married out of community of property:

'(a) ... before the commencement of the Matrimonial Property Act [85 of] 1984, in terms of an antenuptial contract by which community of property, ... profit and loss and accrual ... are excluded; or

(b) ... before the commencement of the Marriage and Matrimonial Property Law Amendment Act [3 of] 1988, in terms of section 22(6) of the Black Administration Act [38 of] 1927,' to order a redistribution of assets where it considers it just and equitable to do so, taking into consideration the contribution, monetary and otherwise, of the parties to the marriage. These provisions were enacted to protect women - married out of community of property - from the potential harsh consequences flowing from such a proprietary regime. However, marriages concluded under the Transkei Marriage Act were precluded from the ambit of s 7(3); thus the court found this differentiation to be irrational and discriminatory as there is no legitimate governmental purpose for the distinction drawn between women in this position in the Transkei and those in the rest of SA.

Several legislative provisions and amendments were passed to ensure that the default proprietary regime for all marriages in 'South Africa', regardless of race, would be in community of property, unless an antenuptial contract was entered into. However, due to Transkei's independence under South African and Transkeian law, such changes were not mirrored in Transkei. The Recognition of Customary Marriages Act 120 of 1998 expressly repealed s 39 of the Transkei Marriage Act, however, the Recognition of Customary Marriages Act only came into operation on 15 November 2000 and moreover, it did not purport to invalidate s 39 of the Transkei Marriage Act retrospectively.

As a result, it is common cause that the marriage in question was indeed out

of community of property. Section 39(1) of the Transkei Marriage Act provided that the default proprietary regime for civil marriages solemnised in terms of the Act was out of community of property unless excluded by an antenuptial contract or there was an express declaration in terms of s 39(2) of the Transkei Marriage Act. At the time that the matter was argued, all the parties accepted, that there was no exclusion of the default regime and that the marriage between the applicant and the first respondent was out of community of property.

In the CC judgment, Froneman J observed that the discrimination in this case is a historical remnant from the Apartheid-era, which sought to disadvantage women on the basis of gender, race, ethnicity, marital status, geographic location and socio-economic status. The court held at para 29 that: 'The intersectional nature of this discrimination compounds the gravity of Parliament's failure to rationalise the Transkei Marriage Act. Although Parliament did not seek intentionally to continue to discriminate against women in the former Transkei, the effect of its failure to remedy the situation is that the discrimination continues.' Therefore, direct access was granted to declare s 7(3) constitutionally invalid to the extent that it excludes women in the applicant's position.

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By
Mohammed
Moolla

Major breakthrough in foreclosure applications in respect of primary residences

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On 12 September 2018 the Full Bench of the Gauteng Local Division in Johannesburg handed down a judgment in the case of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) as premised by s 26 of the Constitution guaranteeing everyone the right to adequate housing.

The judgment commences with the recognition that ordinary citizens are unable to pay cash for immovable property and acquire property by way of home loans from the banks who register a bond over the property purchased. When the home owner defaults on the repayment of the loan, which is secured by the mortgage bond, the bank invariably exercises its right in terms of the loan agreement and forecloses by seeking to execute against the property. The rights are varied, but include the right to call up the loan, accelerate payment and claim execution against the property.

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The court has ruled that reserve prices must be applied in all but exceptional circumstances. 'Save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify

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The court was unequivocal on the issue that if the home owner caught up with their arrears, the mortgage bond would be automatically reinstated. Once the arrears and 'reasonable' legal and administrative costs are settled, the mortgage bond automatically reinstates, up to the point at which the property is transferred. Even if the property has been auctioned but not transferred, one can stop the process. The banks tried to bend s 129 of the National Credit Act 34 of 2005 (the NCA) to suit themselves. The effect of s 129 is that if the home owner reinstates the agreement, the judgment is no longer alive. In terms of s 129(3) of the NCA, a debtor may reinstate a credit agreement where they have fallen in arrears, 'by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.'

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The banks must now arrive at court with all the relevant facts typically required for a sale in execution order including, who lives in the house, their ages, number of dependents, the value of the property, and whether it is a primary or secondary residence. If all this information is in their possession, then only may they get judgment.

Mohammed Moolla *BProc (UKZN)* is a senior magistrate at the Wynberg Magistrate's Court in Cape Town. □



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New legislation



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Legislation published from
1 – 30 January 2019

Bills

Traditional and Khoi-San Leadership Bill B23C and D of 2015.
Public Service Commission Amendment Bill 21A to D of 2015.
Electoral Laws Amendment Bill B33A and B of 2018.

Promulgation of Acts

Adjustments Appropriation Act 17 of 2018. *Commencement:* 17 January 2019. GN15 GG42168/17-1-2019 (also available in Setswana).

Division of Revenue Amendment Act 14 of 2018. *Commencement:* 17 January 2019. GN13 GG42166/17-1-2019 (also available in Sepedi).

Electoral Laws Amendment Act 1 of 2019. *Commencement:* To be proclaimed. GN23 GG42176/21-1-2019 (also available in Afrikaans).

Money Bills Amendment Procedure and Related Matters Amendment Act 13 of 2018. *Commencement:* 17 January 2019. GN17 GG42170/17-1-2019 (also available in Tshivenda).

Political Party Funding Act 6 of 2018. *Commencement:* To be proclaimed. GN63 GG42188/23-1-2019 (also available in Setswana).

Rates and Monetary Amounts and Amendment of Revenue Laws Act 21 of 2018. *Commencement:* 17 January 2019. GN18 GG42171/17-1-2019 (also available in Afrikaans).

Special Appropriation Act 15 of 2018. *Commencement:* 17 January 2019. GN14 GG42167/17-1-2019 (also available in Setswana).

Tax Administration Laws Amendment Act 22 of 2018. *Commencement:* 17 January 2019. GN16 GG42169/17-1-2019 (also available in Afrikaans).

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2018. *Commencement:* 17 January 2019. GN19 GG42172/17-1-2019.

Selected list of delegated legislation
Basic Conditions of Employment Act 75 of 1997

Amendment of sectoral determination 1: Contract cleaning sector. GN26 GG42182/23-1-2019 (also available in isiZulu).

Broad-Based Black Economic Empowerment Act 53 of 2003

Memorandum of Understanding between the Broad-Based Black Economic Empowerment Commission and the Department of Economic Development, Tourism and Environmental Affairs. GN5 GG42152/11-1-2019.

Commissions Act 8 of 1947

Rules governing the proceedings of the judicial commission of inquiry into allegations of impropriety regarding the Public Investment Corporation. GenN12 GG42157/15-1-2019.

Judges' Remuneration and Conditions of Employment Act 47 of 2001

Determination of salaries and allowances of Constitutional Court judges and judges. GN21 GG42174/18-1-2019.

Labour Relations Act 66 of 1995

Amendments of regulations: Commission for Conciliation, Mediation and Arbitration forms. GN R24 GG42178/22-1-2019.

Magistrates Act 90 of 1993

Determination of salaries and allowances of magistrates. GN20 GG42174/18-1-2019.

Medicines and Related Substances Act 101 of 1965

Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fees to be charged by persons licensed in terms of s 22C(1)(a). GN27 GG42183/23-1-2019. Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fees

to be charged by pharmacists. GN28 GG42183/23-1-2019.

Annual single exit price adjustment of medicines and scheduled substances for 2019. GN29 GG42183/23-1-2019.

National Education Policy Act 27 of 1996

2020 calendar for public schools. GN6 GG42155/11-1-2019.

National Environmental Management: Waste Act 59 of 2008

Regulations regarding the control of import or export of waste. GN22 GG42175/21-1-2019.

National Health Act 61 of 2003

Procedural regulations pertaining to the functioning of Office of Health Standards Compliance and handling of complaints by Ombud: Code of conduct for inspectors. GN11 GG42162/18-1-2019.

Postal Services Act 124 of 1998

Fees and charges with effect from 1 April 2019. GN65 GG42193/28-1-2019.

Prescribed Rate of Interest Act 55 of 1975

Rate of interest from 1 January 2019: 10,25%. GN R25 GG42179/22-1-2019 (also available in Afrikaans).

Public Finance Management Act 1 of 1999

Statement of national revenue, expenditure and borrowing as at 31 December 2018. GenN39 GG42198/30-1-2019.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries, allowances of traditional leaders, members of national and provincial houses of traditional leaders. Proc 2 GG42174/18-1-2019.

Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support with effect from 31 January 2019: R 279 994. BN2 GG42162/18-1-2019 (also available in Afrikaans).





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Discrimination on religious grounds

In *TDF Network Africa (Pty) Ltd v Faris* [2018] JOL 40638 (LAC), the employee was dismissed for refusing to work on Saturdays as she was a member of the Seventh Day Adventist church and, as such, was required to observe the Sabbath between sundown on Friday and sundown on Saturday. During this period she was not permitted to work and had to devote her time to spiritual and religious activities.

The Labour Court (LC) found that the dismissal was automatically unfair. The employer appealed to the Labour Appeal Court (LAC), which had to consider whether her dismissal was fair on the basis that it was an inherent requirement of the job for the employee to work on a Saturday.

The employer is a logistics company that offers warehousing services. According to the employer, it is an important operational requirement for the employer to carry out stocktaking of the warehouse once a month. This stocktaking is carried out under the supervision of its managers. The employer accordingly argued that it was an inherent requirement of the employee's job as a manager to work on a Saturday. The employee alleged that she had mentioned during her job interview that she could not perform work on a Saturday, but the employer denied this. According to the employer the employee indicated in the interview that she would have been happy to work over weekends. The employer alleged that had it known that the employee would not work on a Saturday it would not have employed her. A few months after the employee commenced employment the employer took issue with the fact that she had not attended any of the stocktakes. A number of meetings were held with the employee during which it was explained to her that all managers had to be rostered in to conduct a stocktake and no exception could be made for her. She said that she was precluded from complying because of religious reasons. Incapacity proceed-

ings were then initiated and she was dismissed for incapacity.

Section 187 of the Labour Relations Act 66 of 1995 requires the employee to provide evidence that an automatically unfair dismissal took place. The employer must then show that it was not an automatically unfair dismissal. The employer alleged that the reason for her dismissal was not her religion but rather her refusal to work on a Saturday. The employer argued that the employee could have obtained an exception from her church to permit work on a Saturday. The employee admitted that exceptions are made for doctors, nurses and persons in essential services but she said that stocktaking did not fall into this category. Furthermore, she said that she elected as a matter of conscience not to seek a special dispensation from the church.

The LAC had to consider the underlying reason for why the employee refused to work on a Saturday and it held that her religion was the dominant and proximate reason for her dismissal because but for her religion she would have worked on a Saturday and would not have been dismissed. The LAC pointed out that when determining the fairness of an inherent requirement of a job the following should be considered –

- the position of the victim of the discrimination in society;
- the purpose sought to be achieved by the discrimination;
- the extent to which rights or interests of the victim have been affected;
- whether discrimination has impaired human dignity; and
- whether there is a less restrictive means to achieve the purpose.

The LAC emphasised that there must be a proportionality inquiry to determine whether there is an inherent requirement of the job and this requirement must be rationally connected to the job. Furthermore, the requirement should have been adopted in a genuine and good faith belief that it was necessary for the fulfilment of a legitimate work-related purpose and it must be reasonably necessary to achieve that purpose. Furthermore, the employer must show that it took reasonable steps to try accommodate the employee but it is not possible to accommodate the individual without imposing undue hardship on the business. In this regard, it should not in-

sist on an employee complying with the requirement if non-compliance would have little impact on the business.

The employer was of the view that requiring the employee to attend the stocktake on a Saturday was an important operational requirement and it was essential for the employee to be involved as it would give her an opportunity to exercise supervision and control over the employees and provide managerial training. It was also of the view that this was a limited infringement on her right to religion as it only affected her on 12 days of the year and she was free to practise her religion on every other day. The employer further argued that there was a danger that if it accommodated the employee it would open the floodgates for other employees to seek special treatment.

The LAC found that the employer could have accommodated the employee and it would not have caused undue hardship. This was particularly because the employee had not performed the stocktake for 12 months and the employer had not suffered hardship. As regards the floodgate argument, the LAC found that this was not a concern as there are only two religions that preclude working on a Saturday.

The LAC accordingly found that the dismissal was automatically unfair and upheld the LC's order for 12 month's compensation. The LAC, however, did not agree with the LC insofar as it ordered a further R 60 000 to be paid in respect of unfair discrimination. In this regard, the LAC found that liability under s 60 of the Employment Equity Act 55 of 1998 had not been proven and this amounted to double compensation which was unduly punitive.

Is a s 197(6) agreement a collective agreement which is capable of extension?

In *National Union of Mineworkers and Others v Anglo Gold Ashanti Limited and Another* [2018] JOL 40515 (LC), AngloGold commenced a consultation process in accordance with s 189A of the Labour Relations Act 66 of 1995 (the Act) in accordance with the collective agreements between AngloGold and four trade unions, including the National Union of Mineworkers (NUM). During the consultation process it was discussed that certain assets including the hospital would

be sold in order to try preserve jobs. The hospital would be sold as a going concern. However, the purchaser did not wish to take on the employment of all the employees in the hospital and a s 197(6) agreement was accordingly concluded to ensure that only some employees would transfer to the purchaser, failing which the purchaser would not go ahead with the sale. A meeting was held with the unions to sign the s 197(6) agreement in order to give effect to the sale. NUM said that it agreed in principle but needed to get a mandate from its members. NUM's members objected to this and NUM accordingly advised that it would not sign the agreement but it would participate in the implementation of the agreement. The NUM members disrupted the briefing session, which was to determine the employees to be transferred and those to

remain and be retrenched. It threatened to boycott the implementation of the s 197(6) agreement and then embarked in an unprotected strike. AngloGold was granted interim relief by the court and NUM and its members then sought an order interdicting the dismissals.

NUM argued that the s 197(6) agreement was not a collective agreement in terms of s 123 of the Act and could not be extended to bind its members in terms of s 23(1)(d). NUM contended that the hospital was a workplace and NUM was the majority union of that workforce. AngloGold argued that the hospital is not a workplace and referred to the Constitutional Court decision in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] 7 BLLR 641 (CC) in which it was held that the definition of

a workplace is more focused on employees as a collective and that a location is immaterial.

Nkutha-Nkontwana J found that the s 197(6) agreement to opt out of s 197(2) was a collective agreement as it was entered into as part of the retrenchment process and was informed by the mutual interest to save some of the jobs in the hospital. In this regard, he referred to *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways SOC Ltd and Another* [2017] 9 BLLR 867 (LAC) in which it was held that an agreement, which meets or satisfies the requirements set out in s 213 constitutes a collective agreement and as such a retrenchment agreement between an employer and trade union settling a retrenchment dispute is, therefore, a collective agreement.



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Narrow v wide interpretation of the term an 'arbitrary ground'

Naidoo and Others v Parliament of the Republic of South Africa (LC) (unreported case no C865/2016, 12-12-2018) (Prinsloo J).

In *Naidoo* the court admitted conflicting judgments on whether to subscribe a narrow or wide interpretation to the phrase 'any arbitrary ground' as per s 6(1) of the Employment Equity Act 55 of 1998 (EEA), the court in this matter weighed in with its views.

The applicants, all members of the Parliamentary Protection Services, claimed they had been unfairly discriminated against pursuant to the fact that certain of their colleagues received a higher salary for performing the same or similar duties.

Responding to the need to beef up security at Parliament, the respondent employer created a new category of security guards. These newly created posts were filled by guards previously employed by

the South African Police Service as the existing guards did not possess the necessary capabilities. It was common cause that the guards filling the new posts received a higher salary as compared to the guards already employed.

Section 6(1) of the EEA states:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

While s 6(4) states:

'A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.'

Relying on the above sections the applicants firstly drew distinction between themselves and the newly appointed guards on the basis that the new category of guards had less experience and performed only part of the duties they did. Despite these differences, so the applicants argued, the new category of guards were remunerated more. Having made this point, the applicants went on to argue that there was no fair, rational or justifiable reason for the wage disparity and, therefore, the respondent's conduct constituted unfair discrimination on an arbitrary ground.

The legal question before the court was whether the allegation that the wage disparity was informed on a baseless, irrational, unfair, unjustifiable and capricious decision of the employer, consti-

tuted an 'arbitrary ground' for purposes of s 6(1) read with s 6(4) of the EEA.

The applicants argued that the phrase 'or on any other arbitrary ground' should be afforded a wide interpretation. On this approach once an employee establishes that the reason for the wage discrepancy was irrational or unjustified; then the employer's action constitutes unfair discrimination on an arbitrary ground.

The respondent argued for a narrow interpretation whereby the ground relied on to establish unfair discrimination 'must be analogous to a listed ground of discrimination, in the sense that it has the potential to impair upon human dignity in a comparable manner, or have a similar serious consequence' as compared to discrimination on any other listed ground.

The court began by examining the conflicting judgments over this issue. In *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* (2016) 37 ILJ 2872 (LC) the court adopted a narrow interpretation of the phrase under review. This approach was followed in *Ndudula and Others v Metrorail - Prasa (Western Cape)* (2017) 38 ILJ 2565 (LC) and in *Sethole and Others v Dr Kenneth Kaunda District Municipality* [2018] 1 BLLR 74 (LC) where the court in that matter held:

'In simple terms, the phrase "arbitrary" in the context of the unlisted grounds in terms of section 6(1) of the EEA is not a synonym for "irrationality" or even "unlawful". They are different concepts. Something may therefore be irrational or unlawful, but would not be discrimination, without also establishing the "further element" ...'

More recently, however, in *Chitsinde v Sol Plaatje University* [2018] 10 BLLR 1012 (LC), the court supported a wide interpretation and found that a decision of the employer, which was found to be

irrational, fell within the scope of an arbitrary ground for purpose of s 6(1).

The court *in casu* found that it was bound to follow the decision in the *Pioneer Foods* and *Metrorail* cases.

In justifying its reasons for accepting a narrow interpretation over a wide interpretation the court held:

‘... section 6(1) of the EEA does not prohibit differentiation, arbitrariness or arbitrary discrimination; it prohibits unfair discrimination on an “arbitrary ground”. It prohibits discrimination through the phrase “or on any other arbitrary ground” and not “any arbitrary ground”. The wording of the section in this regard is significant.

“Arbitrary ground” provided for in section 6(1), read in conjunction with section 11(2), makes it clear that the irrationality of differentiation *per se* will not

win a discrimination case based on an arbitrary ground. The conduct complained of must amount to unfair discrimination in that it must cause an injury to human dignity. Discrimination has to exist to begin with before rationality is considered. Irrationality does not win a case, the irrationality of discrimination does.

Differentiation *per se* does not constitute discrimination. Differentiation on a specified ground of discrimination is presumed to constitute unfair discrimination, which presumption is rebuttable. Given that an arbitrary ground is synonymous with an unlisted/unspecified ground, the test for whether discrimination is established, is that set in [*Harksen v Lane NO and Others* 1998 (1) SA 300 (CC)] namely, if there is differentiation based on an unspecified ground, then whether or not there is discrimination

will depend upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.’

Applying the narrow interpretation to the facts, the court found that although the applicants may have had reason to feel aggrieved in that the wage disparity may well be irrational, they had, however, failed to demonstrate that the ground relied on to establish unfair discrimination, was a ground that impaired their human dignity comparable to a listed ground. For this reason the court found that the applicants failed to establish unfair discrimination on an arbitrary ground and dismissed their claim with no order as to costs.



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Abbreviation	Title	Publisher	Volume/issue
<i>Advocate</i>	Advocate	General Council of the Bar	(2018) 31.3 December
<i>AHRLJ</i>	African Human Rights Law Journal	Centre for Human rights, Department of Law, University of Pretoria	(2018) 18.2
<i>EL</i>	Employment law	LexisNexis	(2018) 34.6
<i>IJL</i>	Industrial Law Journal	Juta	(2018) 39 (2019) 40
<i>IPLJ</i>	South African Intellectual Property Law Journal	Juta	(2018) 21 October (2018) 21 November (2018) 21 December
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2018) 15.3 November
<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) 6.1
<i>SALJ</i>	South African Law Journal	Juta	(2018) 135. 4
<i>SAMLJ</i>	South African Mercantile Law Journal	Juta	(2018) 30.1
<i>SAPL</i>	Southern African Public Law	University of South Africa Press	(2018) 33.1

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Book announcements



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By Francois Venter
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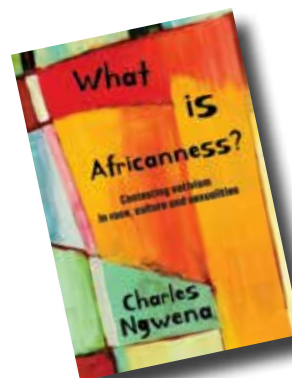
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By Charles Ngwena
Pretoria: PULP (Pretoria University Law Press)
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This book is a peer-reviewed monograph aiming to contribute to the ongoing scholarly conversation in and beyond South Africa about who is African and what is African. It aims to implicate a reductive sameness in the naming of Africans ('nativism') by showing its teleology and effects; and offers an alternative understanding of how Africans can be named or can name themselves. □



Public Interest Litigation in South Africa

By Jason Brickhill
(contributing ed)
Cape Town: Juta
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Price R 645 (incl VAT)
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The importance of the recent publication, 'Public interest litigation in South Africa' can hardly be underestimated. The subject matter of this book covers several fields of law, and very few similar works have ever been published. It is a must read for every lawyer practising in a developing social democracy.

Save to note that the book is interwoven with interesting and stimulating theoretical reflections, this article is limited to some comments on chs 5 and 6 of the book. The purpose of this article is to follow on the second challenge raised by Geoff Budlender SC in the book's foreword, and to pave the way for some important aspects and areas, which have been omitted from the book but should be noted and included in further editions, or in related publications.

In the foreword Mr Budlender outlines six major challenges that still have to be addressed and concludes that much more remains to be done. The second of these challenges refers to the needs of rural South Africans, and in particular their land rights. Mr Budlender specifically mentions the oppressive or unaccountable traditional authorities, but the challenge to address the unequal power relations in rural areas is of course not limited to the network of traditional authorities.

Chapter 5 (pp 159 to 182) of the book, is headed 'Making space for social change: Pro-poor property rights litigation in post-apartheid South Africa'. There is a complete absence of any reference in this to the advances made by public interest litigation in rural areas, particularly those in the five years prior to the publication of the book. The failure of this chapter to refer to these

advances and the constitutional recognition of the rights of poor rural dwellers are noticeable and regrettable.

Chapter 5 introduces a discourse on reshaping property rights in South Africa (SA). While on a universal, theoretical, speculative level, it may be stated at p 162 that 'litigants, courts, the state and Parliament have embarked on a sustained process of re-imagining the nature and purposes of South African property law' this notion does not adequately give recognition of the role of the Constitution in the practice of reshaping property rights in SA. The point is that in practice, the source of reshaping property law in SA is the Constitution. The impression that litigants may let their imagination roam free to boundlessly reshape property rights is unfounded. In this regard see Johan van der Merwe 'On the relativity of property rights in the Constitution' 2016 (Sept) *DR* 32.

This failure to give adequate recognition to the role of the Constitution in reshaping property law is reflected again in the conclusion of ch 5, where it is stated at p 182 that '[t]hrough reforms to property law, South Africa has embarked on a fundamental re-imagining of those terms.' This conclusion overlooks the reality that all the reforms to property law emanate from, and is subject to, the Constitution.

Chapter 5 limits the reshaping of property law to three areas, namely –

- unlawful occupation of land;
- landlord and tenant law; and
- debtor/creditor law.

In limiting the reshaping of the law to these three fields, the book overlooked the important reshaping of the law that took place in the lawful occupation of rural land, and the constitutional rights of rural dwellers.

This shortcoming is exacerbated when the author proceeds to elevate the law relating to the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) at p 173 as 'the most dramatic post-apartheid reform of property law'. How such claim could be made without even referring to other reforms is not clear, and this claim is open to doubt.

The most dramatic post-Apartheid Constitutional Court case reforming property law is probably *Daniels v Scribante and Another* 2017 (4) SA 341 (CC). When the issue of informed consent in the context of socio-economic rights was recently developed in the *Xolobeni* judgment (*Baleni and Others v Minister of Mineral Resources and Others* (GP) (unreported case number 73768/2016, 23-11-2018) (AC Basson J) the court from the outset quoted from the *Daniels* matter.

It is not the place in this article to review the advances in the constitutional rights of rural dwellers and suffice to refer to some of the relevant cases, none of which had even been referred to in ch 5 or anywhere else in the book. These cases include –

- *Hattingh and Others v Juta* 2013 (3) SA 275 (CC);
- *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC);
- *Klaase and Another v Van der Merwe NO and Others* 2016 (6) SA 131 (CC);
- *Snyders and Another v Mgro Properties (Pty) Ltd and Another* [2016] 4 All SA 828 (SCA);
- *Snyders and Others v De Jager and Others* 2017 (3) SA 545 (CC);
- the *Daniels* case; and
- *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC).

In conclusion, a brief comment on ch 6. This chapter labours under a similar failure to mention or even consider developments in jurisprudence applicable to rural dwellers. The discussion of equality jurisprudence, and the discussion of domestic partnerships, do not refer to the important gain that was made for spouses of rural dwellers. In this regard, the precedent had been set of such significance that it should advance the rights of women in an urban environment as well. In essence, the Constitutional Court found that the spouse of a farm-worker is also an occupier in her own right:

'The Land Claims Court's finding that Mrs Klaase occupied the premises "under her husband" subordinates her rights to those of Mr Klaase. The phrase is demeaning and is not what is contemplated by s 10(3) of ESTA [Extension of Security Tenure Act 62 of 1997]. *It demeans Mrs Klaase's rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA.* The construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured' (*Klaase* at para 66) (my italics).

Without incorporating all the relevant aspects and authority, the book stands more like a summary of the work of some non-governmental organisations, as opposed to a treatise on public interest litigation.

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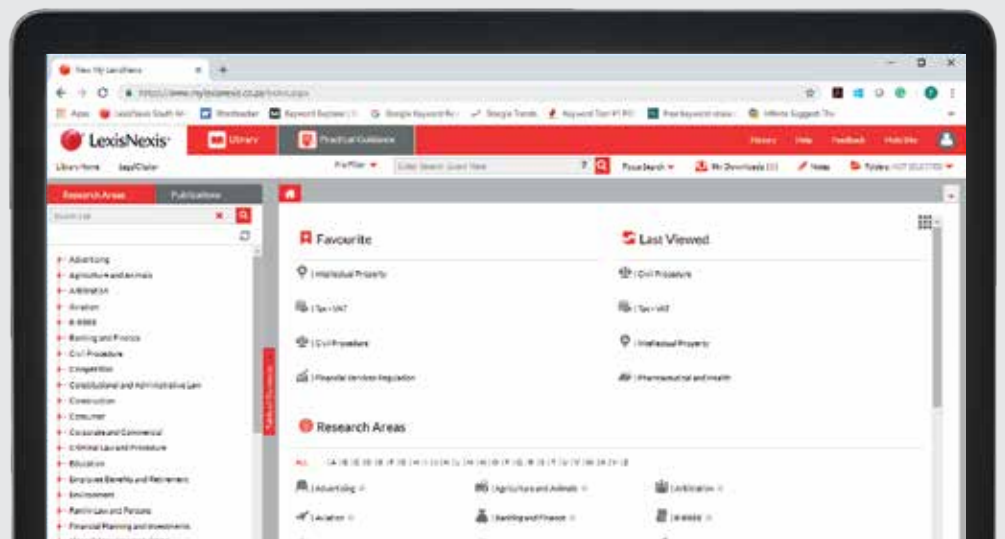
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RISKALERT

MARCH 2019 NO 1/2019

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RISK MANAGEMENT COLUMN

A NOTE FROM THE EDITOR

Welcome to the first edition of the *Bulletin* in 2019.

Five months have elapsed since many provisions of the Legal Practice Act 28 of 2014 (the Act) came into effect on 1 November 2018. It is hoped that all those affected by the Act (within the profession and the consumers of legal services) have now read this seminal piece of legislation and the corresponding regulations. Some of the changes brought about by the Act are the changes to the names of the Attorneys Fidelity Fund (now the Legal Practitioners' Fidelity Fund (LPFF)) and the Attorneys Insurance Indemnity Fund NPC (now the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF)).

With the move by *De Rebus* to an electronic format rather than printed form, the *Bulletin* will also only be available in printed format for those readers who opt for the printed version. The publication is available in electronic format on the LPIIF website (<https://lpiif.co.za/risk-management-2/risk-management/>). Should you prefer to receive a printed version of the *Bulletin*, please inform us and we will add you to our mailing list.

For the benefit of those practitioners who have not had prior interaction with the two entities (the LPFF and the LPIIF), in this and upcoming editions of the *Bulletin*, we will republish some information on the procedure to be followed in lodging a claim against each of the entities. We



Thomas Harban,
Editor

will also publish a series of articles explaining the indemnity provided by the two entities.

The teams at the respective entities are always available to assist practitioners and members of the public with any queries. We also welcome contributions of articles from readers and suggestions of topics that you may want us to cover.

Please do not hesitate to contact us.

Thomas Harban
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Erratum

On page 1 of the December 2018 edition of the *Bulletin*, we erroneously referred to section 94(8) of the Act in the dealing with the consequences of contravening section 84(1) of the Act. The correct reference is section 93 (8) of the Act and not section 94(8) as stated in the article.

We apologise for the error.

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Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.



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SOUTH AFRICA

RISK MANAGEMENT COLUMN continued...

THE NAMES OF THE AIIF AND AFF HAVE CHANGED

The name of the Attorneys Fidelity Fund (the AFF) changed on 1 November 2018 to the Legal Practitioners' Fidelity Fund. Section 53(1) of the Act provides that the Fund will continue to exist under the name the Legal Practitioners' Fidelity Fund (the LPFF).

The Attorneys Insurance Indemnity Fund NPC (the AIIF) has also changed its name and is now called the Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF). Historically, the LPIIF provided the primary layer of professional indemnity insurance to firms of practising attorneys in accordance with the provisions of sections

40A and 40B of the Attorneys Act 53 of 1979. Section 77(1) of the Act provides the statutory framework for the continued existence of the company as the vehicle through which professional indemnity insurance is provided for practising attorneys and advocates who practice with Fidelity Fund certificates (FFCs) in terms of section 34 (2) (b) of the Act. Advocates practising with FFCs are a new class of insureds for the LPIIF on the professional indemnity insurance line of business.

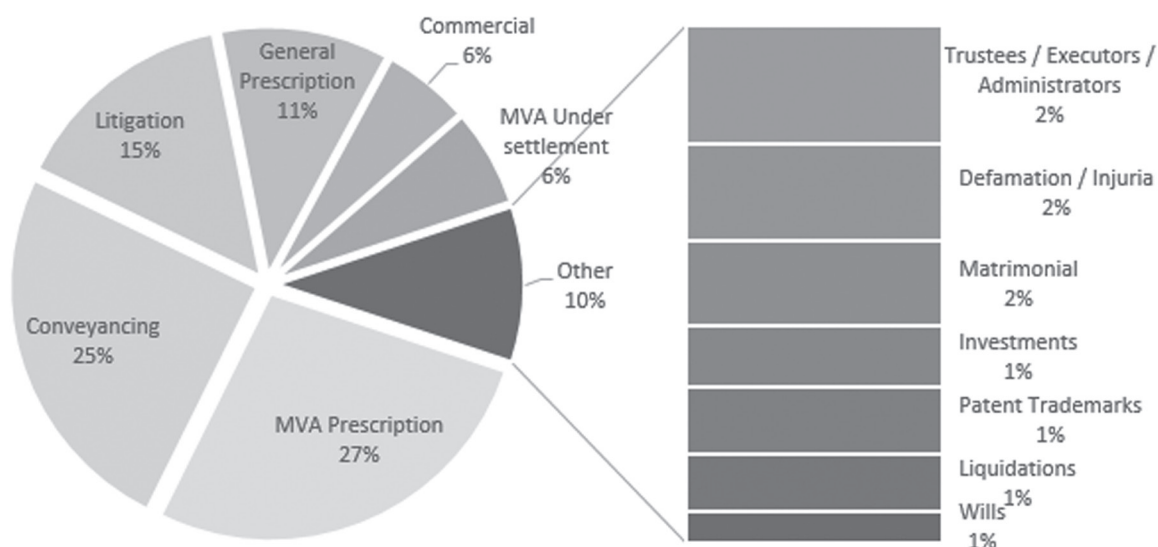
It must, however, be noted that the LPIIF will only issue bonds of security to attorneys (not advocates) who are appointed as executors of deceased es-

tates. Section 77(3) of the Act empowers the Board of the Fund to enter into deeds of security to the satisfaction of the Master of the High Court on behalf of an attorney in respect of work done by that attorney as, *inter alia*, the executor of deceased estates. The LPIIF is also the insurance vehicle through which the bonds of security are granted. As the empowering section refers only to attorneys, advocates appointed as executors of deceased estates will not be granted bonds of security by the LPIIF. There are a number of companies in the commercial insurance market which provide bonds of security to practitioners appointed as executors of deceased estates.

Advocates who wish to apply for bonds of security can approach the commercial market for assistance.

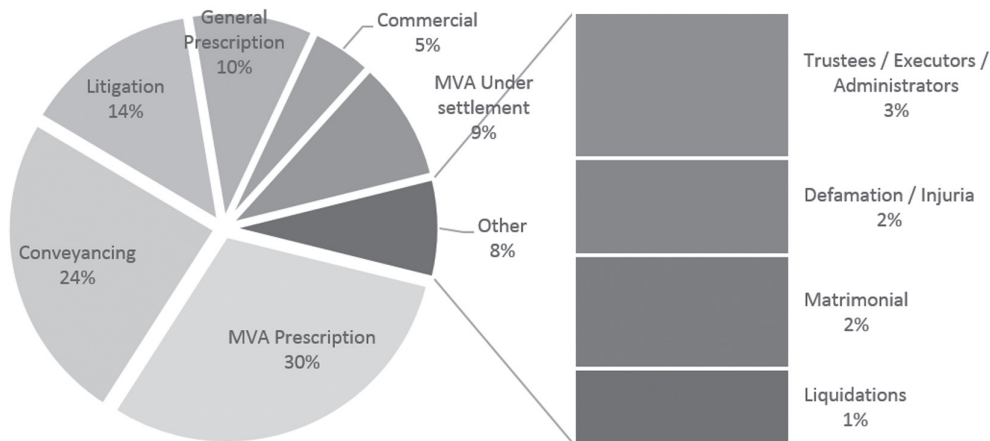
LPIIF CLAIMS STATISTICS (2011 TO 2017)

Number of claims notified

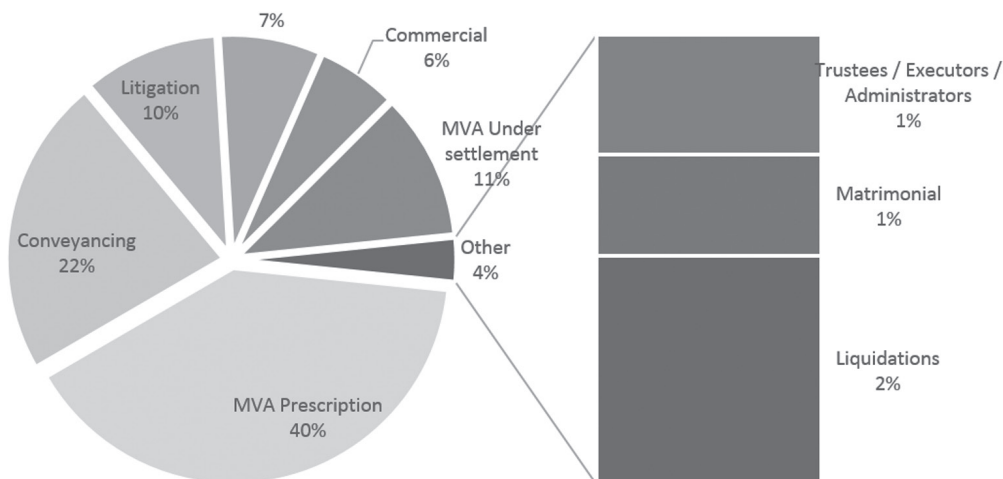


RISK MANAGEMENT COLUMN continued...

Breakdown by number of claims paid



Breakdown by value of claims paid



It will be noted from the statistics above that in the seven year period covered, conveyancing and RAF prescription related claims make up the highest number and value. Some of the underlying problems leading to the high number of conveyancing claims in the period covered are:

- a hangover from the property boom
- the bridging finance phenomenon
- cybercrime targeting conveyancing firms

- a lack of adequate internal controls
- a failure to adequately supervise staff

Over the years we have published extensively on the measures firms can implement to mitigate the risk associated with the prescription of RAF claims. There are a number of documents available on our website (www.lpiif.co.za) to which practitioners can have regard. Practitioners are also urged to register all time barred matters with the Prescription Alert unit and to adhere to the notices

and reminders issued by that unit. A 20% loading will be applied to the deductible (excess) payable in the event of a RAF prescription related claim where the matter was not registered with the Prescription Alert unit or where the alerts from that unit have not been complied with.

It must be remembered that the Prescription Alert system is a back-up diary system and that firms must still implement their own reliable internal diary systems.

WHAT TO DO IN THE EVENT OF A CLAIM OR INTIMATION OF A CLAIM

The points below are also published on our website.

- Refer your client to another practitioner of their choice in a different firm. You cannot assist your client with their claim against you as there will be a conflict of interest.
- You may provide your client with a copy of his/her file, but you must retain at least one complete copy to submit to the LPIIF. It is important to provide the LPIIF with the entire file content: this includes all correspondence, pleadings and all notes made thereon, including file, consultation, telephone, research as well as notes on “post it” stickers (if available).
- Do not admit or deny liability, negotiate, settle a claim or incur any costs or expenses in connection with a claim, without the prior written consent of the LPIIF, as you will be in breach of the LPIIF policy. Your right to indemnity under the LPIIF policy cannot be ceded, assigned or encumbered in some other way for the benefit of a third party.
- On receipt of your notification, the LPIIF will determine whether or not the claim falls within the indemnity afforded under the policy. (Please consult the LPIIF policy regarding the exclusions).
- If the claim is not covered under the LPIIF policy, the claim will be formally rejected.
- If the claim is covered under the LPIIF policy, the claim will be allocated to one of the legal advisors within our team (who are all admitted attorneys).



- The claim will be registered on the system in the appropriate insurance year and the standard first letter, together with additional requirements will be forwarded to you.
- Indemnity is conditional upon the practitioner complying with all the requirements set out in the policy as well as any additional requirements from the legal advisor.
- If an actual claim has been made against your firm (either by letter of demand, summons or application), the legal advisor may request the claimant's attorney to hold over further proceedings to allow the LPIIF to investigate the claim. You may also be requested to file a notice of intention to defend or notice of intention to oppose.
- If the claimant's attorney is not willing to hold over further pro-

ceedings, the legal advisor may request you to assist him or her with the filing of further notices and/or pleadings to provide them with more time to investigate the claim.

- You are obliged to co-operate with the LPIIF at all times. A failure to co-operate or provide assistance may lead to the withdrawal of indemnity.
- After a thorough investigation by the claims team, the LPIIF may, after consultation with you, either settle the claim with the claimant or defend the action on your behalf.
- In the event that, after assessing the claim, the decision is that the matter must be defended, a firm on the LPIIF panel will be appointed to conduct your defence.

GENERAL PRACTICE

THE LEGAL PRACTICE ACT: SOME POINTS FOR THE FINANCIAL SERVICES INDUSTRY TO CONSIDER

In our interaction with representatives of the financial services industry, we have been informed that a significant number of firms (approximately 2000 in total) serve on the panels of the various organisations in the financial services industry. We have also had a request to publish a broad overview of the Legal Practice Act (the Act) for the benefit of this significant block of the consumers of legal services.

There has been a lot of focus on the changes in the financial services industry with the introduction of the Twin Peaks model of regulation and the full implementation of the Solvency Assessment and Management (SAM) regime in 2018. The regulation of the South African legal profession has also undergone a substantial change with the implementation of many provisions of the Act from 1 November 2018. Similarly with the long legislative road travelled by the financial services industry to the implementation of the Twin Peaks and SAM regime, the journey travelled by the legal profession to the full implementation of the Act has taken several years. As with all other industries, financial services require various legal services from time to time (and *vice versa*) and has several touch points with the legal profession. The provisions of the Act also affect lawyers who are not in private practice (including those employed inhouse by corporate entities) and will have to be complied with over and above the regulatory standards applied in the financial services industry. It is thus important that the financial services market is aware of the changes brought about by the Act.

It goes without saying that there are a number of significant changes intro-

duced by the Act. For the first time in South Africa, the office of a Legal Services Ombud will be established when Chapter 5 of the Act comes into effect. (Chapter 5 did not come into effect on 1 November 2018). There are already a number of Ombud offices with jurisdiction over different aspects of the financial services market. The Legal Services Ombud will be a retired judge. Legal practitioners conducting investment practices must register as Financial Service Providers (FSPs) in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act). Compliance with the Financial Intelligence Centre Act 38 of 2001 (the FIC Act) is also compulsory.

Due to space limitations in the *Bulletin*, a comprehensive examination of all the provisions of the Act will not be possible in this article and the focus will thus be on selected matters which, in my opinion, the financial services industry must be aware of. For present purposes, the focus will be on the change in the regulatory structure, the authority to render legal services, the handling of trust money and the draft Code of conduct for legal practitioners (the Code) and how these three topics affect the financial services market in particular. This is not to say that these changes only affect the financial services market.

The introduction of a single regulatory body for the legal profession

The South African Legal Practice Council (the LPC) is now the single regulatory body exercising jurisdiction over all legal practitioners (and candidate legal practitioners). The LPC regulates both attorneys and advocates. The LPC

replaces the four statutory law societies (the law societies of the Cape, Kwa-Zulu Natal, Free State and the Northern Provinces) which regulated the attorneys' profession in the past and the bar councils which regulated the conduct of advocates. Historically, the law societies (in respect of attorneys) and the General Council of the Bar (the GCB) (for advocates) played a dual role as regulators as well as pursuing the professional interests (the so-called trade union function) of their respective members. This has now changed in that the LPC will act only as the regulator of the profession as set out in the LPC and not as a professional interest body. Various structures in the legal profession will now have to form voluntary associations to pursue their various interests as this cannot be done through the LPC. The objects of the LPC (as set out in section 5 of the Act) include:

- (a) facilitating the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;
- (b) ensuring that fees charged for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice- the application of the section dealing with fees for legal services (section 35) has been postponed. The South African Law Reform Commission (SALRC) must investigate several areas relating to legal fees and report back to the Minister of Justice within two years of the implementation of the Act. In conducting its investigation, the SALRC must consider international best practices, the public interest,

GENERAL PRACTICE continued...

the interests of the legal profession and the use of contingency fee agreements;

- (c) promoting and protecting the public interest;
- (d) preserving and upholding the independence of the legal profession;
- (e) enhancing and maintaining the integrity and status of the legal profession and of appropriate standards of professional conduct of all legal practitioners and candidate legal practitioners; and
- (f) upholding and advancing the rule of law, the administration of justice and the Constitution.

Authority to render legal services and the duties in respect of trust money

Only a legal practitioner admitted and enrolled to practise in terms of the Act may render legal services. Every legal practitioner practising for his or her own account (either as a sole practitioner, partner in a firm or a director in an incorporated practice) must be in possession of a valid Fidelity Fund certificate. The consequences of a failure to comply with this requirement are set out in section 93(8) of the Act. The Fidelity Fund certificate is issued annually to a legal practitioner who has met the prescribed requirements, including the outcome of the annual audit of the trust account of the practice, the payment of the prescribed fee to the LPC and whether or not there is any regulatory action taken against the practitioner concerned. The Act also introduces a new category of legal practitioner, being advocates with Fidelity Fund certificates- this category of advocate will be able to accept instructions directly from clients. Historically, the South African legal profession was split into a dual profession. Attorneys took instructions directly from the public and then, in turn, gave an advocate an instruction (referred to as a 'brief') where required. Advocates were thus referred to as a referral profession. The

advocates who elect not to apply for Fidelity Fund certificates will not have trust accounts and will continue operating as a referral profession, only accepting instructions from attorneys. The respective definitions of 'conveyancer' and 'notary' in the Act refer only to attorneys- an advocate can thus not be a conveyancer or a notary. It is important that consumers of legal services (and other stakeholders in the profession) insist on having sight of the current Fidelity Fund certificate of every attorney (or advocate taking instructions directly from the public). Providing legal services when not in possession of a valid Fund Certificate is an offence and the consequences thereof include the possible imposition a fine, imprisonment (or both), the striking-off the Roll of legal practitioners and the person concerned is not entitled to a fee for the services rendered (section 93(8)).

The possession of a valid Fidelity Fund certificate gives members of the public the assurance that the legal practitioner being engaged has met the prescribed requirements and that there will be appropriate protection if the legal practitioner defaults in any way in their duties. The actions of a practitioner practising without a Fidelity Fund certificate will not be covered by the LPIIF. The LPIIF provides the primary (base) layer of professional indemnity insurance to all legal practitioners who are in possession of a valid Fidelity Fund certificate. Members of the public must be aware of this risk. In the same way that a financial services provider or credit provider must be registered with and issued with a licence by the appropriate regulator, the Fidelity Fund certificate is such a licence issued to legal practitioners to provide legal services. The LPFF will also not be liable in the event of the theft of money or property purportedly entrusted to a legal practitioner who practises without a Fidelity Fund certificate. Where necessary, members of the public must contact the LPC in order to verify whether a le-

gal practitioner is admitted as such, on the Roll of practitioners, in possession of a valid Fidelity Fund certificate and also whether or not any regulatory action has or is being taken against the practitioner concerned.

The duties of legal practitioners in respect of the handling of trust money and property as set out in the Act and the Rules include specific requirements in respect of:

- trust money being kept separate from other money
- designation and management of trust investments
- appropriate internal controls being designed, implemented and monitored by legal practitioners over their trust accounts
- implementation of acceptable financial reporting frameworks
- retention of accounting records and files for a minimum of seven years
- conduct of investment practices
- prohibition of the pooling of investments
- firms conducting investment practices being obliged to comply with the FAIS Act
- prohibition against of the investment on behalf of a client in shares or debentures in a company that is not listed on a licenced securities exchange or in unsecured loans

The Code

A draft professional code of conduct has been published. The code addresses several matters, including:

- approaches and publicity, specialisation and expertise- these provisions relate to marketing by practitioners of their services and touting
- the sharing of fees and offices and the payment of commission
- the naming of the partners and the practice

GENERAL PRACTICE continued...

- replying to communication
- conflicts of interest

Part IV of the Code deals specifically with the conduct of legal practitioners not in private practice. Many organisations (including those in the financial services industry) employ legal practitioners inhouse in roles such as legal advisors and corporate counsel. The incumbents in these roles (which, for present purposes will be referred to as 'corporate counsel') must be aware of the provisions of Part IV of the Code which include the duty to act in an ethical manner and adhere to the following standards of conduct:

- (i) act in a fair, honest, transparent manner and with dignity and integrity;
- (ii) remain impartial and objective and avoid subordination or undue influence of their judgment by others;
- (iii) give effect to legal and ethical values and requirements and treat any gap or deficiency in a law, regulation, standard or code in an ethical and responsible manner;
- (iv) not engage in any act of dishonesty, corruption or bribery;
- (v) disclose to any relevant party any personal, business or financial interest in his or her employer or its business or in any stakeholder to avoid any perceived, real or potential conflict of interest;
- (vi) not knowingly misrepresent or permit misrepresentation of any fact;
- (vii) provide opinions, decisions, advice, legal services or recommendations that are honest and objective;
- (viii) when providing legal services or advice to his or her employer, corporate counsel must be free from any conflict of interest, financial interest or self interest in discharging his or her duty to the employer. A corporate counsel must -
 - (a) be and appear to be free of any undue influence or self-interest, direct or indirect, which may be regarded as being incompatible with his or her integrity or objectivity;
 - (b) assess every situation for possible conflict of interest or financial interest, and be alert to the possibility of conflicts of interest;
 - (c) immediately declare any conflict of interest or financial interest in a matter, and must recuse himself or herself from any involvement in the matter;
 - (d) be aware of and discourage potential relationships which could give rise to the possibility or appearance of a conflict of interest;
 - (e) not accept any gift, benefit, consideration or compensation that may compromise or may be perceived as compromising his or her independence or judgment.
- (ix) corporate counsel must at all times act in a professional manner and must: -
 - (a) act with such a degree of skill, care, attention and diligence as may reasonably be expected from a corporate counsel;
 - (b) communicate in an open and transparent manner with his or her employer and with third parties, and not intentionally mislead his or her employer or any third party;
 - (c) make objective and impartial decisions based on thorough research and on an assessment of the facts and the context of the matter;
 - (d) exercise independent and professional judgment in all dealings with his or her employer and with third parties;
 - (e) remain reasonably abreast of legal developments, applicable laws, regulations, legal theory and the common law, particularly where they apply to his or her employer and the industry within which he or she operates;
 - (f) comply with and observe the letter and the spirit of the law, and in particular those relevant to his or her employer or to the industry in which he or she operates, including internal binding and non-binding codes, principles and standards of conduct;
 - (g) observe and protect confidentiality and privacy of all information made available to him or her and received in the performance of his or her duties, unless there is a legal obligation to disclose that information; and
 - (h) generally act in a manner consistent with the good reputation of legal practitioners and of the legal profession, and refrain from conduct which may harm the public, the legal profession or legal practitioners or which may bring the legal profession or legal practitioners into disrepute.

Financial service providers and others who utilise the services of legal practitioners must thus be aware of the provisions of the Act and hold the legal resources they utilise, internally and externally, to the provisions of the Act, the Rules and the Code. How any potential conflicts and overlaps between the Code and similar codes applicable in other industries (for example, the FAIS Code) will be managed is a matter that the respective regulators across the industries will need to engage on.

THEFT BY ANOTHER NAME: UNAUTHORISED 'LOANS' FROM TRUST ACCOUNTS

Clause 16(b) of the LPIIF Master Policy excludes liability for compensation:

'arising from or in connection with misappropriation or unauthorised borrowing by the Insured or Employee or agent of the Insured or the Insured's predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in Section 26 of the [Attorneys] Act;'

Section 55 of the Legal Practice Act contains the provisions relating to the liability of the LPFF and replaces section 26 of the Attorneys Act.

We often receive queries regarding the meaning of the phrase 'unauthorised borrowing' of trust money. This is theft by another name. The term was included in the policy wording on the suggestion of representatives of the broader insurance market who, when dealing with theft claims against law firms, had noted an increase in the number of practitioners who provided an explanation that (in the view of the practitioner) they had not stolen the funds but rather made what was purportedly a loan from their trust creditor, without the knowledge and or consent of the latter.

The facts of a recent Supreme Court of Appeal (SCA) judgment (*The Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018)) provide an example of what can be considered to be "unauthorised borrowing". The relevant facts for present purposes are the complaints against the practitioner that he:

1. Purported to conclude a contingency

fee agreement with an executrix in respect of an instruction to attend to the administration of a deceased estate and charged 15% of the gross value of the assets in the estate;

2. Without the knowledge and authority of his client, had taken his fee prematurely and expressed his apology for 'borrowing' the client's money; and

3. Alleged that part of a payout received from a client in respect of a Road Accident Fund (RAF) claim had been paid to him over and above his fee as a gesture of gratitude by the client.

Section 51 (1) (b) of the Administration of Estates Act 66 of 1965 prescribes the tariff for administration of an estate at 3.5% of the gross value of the assets in the estate. The purported contingency fee agreement thus violated the Administration of Estates Act. It is clear from the judgment that the court was rather skeptical of the explanation in respect of the "unauthorised borrowing" of the trust funds. The funds were taken from the trust account without the knowledge and or consent of the client and there was thus no agreement between the parties in respect of a loan- there could thus not have been a loan. The judgment also indicates that the practitioner had used the funds in question in order to make up a cash shortfall that he had in his practice.

These purported loans from clients are also put up as explanations by attorneys faced with misappropriation claims that are reported to the LPFF or

as an explanation for a delay in paying client funds when due.

It must be remembered that Rule 55.12 prescribes that:

- The firm must account to a client in writing within a reasonable time after the performance or earlier termination of any mandate and retain a copy of such account for at least five years. Each account must specify:

(a) All amounts received in connection with the matter concerned, appropriately explained;

(b) All disbursements and other payments made in connection with the matter;

(c) All fees and other charges charged to or raised against the client and, in the case of an agreed fee, a statement that such was agreed and the agreed amount; and

(d) The amount owing to or by the client.

The firm must pay any amount due to a client within a reasonable time, unless instructed otherwise. Steps must be taken to verify the banking details (and any subsequent changes to the banking details) before any payment is made (Rule 54.13).

Theft of trust funds, whether cloaked as a loan or otherwise, is unlawful and will have serious consequences for the practitioner/s concerned. Moving (rolling) trust funds around in an attempt to hide a trust shortfall will be discovered and action will be taken against the practice.