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DE REBUS

THE SA ATTORNEYS' JOURNAL

MAY 2019

STEP AHEAD CAREFULLY – THE UNCERTAINTY OF UNFAIR CONTRACTS CONTINUES

Handling of trust money – dealing with the obligations of a trust account legal practitioner

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Dismissal for incapacity

Another six basic universal principles applicable to the conduct of a candidate legal practitioner

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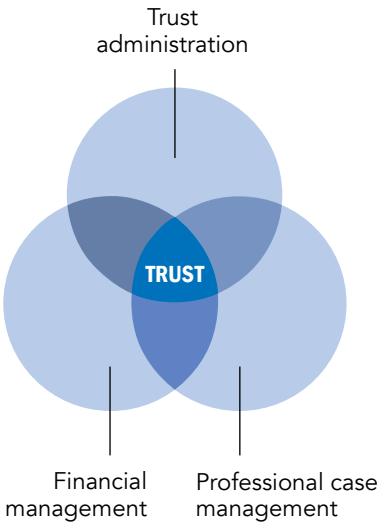

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THE SA ATTORNEYS' JOURNAL

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ISSN 0250-0329

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***DE REBUS* ONLINE:** www.derebus.org.za

CONTENTS: Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

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- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta**. Go to: www.jutalaw.co.za.

PRINTER: Ince (Pty) Ltd, PO Box 38200, Booysens 2016.

AUDIO VERSION: The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

ADVERTISEMENTS:
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CIRCULATION: *De Rebus*, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. It circulates free of charge to all practising attorneys and candidate attorneys and is also available on general subscription.

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela
Tel: (012) 366 8800 • E-mail: david@lssa.org.za

SUBSCRIPTIONS:
Postage within South Africa: R 1 500 (including VAT).
Postage outside South Africa: R 1 700.

Law Society of South Africa

Conveyancing examinations: A source of gatekeeping?

Conveyancing examinations were a hot topic of discussion at both the recently held Law Society of South Africa (LSSA) and National Association of Democratic Lawyers (NADEL) annual conferences. At issue was the notion that the conveyancing qualification examinations were used as a source of gatekeeping into the specialised field. This notion is based on the high failure rate of the conveyancing examinations.

In May and September 2018, for example, a total of 1 221 students wrote the conveyancing examinations, of that number only 281 passed. Students who write the conveyancing examinations write two papers on the same day. The first paper is a practical test, which is designed to test the competence of a student mainly in the practice and procedure of conveyancing and consists of questions, which require students to draft deeds, certificates, applications, consents, agreements, etcetera. Two hundred marks are awarded for this paper. The second paper, which is theoretical, is designed to test the student's knowledge of the various statutes, ordinances and decided cases, applicable to conveyancing. One hundred marks are awarded for this paper. To pass the examination, a student needs an aggregate of 50% for both written papers.

Students who achieve an aggregate of 40% to 49% fail the examination but qualify for an oral examination. After the oral examination, a student who achieves an aggregate of less than 40% fails and is required to write again in the following examination session (May or September).

Discussions at the NADEL conference

During the NADEL conference, conveyancing examiner, Kuki Seegobin noted that the biggest challenge with the conveyancing examination is that it is an 'application' examination. Ms Seegobin added that one of the challenges examiners come across, is that legal practitioners do not have practical experience of conveyancing and they are not able to understand what is required of them.

Another conveyancing examiner, Pumla Mncwango shared the story of how she volunteered at a law firm's conveyancing department for an hour per day, for eight months before she wrote her conveyancing examination. Ms Mncwango said the challenge is that most legal practitioners go into the examination unprepared and with the mentality that by only preparing two months in advance for the examination, they will pass.

The attendants at the NADEL conference noted that the conveyancing field remains untransformed and the examiners for the course remain dominated by white males. The conference also noted that the conveyancing question papers are still written in English and Afrikaans over long hours and that the course continues to reflect a high failure rate.

In view of the above issues raised at the NADEL conference, NADEL resolved the following:

- The conveyancing examinations must be reviewed immediately.
- The examination papers must be written in English only.
- The examination must be written over three days and the structure of examinations, without compromising the quality, must be changed.
- The conveyancing course must be provided by the LSSA's Legal Education and Development (LEAD) division and be made more accessible.
- Alternative forms of assessment must be investigated, which include the format for candidate legal practitioners undergoing training at the law schools.
- The examiners must reflect transformation and more black practitioners, including women and young practitioners, must be appointed.
- A thorough investigation must be launched to establish the reasons why there is a high failure rate in the conveyancing course.

Discussions at the LSSA conference

During the LSSA annual conference, attendees raised a point that the conveyancing examinations are used as a source of gatekeeping because the conveyancing field is predominantly dominated by white males. Ms Mncwango responded by saying the notion of gatekeeping is a perception. She added that she had the same perception prior to her writing the examination. She wrote the examination once and passed. She pointed out that when students write the examination, they do not indicate their race or their name but write their examination number instead.

A question was raised at the LSSA conference, whether conveyancing work should continue to be conducted by legal practitioners, the LSSA resolved that conveyancing work should indeed be conducted by legal practitioners. Dealing with the conveyancing examination duration, the LSSA resolved to support the resolution tabled at the NADEL conference that the two papers be written on separate dates.

Mapula Sedutla – Editor

In view of the issues raised at both the NADEL and the LSSA conferences, LSSA has set up a conveyancing task team to deal with the issues raised by the organised profession. One of the duties of the task team is to engage with the LSSA's LEAD division to completely overhaul the conveyancing course training, considering key elements in conjunction with the examiners and the LSSA Conveyancing Committee.

❑

Would you like to write for *De Rebus*?

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

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

- **Please note that the word limit is 2000 words.**
- **Upcoming deadlines for article submissions: 17 June, 22 July and 19 August 2019.**

LETTERS TO THE EDITOR

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

Unintended consequences of the LPA on the admission applications

Unintended consequences (sometimes unanticipated consequences or unforeseen consequences) are outcomes that are not the ones foreseen and intended by a purposeful action.

This letter is written to highlight the postponement of admission applications of legal practitioners in the Gauteng Division of the High Court in Pretoria, which were issued after 1 November 2018, pending the outcome of the Full Bench judgment of the Gauteng Local Division of the High Court in Johannesburg.

On 18 February, one of our candidate legal practitioners attended the Gauteng Division to have his admission application heard under case number 88173/18.

Despite having satisfied all the requirements under the Legal Practice Act 28 of 2014 (LPA) for admission and enrolment as a legal practitioner, save for those requirements yet to be prescribed by the minister, the application was postponed *sine die* due to the fact that same was issued after 1 November 2018.

On Monday, 25 February, several applicants were admitted as legal practitioners at the Gauteng Division, despite only becoming eligible to qualify as legal practitioners and/or having their applications issued after 1 November 2018. It is our understanding that legal practitioners in other divisions of the High Court in other provinces are being admitted and enrolled.

The apparent lack of uniformity among the courts, who continue to admit applicants during this uncertain period, is severely prejudicial to those applicants whose applications were postponed, potentially to a date several months away.

The barriers which prevent entry into the legal profession, are well documented. This new seemingly artificial barrier which impedes candidate legal practitioners who diligently served their articles under the now repealed Attorneys Act 53 of 1979, needs to be urgently addressed. It can never be that due to the lack of clarity on the provisions of the LPA and/or the failure to have clear transitional provisions to cater for this situation that candidate legal practitioners should be prejudiced.

Furthermore, having admissions placed on hold for such a prolonged period is hindering on the rights of applicants to make advancements in their legal careers, and consequently affecting the ability to be gainfully employed.

This anomaly needs to be addressed as it is prejudicial to a class of new entrants to the legal profession and contributes to the perception of inequality, which may or may not be correct. Equality is a cornerstone of our new democracy. We must ensure that all legal practitioners, including aspiring candidate legal practitioners, are accorded equality of status and opportunity within the profession. The object of the quest for equality is not to seek special dispensation to allow their admission, but rather to ensure that all legal practitioners are treated with dignity and equality no matter where and when they served their articles of clerkship.

A recommendation would be to establish a special motion court for applicants affected by the postponement, in an attempt to speedily deal with the backlog of postponed applications and to reduce the severe prejudice already suffered as a result thereof.

In closing, the moratorium on the hearing of admissions has to be lifted so we have the semblance of uniformity and equality in our division and our profession and in so doing address the unintended consequences of the LPA.

Update on the issue

Be advised that I addressed the concerns detailed in the letter above to the two respective Judge Presidents of the High

Courts in this Division. The response received indicated that applications would be fast-tracked on a positive decision made by the Full Bench in *Ex Parte: Goosen* (GJ) (unreported case no 2018/2137, 25-3-2019) (Sutherland J). The Full Bench pronounced on the issue on 25 March.

On 26 March, I addressed a further letter to the Pretoria Judge President indicating that I was now of the view that the self-imposed prohibition to admissions should be lifted in keeping with the letter of 19 March.

I am pleased to advise that two of our candidate legal practitioners have now been admitted. Be that as it may, I believe that the issue highlighted in the letter is still relevant and should be circulated to raise awareness. I am certain that a number of candidate legal practitioners effected by the Bar to admissions are unaware of the Full Bench decision. The issue has been addressed with the pronouncement on s 115 of the Legal Practice Act 28 of 2014 and the moratorium has subsequently been lifted.

Shaun Hangone, legal practitioner, Johannesburg

A copy of the judgment can be found on www.derebus.org.za

– ***Editor***

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

De Rebus welcomes letters of 500 words or less. Letters that are considered by the Editorial Committee deal with topical and relevant issues that have a direct impact on the profession and on the public.

Send your letter to:
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Book announcement

Law Clinics and the Clinical Law Movement in South Africa

By Jobst Bodenstein (ed)
Cape Town: Juta
(2018) 1st edition
Price R 795 (incl VAT)
573 pages (soft cover)

This book provides guidelines to assist clinicians and universities with the development of the clinical legal education curriculum, teaching methodology and the administration of a university-based law clinic. The book offers a wide range of guidance on many components of clinical legal education, including integrating clinical legal education with the requirements of higher education and the legal profession, setting goals and objectives for a clinical legal education programme, and an examination of the basic principles of teaching and learning as well as assessment.

By Rampela Mokoena

Handling of trust money – dealing with the obligations of a trust account legal practitioner

The promulgation of the Legal Practice Act 28 of 2014 (the Act) and the subsequent South African Legal Practice Council Rules (the Rules) made under the authority of ss 95(1), 95(3) and 109(2) of the Act create requirements, whether expressly or by necessary implication, for a trust account legal practitioner. This article touches on those requirements expounded from ch 7 of the Act. While obligations relating to Inspections of accounting records in terms of r 50 and Accounting Rules in terms of r 54 equally form part of ch 7, these are not directly discussed in this article.

Discussion

The departure in relation to the obligations of a trust account legal practitioner is that a trust account legal practitioner must be in possession of a Fidelity Fund Certificate (FFC), which must indicate that the legal practitioner concerned is obliged to practice subject to the Act (s 84(1) and (4)). If a trust account legal practitioner is not in possession of an FFC, no legal practitioner or person employed by that legal practitioner may receive or hold funds or property belonging to any person, nor may they take a deposit on account of fees or disbursements in respect of legal services to be rendered (s 84(2) and (3)).

Trust account legal practitioners practising for the first time must complete a legal practice management course within the period and after payment of a fee determined by the Legal Practice Council (LPC) (s 85(1)(*b*) read with r 27(1)). In the case of a first time applicant who is required to be in possession of an FFC, proof is required to be submitted to the LPC that the applicant has completed the legal practice management course – referred to in s 85(1)(*b*) of the Act – and the proof of completion must accompany the application (r 47.7.1). If an applicant was in possession of an FFC in the previous year, the certificate of an auditor – in respect of an audit of the trust account legal practitioner's trust bank accounts that was performed for the year ended immediately prior to the application – must have been submitted or proof of such submission must accompany the application (r 47.7.2). An FFC is valid until 31 December of the year in respect of which it was issued (s 85(8)).

An application to the LPC for an FFC is made by truly, accurately and completely setting out the information and particulars provided for in the form, and completing the application form in every respect, in the manner determined in the rules (r 47.3) – and simultaneously paying the contribution required, or by submitting proof of such payment.

Every legal practitioner referred to in s 84(1) must operate a trust account (s 86(1)), which trust account must be kept at a bank with which the Legal Practitioners' Fidelity Fund (the Fund) has made an arrangement as provided for in s 63(1)(*g*). The legal practitioner must deposit, as soon as possible after receipt thereof, money held by such practice on behalf of any person. A trust account practice may, of its own accord, invest in a separate trust savings account or other interest-bearing account any money which is not immediately required for any particular purpose (s 86(3)). Additionally, and on the instructions of any person, a trust account practice may open a separate trust savings account or other interest-bearing account for the purpose of investing therein any money deposited in the trust account of that practice, on behalf of such person over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity (s 86(4)).

In terms of interest accrued on trust bank accounts, trust account legal practitioners are obligated to pay over any and all interest generated or accruing on the separate trust savings or other interest-bearing account opened by the trust account legal practitioner in terms of s 86(2) and (3) of the Act to the Fund. Additionally, 5% of the interest generated on an investment account opened on the specific instructions of a client in terms of s 86(4) is payable to the Fund. The balance of this interest must be paid to the client.

Further obligations of trust account legal practitioners include a peremptory duty to immediately report, in writing, to the LPC the occurrence of the total amount in a trust account practice bank account and money held as trust cash being less than the total amount of credit balances of the trust creditors shown in its accounting records, together with a written explanation of the reason for the debit and proof of rectification (r 54.14.10). A trust account practitioner is required to immediately report, in writing, to the LPC should an account of any trust creditor be in debit, together with a written explanation of the reason for the debit and proof of the rectification (r 54.14.11). Equally, and unless prevented by law from doing so, every legal practitioner is required to report to the LPC any dishonest or irregular conduct on the part of a trust account legal practitioner in relation to the handling of or accounting for trust money on the part of that trust account legal practitioner (r 54.36).

In general, trust account legal practitioners are responsible for ensuring that the provisions of the Act and of those rules relating to trust accounts of the firm are complied with (r 54.19).

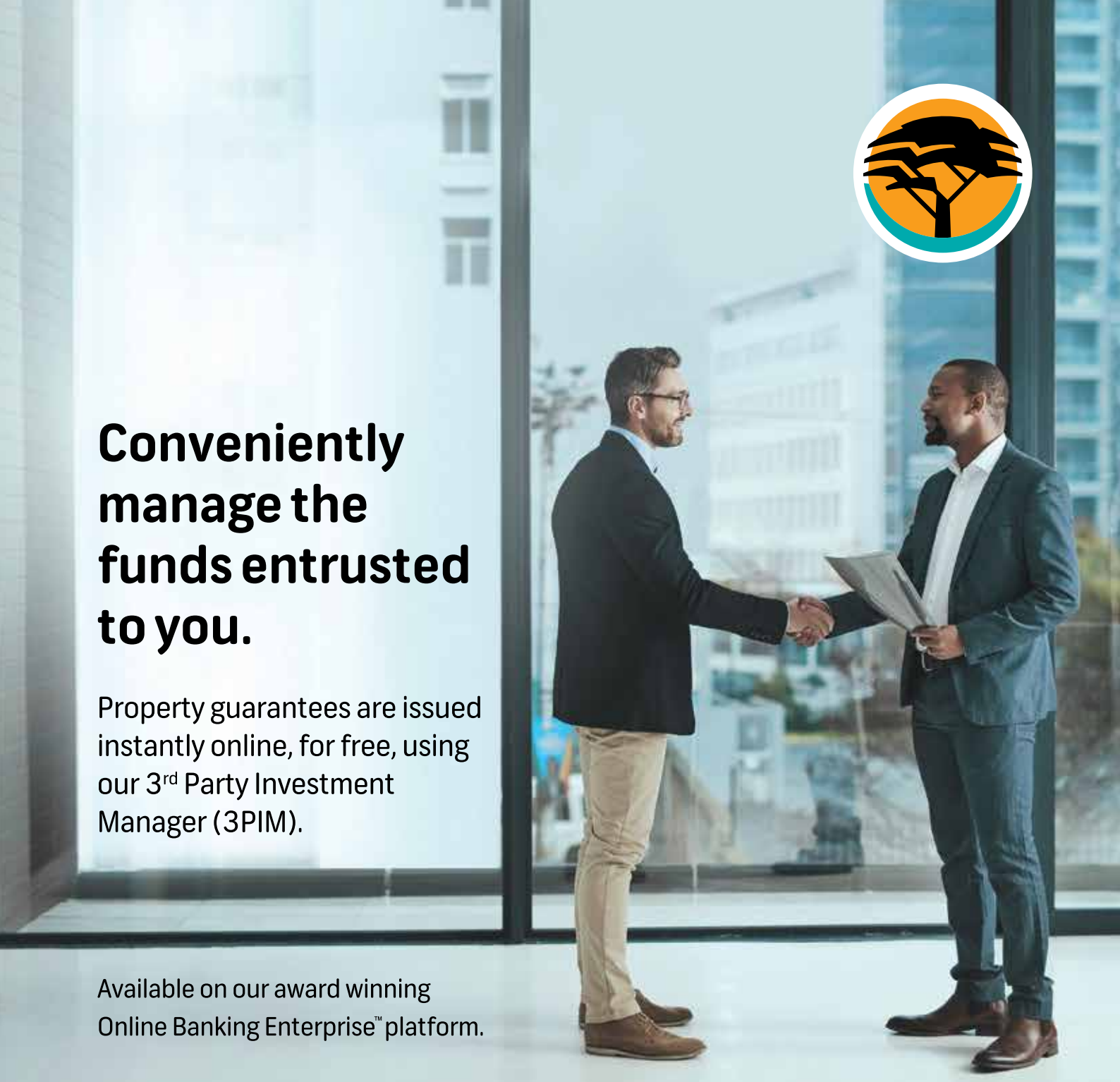
Compliance with obligations expounded in r 54.31 to 54.32 is necessary for trust account legal practitioners ceasing to practice or transferring from one practise to another.

Conclusion

Obligations attached to trust accounts, are the responsibility of each individual trust account legal practitioner, whether they are practising (or deemed to be practising) for their own account – either alone or as a partner, or as a member or director of a juristic entity, or as a s 34(2)(*b*) advocate. A trust account legal practitioner must always be aware of their duty to comply with the requirements of the Act and the rules. Reasonable measures and controls must be implemented by the legal practitioner to ensure compliance with such obligations.

Proper compliance with the obligations imposed on trust account legal practitioners enforces professionalism and ethical conduct and achieves proper management of the risk of theft or misappropriation of funds or property given to or held in trust by the trust account practice.

Rampela Mokoena *BProc (University of Zululand)* is a curatorship officer at the Legal Practitioners' Fidelity Fund in Centurion.



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Another six basic universal principles applicable to the conduct of a candidate legal practitioner

By Francois Terblanche

In a previous article 'Five basic universal principles applicable in the conduct of a candidate attorney' 2018 (Nov) *DR* 20, we looked at the first five universally applicable conduct principles. Those principles, and the principles dealt with in this article, apply regardless of culture and where one works.

In this article we will look at the remaining six universally applicable conduct principles.

Principle 6: Be very careful about what you do on social media

The lines between your professional life and your private life have, as far as social media is concerned, basically disappeared.

You should be aware of what you post or say on social media. Being a candidate legal practitioner means that you are working towards becoming a member of the legal profession. This means at least two things:

- Firstly, your firm's clients want to know that their legal affairs are in safe and reliable hands. Always ask yourself whether your social media actions send a different message to your firm's clients. It may seem great fun to post pictures of your group of friends at a drunken party on Facebook. Doing that will, however, not give your firm's clients any comfort that their legal affairs are being handled by the right firm.
- Secondly, what you do on social media is ultimately a reflection on your firm. People will normally connect the dots between your social media posts and your firm. It will not reflect positively on you or your firm if your social media posts are offensive or in poor taste.

The best approach is to stay away from any social media posts that are, or could be, offensive. As a rule of thumb, you should stay well clear of any crude, political, racist, religiously divisive, insulting or sexual posts.

Also, be careful which posts you 'like' or 'share'. The same rules apply there.

It is a good idea to go through all your previous social media posts and delete all posts, likes and shares that are no longer appropriate in your new position as an employee of a firm of legal practitioners.

Principle 7: Maintain absolute legal practitioner/client confidentiality

The identities of all of your firm's clients are confidential.

All details of your firm's client's matters are confidential.

Each and every employee of a law firm (including candidate legal practitioners) is automatically under an obligation to maintain absolute confidentiality in respect of the firm's clients and their matters. There are two main exceptions to this obligation, namely:

- Firstly, you can disclose a client's identity and details of the client's matter if the client has consented thereto. Law firms are often asked by potential new clients for a list of some of the bigger clients that the firm has acted for. The firm can only disclose those clients' identities to the potential new client if those clients have consented to it.
- Secondly, strictly speaking, you do not have to maintain that confidentiality to the extent that the information is already lawfully available publicly. For example, if your client is a party to litigation proceedings, the documents and information that is publicly available in the court file are no longer confidential. However, clients do not enjoy having their matters discussed in public, even if the details of the matter are lawfully publicly available. The best approach is not to discuss, disclose or comment on a client's matter unless the client has given you its express consent to do so.

It seems like such an obvious and easy obligation for you to comply with. Where is the problem, you may ask? The problem can, for example, arise because you and your friends from other law firms meet up from time to time and want to exchange notes about your experiences. You are eager to compare notes and to share your experiences. In your eagerness (but before you realise what you have done) you have told a friend from outside your firm that you do a lot of commercial agreements for client A, B or C. That is a breach of the legal practitioner/client confidentiality obligation that applies to you as an employee of your firm. Place a guard over your mouth. Always.

Another area where it becomes tempting to breach this obligation is if you are working on a high profile matter. You may want to impress your friends by telling them the inside scoop of 'what really happened' or 'what is really going on'. Do not. It is never worth it.

Principle 8: Be on time

We all know that first impressions count. The worst first impression you can make (apart from tripping over your feet) is to be late for a meeting, for work or for court proceedings.

Being late is incredibly rude – by being late for a meeting you are basically insulting the other participants. Your conduct tells them that their time is not as valuable as yours and that they must just waste their time until you eventually grace them with your presence.

Do not be late. You start with a massive disadvantage if you arrive late.

However, if for some really justifiable reason (such as a two-hour delay on the highway because of load shedding), you find that you are going to be late, let the host of the meeting know that you will be late and why. When you do arrive, apologise for being late.

Principle 9: Avoid toxic people

Each day has only 24 hours. A normal working day has (theoretically anyway) only seven and a half hours. Use your time wisely and productively.

One of the biggest thieves of your working hours is 'toxic people'. Toxic people are people who are almost always negative, who are always complaining and who very rarely manage (or even try) to do anything constructive.

Toxic people literally steal your time and sap your energy.

Judging from some 25 years' experience and discussions with business people, phrases that a toxic person may typically use include 'I am so tired' (said every single day without any underlying medical reason), 'the partners in this firm [followed by some or other negative

comment]' and 'I cannot believe that they [followed by some negative remark]'.

Toxic people will happily eat up your time and your energy. And never give anything back in return.

If you do not give toxic people the opportunity to unpack their never-ending tales of woe on you, they will just move on and find the next victim who has to endure their lamentations.

Avoid toxic people like the plague, and obviously, do not be a toxic person yourself.

Principle 10: Have goals, not dreams

It is perfectly normal to speak about your dreams and aspirations when you officially start your legal career.

You have to be rather precise in what is meant by your dreams though.

If your dreams are really just wishes, then they are of no use to you.

If I say that my dream is to become 'a partner at this firm' or 'the senior partner of this firm' or 'a sole practitioner with my own firm' or 'a solicitor practising in the City of London', then I am just expressing a wish.

I could just as well have said that I wish one day to be 'a partner at this firm' or 'the senior partner of this firm' or 'a sole practitioner with my own firm' or 'a solicitor practising in the city of London'.

Dreams, or wishes, just tell us the result that we want to achieve. They do not give us any guidance on how we are going to get there.

Goals, on the other hand, do give us that critical guidance. Your goals must be stated in writing. Your goals should also be 'SMART'. That is, your (written down) goals should be:

- Specific: Write down your short term and medium-term goals. Make sure that your goals are specific. For example, 'by the end of my first year of articles I want to be able to draft pleadings properly'.
- Measurable: Make sure that your goals are measurable. How are you going to measure your pleadings drafting goal? You could say that you have achieved that goal if that brilliant 30-year experienced litigation partner in your firm only makes very minor changes to the pleadings that you have drafted.
- Achievable: Make sure that your goals are realistic and are, therefore, achievable. Do not be too lenient on the time lines for achieving your goals but be realistic too. For example, you are probably not going to be a very competent corporate law practitioner after one year of exposure to that field – the field is just too complex and varied. Some things take time. But you can set a one-year goal whereby you want to know and be able to apply those sections of the Companies Act 71 of 2008 that typically come up in corporate transactions.
- Required: This is a critical element of your goal setting. What is required for you to achieve your goals? This element should record what you have to do in order to achieve your goal. For example, if we take the Companies Act goal set out above, you could say: 'I need to read those sections until I know their substance by heart. Then I need to read the commentary on them until I know all their nuances. Then I must practise applying them in each corporate transaction that I am involved in. Obviously, I must make sure that I am involved in enough corporate transactions'.
- Time based: You should have a definite time line for achieving each of your goals. That time line should be realistic but not too lenient. Do not wait until the time line expires before you measure how you are faring in achieving your goals – measure that every now and then and adjust your time lines if necessary. Do not be too hard on yourself, but do not be too lenient either.

Find 30 minutes. Go sit at a peaceful place (or any other place that energises you). Write down your goals. Make sure that they are SMART. Then revisit your goals often. Measure how you are doing. Adjust the time lines if needed. And, very importantly, give yourself a massive pat on the back every time you have achieved one of your goals. Be sure to celebrate each and every one of your successes.

Principle 11: Remember your past, live in the present and work towards the future

Being a candidate legal practitioner is a unique period in any legal practitioner's life. It is at times bewildering, frustrating and demotivating. It is also exciting, rewarding and a great learning curve.

Do not wish your life away. Do not wish your articles over. Rather, enjoy the experience. Just as with anything else in life, the more effort you put into your articles, the more rewarding the experience will be.

Keep one eye firmly fixed on your future. Be clear about where you want to get to, and how you are going to do that. Your goals (written down and SMART) will assist you greatly with that.

However, never forget your past. Always remember where you come from. Every now and then, take the time to measure how far you have come already. And pat yourself on the back for it. Then look forward to the future and be clear about how far you still want to progress. Your goals will tell you how you are going to get there.

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Does the life of a *rule nisi* automatically extend on postponement of return date?

By Sinazo Ntshangase

This article is set to deal with the following –

- the status of a *rule nisi* order after postponement of return date without a court order dealing with the life of the *rule nisi*; and
- remedies available on expiry or discharge of the *rule nisi*.

A *rule nisi* is an order granted *ex parte* directed to a particular person or persons calling on them to appear in court on a certain fixed date to show cause why the rule should not be made absolute.

In practice it has become a norm and a logical presumption that in the instance where the *rule nisi* is the subject matter or heart of the proceedings then the postponement of the *rule nisi* has an automatic effect of extending the life of the rule. This was supported in the case of *Crundall Brothers (PVT) Ltd v Lazarus No and Another* 1991 (3) SA 812 (ZH), where the court held that postponement of a *rule nisi* had an automatic effect of extending the life of the rule. This was held on the ground that the relief was provided by the *rule nisi* and consequently to hold that the rule had lapsed would render the postponement nugatory as there would be no rule to confirm on the postponed return date.

I hold a different view, on the basis that a *rule nisi* is primarily an interim order of the court and it further has no independent existence, but is conditional on confirmation by the court, therefore, the court has no authority to *mero motu* extend the life of a lapsed order (see *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) irrespective of whether or not the relief sought is dependent on the existence of the *rule nisi*.

This means that on the return date, when the matter is postponed and there is no order of court dealing with the life of the *rule nisi*, the rule then lapses and consequently the umbrella of protection afforded to the applicant by the rule falls away, leading to the discharge of the duty of compliance on the respondent or defendant post expiry of the rule.

In *National Director of Public Prosecutions v Walsh and Others* 2009 (1) SACR 603 (T) the court provided that, a *rule nisi* order is an unusual indulgence to the applicant, as it permits the applicant to exceptionally condemn the unheard respondent in their absence. Such practice goes against the general grain of fairness in the judicial process and it is for this reason that orders of this nature should be strictly temporary and for a fixed limited duration.

Therefore, it is solely the duty of the applicant when postponing a return day for a matter incorporating a *rule nisi* order to bring to the attention of the court the existence of the rule to enable the court to extend the rule to a specific date and the date to which the matter stands postponed, otherwise the rule simply lapses.

Remedies available to the applicant on expiry or discharge of the *rule nisi*

A *rule nisi* is discharged by failure of appearance by an applicant on the return date. *Rule nisi* is also discharged on expiry of its fixed period.

Where the *rule nisi* is discharged by prescription or effluxion of time, the applicant may on expiry of the *rule nisi* bring an application in terms of r 27(1) and (2) of the Uniform Rules of the Court, which reads:

'(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any steps in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit.

(2) Any such extension may be ordered although the application, therefore, is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seem fit … .'

The applicant may only bring an application in terms of the above intimated in circumstances where the rule has expired, this remedy may be used in instances where the applicant postpones the return date and omits to deal with the life of the rule on postponement.

In the case of *Fisher v Fisher* 1965 (4) SA 644 (W) the court had to deal with an issue where the applicant failed to appear on return date and in the circumstances the court held that it did not have the power to revive a *rule nisi*, which had lapsed because the applicant had failed to take steps within the time limit laid in the rule and the court then decided that where the applicant defaults by failing to appear on return date then the *rule nisi* is discharged and the matter struck from the roll.

It is the above decision that inspired the amendment of r 27 and birthed r 27(4) which reads:

'(4) After a *rule nisi* has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.'

Therefore, where the rule is discharged by default of appearance of the applicant on return date, the applicant may bring an application in terms of r 27(4) referred to above to revive the life of the discharged rule.

In conclusion, it is crucial for litigants to know the distinction between r 27(1), 27(2) and 27(4) of the Uniform Rules of the Court applications and the different circumstances to which the remedies intimated above are available. The above seeks to protect the applicant in *rule nisi* applications. Further, applicants as *dominus litis* are in applications of this nature entrusted with a duty to take reasonable steps to ensure that the court makes an order as to the life of the *rule nisi* on the return date and to ensure that a *rule nisi* order does not continue beyond the date without a court order.

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By
Mohammed
Moolla

Clearing up the confusion on evictions

There has recently been turmoil and confusion on how to proceed with eviction applications in respect of residential properties.

The judgment of *McNeil and Another v Aspeling and Others* (WCC) (unreported case no A85/18, 28-6-2018) (Davis AJ) handed down by the Western Cape Division of the High Court on 28 June 2018, the eviction procedure to be followed by the magistrate's court in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was confirmed.

Following the amendment of r 55 of the Magistrates' Court Rules, the application procedure in the magistrate's court is in all material respects identical to that in the High Court. Rule 55(1) now provides that every application shall be brought by notice of motion supported by an affidavit and addressed to the party or parties against whom relief is claimed and to the registrar or clerk of the court. The notice of motion must be in a form, similar to Form 1A, which is equivalent of the long form notice of motion used in the High Court. The notice of motion must set a day not less than five days after service on the respondent by which notice of opposition is required to be given and must stipulate a day on which the application will be heard in the absence of any notice of opposition.

Except in the case of urgent applications – where a different procedure may be adopted on proper motivation – service of the (long form) notice of motion and founding affidavit in terms of s 4(3) of PIE should ordinarily precede the *ex parte* application to court for authorisation and directions in regard to service of a s 4(2) notice, which will then be served subsequently at a stage when the hearing date has been determined. Thus, service will be effected twice, initially when the notice of motion and affidavit is served in accordance with the rules, and subsequently when the s 4(2) notice is served, which contains the hearing date.

The grounds for the proposed eviction must also be set out in the s 4(2) notice. The mere stating that the grounds are set out in the affidavit attached does not constitute proper compliance with s 4(5)(*c*) of PIE. The grounds of the proposed eviction need to be expressly stated in the s 4(2) notice for the notice to be effective. 'The recipient should not be left to trawl through an affidavit in order to try and ascertain what grounds are relied on for eviction.'

Section 4(1) to (5) of PIE lays down peremptory requirements for obtaining of an eviction order. In terms of the s 4(1) proceedings may only be instituted by the owner of the property. In terms of s 4(2) at least 14 days before the date of the hearing, effective notice must be given in writing to the unlawful occupier and municipality having jurisdiction. In terms of s 4(3) the procedure for serving and filing papers is as prescribed by the rules of court. In terms of s 4(4) the court has to be satisfied that service cannot be conveniently or expeditiously effected to grant service in another manner. In

terms of s 4(5) the notice of proceedings as contemplated in subs (2) must –

'(*a*) state that proceedings are being instituted in terms of subsection 4(1) for an order for the eviction of the unlawful occupier;

(*b*) indicate on what date and at what time the court will hear the proceedings;

(*c*) set out the grounds for the proposed eviction; and

(*d*) state that the unlawful occupier is entitled to appear before the court and defend the case and where necessary, has the right to apply for legal aid.'

In the case of *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) the court interpreted s 4 of PIE and set out the correct procedure to be followed in eviction applications.

First, it was held that the notice of eviction proceedings contemplated in s 4(2) of PIE must be authorised by an order of court in addition to the notice of proceedings in terms of the rules of court as contemplated in s 4(3) of PIE, namely the notice of motion.

Secondly, it was held that since the date of hearing of an application in the High Court is usually only determined after all the papers have been served, and seeing that the s 4(2) notice must indicate the date on which the application will be heard, that has the consequence that an application for authorisation to serve a s 4(2) notice can only be made after all the papers have been filed, that is after the notice of motion and affidavits have been served in accordance with the rules of court as contemplated in s 4(3).

The fundamental principle laid down in the *Cape Killarney* case was that the notice in terms of s 4(2) of PIE must inform the recipient of the date on which the eviction proceedings will be heard.

The step-by-step procedure is as follows:

- Every application in terms of PIE is brought in terms of r 55 of the Magistrates' Court Rules. It is brought on notice of motion supported by an affidavit as to the facts on which the applicant relies on relief. In terms of the notice the respondent is given five days to oppose the application. The respondent is also requested – if they wish to oppose the matter – to appoint an address where there are three or more attorneys practising independently of one another within 15 km of the clerk of the court.
- Once the application papers are signed, the clerk of the court is approached to issue a case number and supply a date for when the main application will be heard. When requesting the date, the applicant must take into account how long it will take the Sheriff to serve this document, as well as the procedural rule of s 4(2) of PIE, which requires at least 14 days before the date of the hearing.
- The application papers are then taken to the Sheriff for service.
- On receipt of the return of service, the applicant drafts the application in terms of s 4(2). The grounds for the proposed eviction must be set out briefly in the s 4(2) notice. As stated earlier, the mere stating that they are fully set out in the supporting affidavit does not constitute proper compliance with s 4(5) of PIE. The grounds need to be effectively stated in the s 4(2) notice.
- Once the application has been signed, the applicant approaches the magistrate at court with the *ex parte* papers, including proof of service by the Sheriff. The court will then be requested to consider the contents of the notice and suggested manner of service and to endorse its approval or disapproval thereof of the application.
- Once the *ex parte* application is granted, the s 4(2) notice may be served on the respondents and the municipality having jurisdiction.
- The service must take place in accordance with the directions of the court and at least 14 days before the hearing takes place. The 14-day period refers to ordinary days and not court days.
- On the return date the court will hear evidence as to the equity provisions as set out in s 4(6) with regard to elderly persons, and households headed by women and/or children.
- The court must then, in the light of all the facts placed before it, make an order as to what is just and equitable to grant an order for eviction considering the provisions of subss 4(6), 4(7), 4(8) and 4(9) of PIE.
- Frequently, applicants are faced with the difficulty of effecting service. In that case the applicant will have to bring an application in terms of r 10(1)(b) read with r 55(4)(b). Rule 10(1)(b) provides that:

'If service of process or document whereby proceedings are instituted cannot be effected in any manner prescribed in rule 9 … the person desiring to obtain leave to effect service may apply for such leave to a presiding officer, who may consider such application in chambers.'

The person desiring to obtain leave in the circumstances contemplated in r 10(1)(b) shall make an application to court setting forth concisely the nature and extent of their claim, the grounds on which it is based, on which the court has jurisdiction to entertain the claim, and also the manner of service which the court is asked to authorise. If the applicant is requesting for service other than personal service, the applicant should also set forth the last known whereabouts of the person and the inquiries made to ascertain their whereabouts. The court may make an order as to the manner of service it deems fit and shall further order time within which the notice of intention to defend is given or any other step is to be taken by the person to be served.

Rule 55(4)(b) makes provision for '[a]pplications to the court for authority to institute proceedings or directions as to procedure or service of documents [which] may be made *ex parte* where the giving of a notice of such application is not appropriate or not necessary.'

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Step ahead carefully – *the uncertainty of unfair contracts continues*

By
Igor
Szopinski

In the case of *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) the Constitutional Court (CC) held that the exercise of a right of cancellation in a contract of purchase in instalments of immovable property was unenforceable on the ground that to enforce it would be 'unfair' in the circumstances because of its disproportionately adverse consequences for the purchaser.

Facts

GB Bradfield (ed) in *Christie's Law of Contract in South Africa* 7ed (Cape Town: Juta 2016) at p 22 summarises the case as follows: The purchaser 'after having paid more than half the instalments due under the contract, but before exercising the statutory right in terms of [s 27 of] the Alienation of Land Act [68 of 1981] to have the property transferred into her name against registration of a mortgage bond over the property for the balance of the purchase price, the [purchaser] defaulted in the payment of instalments, municipal rates, taxes and service charges for which she was liable under the agreement. The seller exercised its contractual right to cancel the contract. The contract contained a forfeiture clause in terms of which the instalments already paid were forfeited to the seller. The purchaser, despite having made no further payments, then invoked her statutory right to claim transfer of the property into her name, against registration of a mortgage bond over the property for the balance of the purchase price. No reference was made to how the arrears were to be dealt with. The seller responded some time after the demand for transfer with a demand for payment of the arrears still due. The purchaser did not respond to this and the seller notified her of its intention to cancel the contract. The purchaser responded tendering the arrears against transfer of the property. The seller did not respond to this and instituted proceedings to have the sale cancelled and the purchaser evicted. The application was opposed by the purchaser who counterclaimed for an order compelling transfer of the property into her name. The seller argued that the contract had been validly cancelled and, alternatively, that, in the event that the cancellation clause was found to be unenforceable, they were entitled to withhold transfer of the property until the purchaser had paid the arrears due.'

Picture source: Gallo Images/Getty

Judgment

In reaching its decision that the enforcement of the contracting right to cancellation would be 'unfair' in the circumstances, the court relied on a somewhat 'free-floating' notion of fairness (see D Bhana and A Meerkotter 'The Impact of the Constitution on the Common Law of Contract: *Botha v Rich NO* (CC)' (2015) 1323 *SALJ* 494).

The court held: 'In my view, to deprive Ms Botha of the opportunity to have the property transferred to her under s 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable proportion of the purchase price she has already paid, and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees.'

Regarding the cancellation of the agreement the court held as follows:

'[G]ranting cancellation – and, therefore, in this case forfeiture – in circumstances where three-quarters of the purchase price has already been paid would be disproportionate penalty for the breach. In their application for cancellation the trustees did not properly address the disproportionate burden their claim for relief would have on Ms Botha. They took the view that the question of forfeiture and restitution was independent of, and logically anterior [sic] to, the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The trustees' stance, therefore, meant that they could not justify this court's awarding the relief they sought. In view of the above the cancellation application must fail.'

Issue

Bradfield (*op cit*) at p 23, thereafter correctly points out that: 'This decision creates uncertainty with regard to the exercise of a contractual right to right to cancellation ... on the basis that the effect of cancellation will be disproportionately harsh in light of their breach.'

However, the inquiry into this matter cannot end here. It is necessary to examine whether the CC's judgment is correct in the first place and whether the underlying reasoning of the court is acceptable to justify the outcome.

Prior to 1962 as it is now, it is not uncommon for contracting parties to include a term in their contract binding the one party to pay a fixed sum of money or return the property and forfeit all instalments already paid in the event of committing a specified breach of the contract. Parliament in order to combat improper 'unfair' or 'excessive' penalties or forfeiture clauses intervened and as a result the Conventional Penalties Act 15 of 1962 (the Act) was passed.

Snyman J in *Van Staden v Central South African Lands and Mines* [1969] 1 All SA 44 (W) at 351 summarised the object of the Act as follows:

'This Act may be said mainly to aim at two things –

(1) to make it plain beyond doubt that a penalty stipulation arising out of the contractual obligation is enforceable at law; and

(2) to prevent the exaction of unfair or excessive penalties being stipulated for in contracts, and in this respect also to prevent both a penalty and damages being claimed in respect of the same act or omission on the part of the debtor.'

The CC in its judgment refers to the seller as making a fundamental error by treating forfeiture and cancellation of the contract independently. Interestingly enough, based on the Act, the seller had the right to enforce the forfeiture by law in the event of a breach, so there was no obligation for the seller to justify the consequences of cancellation, as forfeiture is not reliant on cancellation but on breach of the agreement (see s 1). The CC should have granted the order of cancellation based on breach instead of not agreeing to the cancellation, because it is prejudicial to the money already paid by the purchaser. The law was not followed accordingly, as regard to whether there is cancellation or there is no cancellation of the agreement, under s 1 the seller was still entitled to forfeiture.

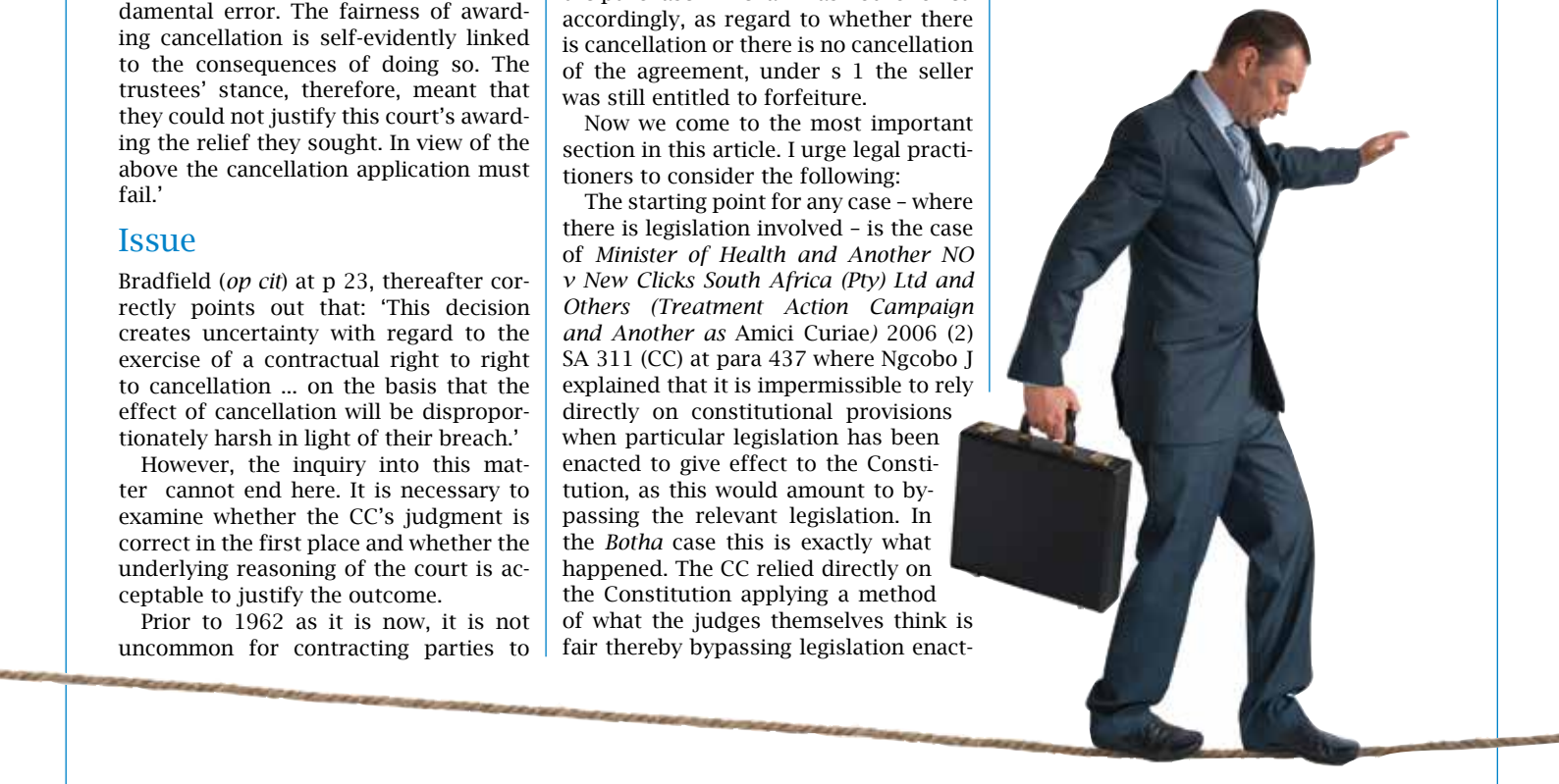
Now we come to the most important section in this article. I urge legal practitioners to consider the following:

The starting point for any case – where there is legislation involved – is the case of *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC) at para 437 where Ngcobo J explained that it is impermissible to rely directly on constitutional provisions when particular legislation has been enacted to give effect to the Constitution, as this would amount to bypassing the relevant legislation. In the *Botha* case this is exactly what happened. The CC relied directly on the Constitution applying a method of what the judges themselves think is fair thereby bypassing legislation enacted particularly to deal with unfair penalties or forfeiture clauses. The court was required to follow the Act.

In *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) the Supreme Court of Appeal (SCA) in response to a decision of the CC in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) – which decision was based on the CC's notion of what is unreasonable and unfair in the area of contract law – stated that this notion is fundamentally unsound and it did not reflect the principles of our law of contract. The court further held: 'Reasonableness and fairness are not freestanding requirements for the exercise of a contractual right'. Brand JA held that unless and until the CC holds otherwise, the law must be taken to be as stated by the SCA, and the judge concluded that the High Court had been obliged to follow the common law, and that its decision to do otherwise had violated the principle of legality. Brand JA further added that the reason why the law should not give judges the freedom to decide cases according to what they regard as reasonable and fair is essentially that this would give rise to intolerable legal uncertainty.

In *Burger v Central South African Railways* 1903 TS 571 at 576, Innes CJ said that 'our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable'.

In *Bredenkamp and Others v Standard Bank of SA Ltd* [2010] 4 All SA 113



In reaching its decision that the enforcement of the contracting right to cancellation would be 'unfair' in the circumstances, the court relied on a somewhat 'free-floating' notion of fairness (see D Bhana and A Meerkotter 'The Impact of the Constitution on the Common Law of Contract: Botha v Rich NO (CC)' (2015) 1323 SALJ 494).

(SCA), Harms DP stated that the notions of 'fairness, justice and reasonableness' should not extend beyond instances of public policy as well as '[m]aking rules of law discretionary or subject to value judgments may be destructive of the rule of law'. This article is an illustration that Harms' view is correct.

The *Botha* case seems to indicate that enforcement of contractual obligations now relies on a particular judge's view of what is fair rather than the terms of contract especially when we compare it to the *Barkhuizen* case. Thus there are two completely different notions on what is 'fair'.

It is a general rule that courts are assumed to know the law and take judicial notice of statutes. The *Botha* case clearly illustrates that this is not always the position. I urge legal practitioners in future to take notice of *Raad vir Kuratore vir Warmbad Plase v Bester* 1954 (3) SA 71 (T). The existence of statute need not be pleaded but it is helpful. I am referring to this case in that the existence of the Act was never considered.

In *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A) Smalberger JA warned that '[o]ne [referring to a judge] must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness'. The *Botha* case does exactly the opposite and the CC applied its own individual sense of propriety and fairness without taking legislation into account.

Section 8(3)(*a*) in the Bill of Rights requires the court to develop the common law to the extent that legislation does not give effect to that right. This begs the question: How is it possible for the CC to develop the common law while ignoring and acting contrary to the Act, whose sole purpose it is to address 'unfairness' of forfeiture clauses?

In the *Botha* case the CC placed the burden of proof on the seller in that the seller must show that the cancellation is fair taking account of the buyer's consequence of doing so, namely, the forfeiture. Meanwhile, the law is clear that the full legal onus of proving that the penalty is out of proportion to the prejudice suffered by the seller in terms of the Act is on the buyer (see *Steinberg v Lazard* 2006 (5) SA 42 (SCA)).

Conclusion

What the CC has done is to provide decisions based on a particular judge's view on what is fair, without considering the terms of a contract, relevant legislation or the law of contract itself. The court did not even compare the possible outcomes of these type of cases when determined via the 'rule of law' as compared to its personal notions of what is fair. The decision in the *Botha* case is simply incorrect as the court was obliged to follow the Act and at the very least comply with its provisions, unless there was a direct constitutional challenge to its provisions, and the Act was found to be unconstitutional. Instead the final outcome of the case leads to intolerable legal uncertainty, which has further opened the doors to defaulting parties to resist contractual rights of the other party, on the notion of fairness. The result and outcome in this case, is therefore, destructive to the rule of law.

The CC needs to ask itself the question: *Quo vadis*?

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The High Court still has jurisdiction in labour matters

By Bayethe Maswazi

Picture source: Gallo Images/Getty

Before the Constitutional Court (CC) decision in *Chirwa v Transnet Limited and Others* 2008 (3) BCLR 251 (CC) it was easy to determine whether the High Court in a given labour matter has jurisdiction or not. This is because the CC decision in *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) SA 693 (CC) clarified the issue. The fine principle in the *Fredericks* case, which is underpinned by a lucid analysis of the Labour Relations Act 66 of 1995 (the LRA), was understandably, confirmed by the Supreme Court of Appeal (SCA) in *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA). Both decisions agree that the High Court has concurrent jurisdiction with the Labour Court (LC) in matters, which are dealt with in s 157(2) of the LRA. Moreover, both decisions accept that s 157(1) does not deal with all labour matters, instead the High Court loses jurisdiction on the strength of s 157(1) of the LRA and the LRA specifically assigns the jurisdiction in respect of such a matter to the LC. Ironically, this principle seems to have been accepted in the *Chirwa* case, how the CC then proceeded to find that the *Chirwa* case was a matter where the jurisdiction of the High Court is ousted, remains one of the ironies of the case.

One would have thought that the principle in the *Fredericks* and *Fedlife* judgments delivered from two of South Africa's most superior courts would settle any controversy that may have existed regarding the jurisdiction of the High Court in labour matters. However, it was not to be and to this day, the sorry legacy of the *Chirwa* judgment follows our jurisprudence.

In this article I examine the controversies relating to the jurisdiction of the High Court in labour matters, which have had many practitioners being careful – sometimes too careful – not to take matters concerning labour disputes before the High Court.

I do this by examining various concepts, which are important in the determination of the issue, and the problem precipitated by the misunderstanding of these concepts, particularly in relation to the *Chirwa* and *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) cases. Later, with the assistance of the Constitution, I shall put the *Fredericks*, *Chirwa* and *Gcaba* cases in their proper context to illustrate that the *Fredericks* judgment remains good law while the *Chirwa* case seems to have been decided on its peculiar facts, which to some extent, were not properly interpreted. With regard to the *Gcaba* case, I will simply say that it is safe to assert that jurisdiction must be understood from the pleadings themselves, which is generally accepted, it adds nothing to the debate, but it will be necessary for me to support this contention and I will do so. But first, the concepts.

Jurisdiction

Jurisdiction as a legal concept refers to the power of a court to adjudicate a particular matter definitively, meaning by being able to decide the competing rights of the parties in that given matter,

as opposed to merely inquiring on the issue of jurisdiction. What this means is that where a court decides a matter on its merits, by implication, it accepts that it has jurisdiction to hear the matter, otherwise a court with no jurisdiction has no entitlement to decide the merits of the matter.

Jurisdiction may arise in various guises, sometimes a cause of action will determine it, while in other instances, the territory where the cause of action arose, will be the guiding consideration. However, in this article, I am only concerned with jurisdiction as it pertains to the cause of action.

Because of the manner in which various courts have approached this issue, it is necessary that the above point is made, if only for taking the issues back to basics.

In the premises, therefore, a court that does not have jurisdiction does not have the power to decide the merits of the matter. This is important, for as I will illustrate – when dealing with the three cases mentioned – this salutary principle has not always been observed.

An example is apposite. If there was a court that deals exclusively with contractual disputes, a party who claims to be a victim of a breach of contract would be entitled to bring that dispute to such a court. In turn that court would exercise jurisdiction over that matter, this it will do purely on the basis that it is a contractual dispute based on the plaintiff's pleaded case. The question then arises whether this change if the defendant pleads that there was never a contract between the parties and, therefore, the court does not have jurisdiction?

This notional plea, at least at first glance seems reasonable, since if there was no contract, surely there cannot be a contractual dispute and in consequence, the court lacks jurisdiction.

But if we restate the principles set out above, namely, that a court that does not have jurisdiction has no business in the merits of the matter and that jurisdiction is determined by the form of the pleadings, and not substance of the case, the inelegance in the defendant's plea becomes glaring. To illustrate further, if there was no contract, the plaintiff does not have a cause of action, but the court does have jurisdiction, hence a finding that there was no contract between the parties. Otherwise, a court which does not have jurisdiction would have to decide the merits of the matter and thus offend quite egregiously, the very bedrock on which jurisdiction as a legal concept rests. It is not available then to the court, which does not have jurisdiction to inquire into the existence or otherwise of the contract between the parties, it is sufficient that the applicant has framed their pleadings to show that their case is one of contractual dispute. Whether this is true or not is not for the court, which does not have jurisdiction. It is for a court exercising its jurisdiction.

The doctrine of precedent

To restate the obvious, the doctrine of precedent holds that a court of lower status is bound by its own decisions and of those of the courts higher or superior to it. This principle seems uncontroversial, and in practice it often is. This for two reasons –

- first, not everything said by a court of higher status is binding on a lower court, but only the reasoning underpinning what the court pronounces in response to the issue put before it, is; and
- secondly, it is possible for the lower court to distinguish the reasoning of the higher court from the issue it must decide and thus hold itself free from the clutches of the doctrine of precedent in relation to the issue.

It is also possible for a lower court to conclude that what was said in a given case by the higher court, which at face value, seems binding, was not the reasoning underpinning the conclusion which the latter was required to decide, in other words, it had no precedential value.

All of this, in summary, means that in order to decide whether what the higher court held constitutes precedent, we must understand what the issue is that court had to decide on. In that case, we will find it easy to identify the reasoning that underpinned its answer to the question it was required to answer, in other words, its *ratio decidendi*. This is necessary to clarify since many times, the significance is often overlooked. This passage will be significant later.

The Constitution

Since the High Court derives its jurisdiction from the Constitution, we must look at the Constitution in order to answer the question of whether the jurisdiction of the High Court in labour matters is ousted as a matter of general principle. This is so because any statute that purports to deprive the High Court of jurisdiction, must do so consonant to the Constitution. Section 169 of the Constitution gives the High Court jurisdiction to decide constitutional matters, except where such matters are –

- within the exclusive jurisdiction of the CC; or
- are assigned to another court equivalent to the High Court.

In the same section we glean that the High Court has jurisdiction in respect of any other matter except a matter, which has been assigned to another court, irrespective of the status of such a court.

Therefore, just on the elementary reading of s 169 of the Constitution, it is not possible for the High Court to lose jurisdiction to any forum that is not a court of law, including the Commission for Conciliation, Mediation and Arbitration (CCMA) on the basis of the above constitutional framework.

The *Fredericks* case

This case concerned a refusal of the Department of Education, Eastern Cape to approve severance packages in respect of certain of its employees. Consequently, these employees approached the High Court seeking review of the refusal and other consequential relief. The High Court, per White J refused to hear them on the basis that their claim was a labour matter and thus the High Court lacked jurisdiction. The CC, on appeal, took a different view reasoning that the High Court has concurrent jurisdiction with the LC in respect of the dispute. Of importance to the decision in this matter is that the CC arrived at its decision anchored by s 169 of the Constitution, and held that since the CCMA is not a court in terms of s 169, the High Court's jurisdiction is only ousted where the matter is assigned to the LC in terms of s 157(1). This decision was distinguished in the *Chirwa* case and was not overruled, which means it is still good law. Decisions of the various High Courts to the effect that the *Chirwa* case must be understood to have overruled the *Fredericks* case have been unpersuasive in their reasoning in this regard.

The *Chirwa* case

This matter concerned a dismissal of an employee for incapacity. She referred the matter to the CCMA whose proceedings she abandoned midstream and approached the High Court for a review of the decision arguing that it constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) since the decision violated the Code of Good Practice contained in sch 8 of the LRA. The High Court nonsuited her, reasoning that her dispute was a labour matter and thus the High Court lacked jurisdiction. Her appeal to the SCA was met with the same fate albeit by a narrow majority. Similarly, the CC did likewise. The majority decision of the CC distinguished the *Chirwa* case from the *Fredericks* case, reasoning that she relied on the LC, while the *Fredericks* case did not. There is a lot to be said about the tenuous reasoning of the CC in the *Chirwa* case for distinguishing the *Fredericks* case, since reference to the Labour Code was only resorted to only for the purpose of establishing that the dismissal contravened a statute in terms of PAJA and not to anchor the entire application in the LRA. In any event, in the absence of any general principle that ousts the jurisdiction of the High Court in labour matters in the LRA, the conclusion in the *Chirwa* case, while clear on the facts, seems rather opaque in prin-

ciple, which is why one must be hesitant to hail the *Chirwa* case as establishing a new principle regarding the subject of the jurisdiction of the High Court in labour matters.

The *Gcaba* case

Mr Gcaba applied for the position of the Station Commander, which he did not get as someone else was appointed. Aggrieved by this he challenged the failure to appoint him to the position, by way of review at the High Court, contending that the decision not to appoint him constituted administrative action in terms of PAJA. His case was one of review of an administrative action. The High Court for its part held that in the light of the *Chirwa* case, the High Court does not have jurisdiction since it was a labour matter. On appeal to the CC, the result did not change for a very interesting reason. The CC, after making the point about the doctrine of precedent and its importance for the rule of law, framed the issue before it as being whether the failure to appoint Mr Gcaba constituted administrative action contemplated in PAJA. The court then proceeded to answer this question in the negative. This means that the court said the dismissal did not constitute administrative action.

Unless I have missed something, it appears to me that this conclusion put paid to any issue before court, since it meant that Mr Gcaba had failed to make a case for the relief he sought. My analogy of a contractual dispute above regarding a court meant only for contractual disputes finds its practical application. Anything else that the court said including its interpretation of ss 157(1) and 157(2) of the LRA was said as by the way or what is called *obiter dictum*. This is the reason, in my view, why the *Gcaba* case made no contribution to the debate regarding the jurisdiction of the High Court in labour matters at all.

Conclusion

The jurisdiction of the High Court in all matters is no longer a matter of common law, s 169 of the Constitution clearly takes that responsibility. As the supreme law, the Constitution is unable to run parallel to the common law on any issue. If the Constitution tells us that the High Court has jurisdiction in all matters, except when such jurisdiction is assigned to another court in terms of legislation, we must wait for such legislation before we take away constitutionally awarded authority from the High Court. Section 157(1) does not take away the jurisdiction of the High Court in labour matters. Instead, the section tells us of the general approach applicable when assigning the jurisdiction to the LC. This approach can be expressed simply as meaning that where the LRA says a particular dispute is assigned to the LC, the latter has exclusive jurisdiction only in respect of that particular matter, surely not all labour matters. This is the best meaning of s 157(1). Both the *Fredericks* and *Chirwa* cases accepted this meaning.

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THE LAW REPORTS

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March 2019 (2) South African Law Reports (pp 1 – 328); [2019] 1 All South African Law Reports February (pp 291 – 584); [2019] All South African Law Reports April (pp 1 – 305); 2019 (1) Butterworths Constitutional Law Reports – January (pp 1 – 163)

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

Abbreviations

CC: Constitutional Court
ECP: Eastern Cape Local Division, Port Elizabeth
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Civil procedure

Conflicting versions of expert evidence – balance of probabilities: In *Batohi v Roux* [2019] 1 All SA 390 (KZD) the defendant was a practising neurosurgeon in private practice and the plaintiff was his patient. During 2004, the defendant successfully operated on the plaintiff to alleviate a nerve-related problem. The plaintiff was almost immediately, rendered pain-free. In 2011 the pain recurred. The defendant performed a revision operation. This time, the procedure was less successful. The plaintiff sustained permanent and irreversible nerve damage.

The plaintiff sought damages from the defendant in delict on the ground that the latter was negligent in that he failed to allow for a sufficiently meaningful period of conservative treatment before advising the plaintiff to undergo the surgery in question. The plaintiff also averred that he was not sufficiently informed of the risks attached to the surgical procedure.

Vahed J held that the material issues for determination were as follows:

- First, whether the defendant was negligent in not treating the plaintiff conservatively in the first instance and before resorting to surgery.
- Secondly, whether the defendant failed in his duty to obtain the plaintiff's informed consent to the surgery.
- Thirdly, whether any such negligence on the defendant's part contributed to, or was a cause of, any damages which the plaintiff might prove he has suffered (causation).

The plaintiff bore the onus of proof on all the issues.

The two versions placed before the court were conflicting and irreconcilable. The test, in such circumstances, is that the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and, therefore, acceptable. The plaintiff must further prove that the other version advanced by the defendant is, therefore, false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.

Both expert medical witnesses shared the view that, in the circumstances of this case, it was not unreasonable for the defendant to have recommended surgery without further conservative treatment. Even if it could be established that the defendant was negligent in not treating the plaintiff conservatively before resorting to surgery, the plaintiff had not succeeded in establishing that further conservative treatment would have resulted in a recovery. The plaintiff had thus not discharged the onus of proving causal negligence on the part of the defendant.

The court accordingly found in favour of the defendant.

Competition law

Unlawful use of confidential information and trade secrets: In *Pexmart CC and Others v H Mocke Construction (Pty) Ltd and Another* [2019] 1 All SA 335 (SCA) the first respondent (Mocke Construction) was a pipeline construction company that specialised in lining steel pipes used in the mining industry with a plastic high density polyethylene liner. Before the material events that gave rise to the present litigation, both the second respondent, Mr Mocke, and the third appellant, Henn, had developed experience in the plastic lining of steel pipes.

In furtherance of his ambition to revolutionise the pipelining industry by rehabilitating old pipes through placing a plastic liner inside the steel pipe, Mr Mocke began discussions with one Gish, an American, who sold Mr Mocke the exclusive and irrevocable licence to the process needed for plastic-lining steel pipes. In turn, Mr Mocke, with Gish's consent, permitted Mocke Construction use of the intellectual property rights that flowed from the licence.

In 2011, Henn was employed by Mocke Construction. During his employment with Mocke Construction, he became involved in the plas-

tic-lining process, but as revolutionised by Mr Mocke.

In 2013, Henn's services with Mocke Construction were terminated and, he almost immediately thereafter, took up employment with the first appellant (Pexmart). Mocke Construction contended that Pexmart and Henn then became their competitors in the pipe-lining industry through the alleged unlawful actions of Henn. It alleged that the appellants had unlawfully made use of their confidential information and trade secrets.

Navsa ADP pointed out that the principles on which liability for unlawful competition rests are that every person is entitled to carry on their trade or business in competition with their rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss. The protection of confidential information is not always absolute nor is the protection always permanently available.

The court confirmed the reasoning and conclusion of the court below that in this case, the processes adopted by Pexmart and Henn were dissimilar to those employed by the Mocke Construction. Henn's failure to testify was another factor that counted against Pexmart and Henn. He was at the centre of the dispute. The affidavits he filed were emphatic in their denial of material aspects of the respondents' case. The material assertions by him in the answering affidavit filed on his behalf ought to have been testified to during the trial. His failure to testify was rightly held against Pexmart and Henn.

The court held that Pexmart and Henn made unlawful use of Mocke Construction's confidential information and trade secrets. The appeal was dismissed with costs.

Constitutional law

Upgrading of Land Tenure Rights Act: In *Rahube v Rahube and Others* 2019 (2) SA 54 (CC); 2019 (1) BCLR 125 (CC) the court had to confirm an order of invalidity from the High Court with regards to s 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 (the Upgrading Act). The High Court declared it invalid to the extent that it automatically converted the holders of land tenure rights into owners of the property, without providing other occupants or affected parties with an opportunity to make submissions.

Ms Rahube (applicant) was the sister of Mr Rahube (respondent). Ms Rahube moved into the property in question, and lived there with her family (grandmother, uncle, children, brothers). Ms Rahube, once married moved out, but moved back after divorce. Mr Rahube was elected as the holder of a certificate of occupation in 1987, and a deed of grant was issued in terms of proclamation R293 under the Black Administration Act 38 of 1927. The Upgrading Act automatically converted rights in property to ownership rights, which led to the respondent automatically becoming owner of the property, whether he was residing on the property or not.

The High Court held that this conversion was inherently gender biased because, in terms of the proclamation, women could not be the head of the family and, therefore, could not have a certificate or deed of grant registered in their name. The internal appeal procedure in s 24D of the Upgrading Act could not rescue the section, and it was, therefore, declared unconstitutional.

The order of invalidity was to apply retrospectively to 27 April 1994 but did not apply to cases where property has been sold to a third party or where the property had been inherited by a third party in terms of the laws of succession. The order was suspended for 18 months to allow Parliament to rectify the defect. Mr Rahube was precluded from transferring or encumbering the property.

On appeal the CC confirmed the order of the High

Court. Goliath AJ held that the purpose of the Upgrading Act is to provide recognition and security of rights that had been previously ignored or systemically devalued. The Upgrading Act sought to address the pre-existing inequitable access. The automatic upgrading did not achieve this purpose since it effectively excluded African women from the benefit of the legal protection.

The court further held out that it is clear from the historical context of the provision, coupled with the wording (that referred only to 'he'/'his' with regard to the holder), had a discriminatory impact on women, and is therefore against s 9 of the Constitution.

• See law reports 'land tenure' 2018 (April) *DR* 40 for the GP judgment.

Customary law

Requirements of a customary marriage: The facts in *Sengadi v Tsambo; In re: Tsambo* [2019] 1 All SA 569 (GJ) were as follows: The applicant and the deceased agreed to marry in terms of customary law. On 28 February 2016 the families met to negotiate *lobolo*. They agreed on *lobolo* of R 45 000. On signature of the agreement the deceased paid R 30 000. The balance was to be paid in two instalments in future.

After the negotiations both the deceased and the applicant dressed up in wedding attire. The deceased's family intended to conclude the wedding on the same day as the *lobolo* negotiations. The applicant was introduced as the deceased's wife and she was welcomed into the deceased's family. The event was captured by way of a video recording.

Due to the deceased's infidelity and substance addiction the applicant moved out of the matrimonial home and stated that she will only return if the deceased goes for rehabilitation. When the deceased died the applicant moved back to their matrimonial home to mourn his death but was informed that she is not welcome, and the family did not recognise her as the customary-law wife of the deceased.

The respondent argues that the applicant was not handed over and that this is the most crucial part of the customary marriage.

An urgent application was launched where the applicant sought the following relief –

• a declaratory order confirming that she is the customary wife of the deceased;
• an order interdicting the respondent from burying the deceased;
• a declaratory order entitling her to bury the deceased; and
• a spoliation order against the respondent to restore to her the matrimonial house and other effects.

Mokgoathleng J held that the requirement of handing over the bride (integration) is discriminatory on the ground of gender and infringes on the right of dignity. Handing over (integration) cannot be regarded as an essential requirement in terms of s 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998. The applicant is the customary wife of the deceased.

Although the applicant is entitled to bury the deceased in terms of customary law, the deceased's family can bury him on consideration of *ubuntu*. The deceased was a public figure of national importance and was to be accorded a civil funeral by the provincial government of the North West, which was funding the funeral.

The court refrained from making a ruling on the spoliation request.

Execution

Instance when a creditor may execute against debtor's immovable property: In *Nkola v Argent Steel Group (Pty) Ltd* 2019 (2) SA 216 (SCA) the parties had been locked in litigation for several years. The respondent, Argent, had obtained judgment against Nkola, a particularly evasive and tricky debtor, for payment of a debt of R 914 712. Argent

applied for two immovable properties owned by Nkola to be declared specifically executable since Nkola failed to point out sufficient movables to satisfy the judgment debt. The application was granted in the court of first instance.

Nkola appealed against this order, arguing that he has substantial movable assets in the form, largely, of shares in companies that he controls, but also expensive motor cars, and that Argent should have obtained execution in respect of these before seeking execution in respect of the immovable properties.

Lewis JA pointed out that it is correct that in executing a judgment, a debtor's movable property must be attached and sold to satisfy the debt, before the creditor can proceed to execute against immovable property.

Only if the movables are insufficient to fulfil the debt may a creditor proceed against immovable property. The common-law rule is confirmed in rr 45 and 46 of the Uniform Rules of Court.

Rule 45(3) requires the officer of the court executing the order to demand payment of the debt by the debtor, and failing payment, 'demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy' the writ of execution, and failing such pointing out, search for such property.

There was no evidence before the court that any movable assets were pointed out by Nkola to the Sheriff, despite Nkola subsequently claiming in court papers that he had sufficient movable assets to satisfy the judgment debt.

The common law and the court rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available. In *Silva v Transcape Transport Consultants and Another* 1999 (4) SA 556 (W) the court held that r 45 did not remove the court's discretion in this regard.

In the present case the fact that one of the properties was the family home, is irrelevant as the debtor had the means to avert the sale of the home, but deliberately chose not to do so.

The appeal was dismissed with costs.

Land law

Expropriation grounds for review: In *Staufen Investments (Pty) Ltd v Minister of Public Works and Others* 2019 (2) SA 295 (ECP); [2019] 2 All SA 258 (ECP) the applicant, Staufen, approached the court for an order to set aside a decision taken by the Minister of Public Works to expropriate certain rights over a portion of Staufen's farm (in favour of Eskom). Since the decision to expropriate is an administrative act, Staufen also relied on s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The existing electrical substation was built on the farm, and remained there in terms of an unregistered servitude with previous owners. Eskom tried to negotiate registering the servitude against payment of compensation to Staufen, but this was refused.

When Eskom failed to register the servitude, the Minister of Public Works instituted expropriation proceedings in terms of s 26(1) of the Electricity Regulation Act 4 of 2006 and the Expropriation Act 63 of 1975.

Staufen argued that the uncontrolled access to the power station posed a security risk, that the power station was on a large part of his quality arable land, that the land underneath the power lines had become sterilised, that the land's value was diminished due to the building rubble and that the vehicles moving around was inconvenient. Staufen wanted the station moved. Eskom refused, stating that it would be too expensive, and that the power interruption on the surrounding communities and farms would be too disruptive. Eskom also provided reasons why it thought the state should, instead, expropriate the property.

Staufen, in turn, argued that Eskom was trying to regularise and legalise their occupation *ex post facto*, and that the expropriation was not for a legitimate public purpose as it was trying to regulate unlawful unconstitutional conduct as ulterior purpose.

Revelas J confirmed that the state may expropriate property within the parameters of the law, against the payment of compensation.

The court further confirmed that Staufen is entitled to administrative action that is lawful, reasonable and procedurally fair. A decision to deprive someone of their property will be arbitrary if there is not sufficient reasons for the deprivation, or if it is procedurally unfair. If there are less restrictive means to achieve the same purpose, this needs to be taken into account.

If Eskom's current occupation is not regularised and they are subsequently expropriated, this will have a substantial negative impact on the electricity infrastructure. Eskom also *bona fide* believed that it did so in terms of a legal entitlement.

The obligation to pay compensation is a condition of expropriation, and not a prerequisite for its operation. Even if there was no determination of compensation, this does not affect the validity of the application.

Staufen's application to review Eskom's decision to expropriate the substation area on its farm was dismissed with costs. Staufen was ordered to pay 80% of the costs of the application, including the costs of two counsel.

Deprivation of informal land rights: The decision in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC); 2019 (1) BCLR 53 (CC) concerned the rights of a community who are living on a land on which the respondent mining company, Itereleng, enjoyed mining rights.

The title deed of the land on which the mine is situated is registered in the name of the Minister of Rural Development and Land Reform, who owns the farm in trust of the Bakgatla-Ba-Kgafela community. It is not disputed that the community holds right in the land (informal land rights) in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).

Maledu and the other appellants (on behalf of the community) claim that they occupy and own the farm in question. Itereleng is the holder of the rights to mine. The mining right was awarded to Itereleng in terms of s 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which included an environmental management programme in terms of s 39 of the MPRDA. A surface lease agreement was concluded with the Bakgatla-Ba-Kgafela Tribal Authority, which enabled the mining company to start full-scale mining operations on the farm, infringing the applicants' peaceful and undisturbed occupation. The community obtained a spoliation order against the mining company, which prompted the mining company to apply for an eviction order and an interdict to prevent them from re-entering the land.

The community opposed this eviction application, claiming that they were not consulted by the mining company as is required in terms of s 2(1) of IPILRA. They have also not consented to being deprived of their informal rights to the farm, and the rights were not validly extinguished. They argued that in terms of s 25(2)(*d*) of the MPRDA, the mine did not comply with all the applicable laws. They also question the validity of the mining right, stating that they were never consulted during the process of the award of the mining right. Finally, the community argued that the interdict should fail, as there was a mechanism in the MPRDA in s 54 to resolve disputes in respect of the surface rights, which had not yet been exhausted.

The court *a quo* rejected the community's arguments and granted an eviction order and an interdict against them.

The CC, per Petse AJ (Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J and Theron J concurring), pointed out that the core issue turned on s 54 of the MPRDA and s 2 of IPILRA. The question was whether s 54 of the MPRDA is available to Itereleng, and if so, whether the section precludes Itereleng from obtaining an interdict before exhausting the mechanisms in s 54. The question that hinges on this is then also whether the community consented to being deprived of their informal land rights or interests in the farm.

The objects of the MPRDA are set out in s 2, which recognises the custodianship of the country's minerals vesting in the state. The state must ensure that the resources are exploited for the benefit of the nation as a whole.

A mining right confers on its holder certain limited rights with respect to the mineral and land to which it relates. It gives the holder a right to enter onto the land and to do what is necessary to exercise the mining right. It mimics the common law in that respect. The exercise of these rights is subject to other provisions of the MPRDA.

Section 22(4)(*b*) of the MPRDA imposes a duty on a person applying for a mining right to consult with the landowner, lawful occupier or any interested or affected party, and to include the outcome of such consultation in the relevant environmental reports. This then places an obligation on obtaining consent from the affected person(s).

Section 2 of IPILRA protects people with any informal right in land from the deprivation of such a right, unless there was consent in terms of the customs and usages of the community or where the right is expropriated (and compensation paid).

Section 54(1) of the MPRDA obliges the Regional Manager appointed by the Director-General (Minerals and Energy) to be notified if the holder is prevented from commencing mining operations because the lawful occupier refuses entry. This section aims to balance the rights of the mining right holder and those whose surface rights are affected.

The mining company must take all reasonable steps to exhaust the s 54 process before it can apply for an interdict or eviction. It also cannot rely on the common law.

The MPRDA must be read together with the IPILRA as far as possible. The awarding of the mineral right does not nullify the occupation rights under IPILRA. Since the community have rights in the land, they need to be consulted before their rights can be taken away.

The appeal was upheld with costs.

Trusts

Whether 'children, issue and descendants' include adopted children: In *Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA) the court was asked to consider whether the words 'children', 'descendants', 'legal descendants' and 'issue' in a trust deed, include 'adoptive children'. In January 1953 one Druiff (the donor) executed a notarial deed of trust and on the same day executed a Will. The provisions of the trust deed determined that the income from the trust must be applied to the benefit of the four biological children of the donor and their children. On the death of the donor the trust income must be divided between the children of the donor or, if any child has died, the descendants of the child.

At the time of the execution of the trust deed the donor had four children of which three had children of their own. One of the donor's daughters was married but did not have any children. She did fall pregnant on more than one occasion prior to the execution of the deed but was unable to carry the baby full term. She had informed the donor that she intended to adopt, and he responded that she should not rush into anything and rather wait to see what the future held.

She did, however, adopt two children after the donor's death. There was uncertainty whether her adopted children would inherit her share in the trust after her death. The daughter approached the

WCC for declaratory relief. The trustees opposed the application. Relief was denied, but permission to appeal granted. After the appeal was granted the first applicant died and was substituted by the executor of her estate (Harvey).

Harvey argued that the donor had the intention to include the adopted children.

In a majority decision Ponnan JA (Tshiqi JA, Zondi JA and Dambuza AJ concurring) held that the trust deed speaks from the time it was executed and must be interpreted as at that time. The intention of the donor must be determined from the ordinary grammatical meaning of the language used in the circumstances that existed then. Subsequent events cannot be used to alter the intention.

The Children's Act 31 of 1937 (the 1937 Act) was still in force at the time of the execution of the deed. Under s 71(2)(*a*) of the 1937 Act, adopted children were not entitled to any property if the instrument was executed prior to the adoption, unless the instrument clearly conveyed the intention that property should devolve on an adopted child.

The donor was aware that the first applicant might not be able to bear children when he executed the deed. He made express provision for the eventuality that one or more of his children might die without issue, but did not make any provision for adoptive children. The deed was drafted by a professional person, probably a legal practitioner, and they would have advised the donor that he specifically needed to include adopted children in the deed. The donor's omission is indicative that he had no such intention.

By employing the words 'children', 'descendants', 'issue', and 'legal descendants' the donor did not intend to benefit adopted descendants.

A clear distinction must be drawn between public and private trusts when determining freedom of testation. In the public sphere a trust may not be allowed to discriminate, however, in the private sphere emphasis should be placed on freedom of testation. The freedom of testation is guaranteed in the Constitution. Freedom of testation protects an individual's right not only to unconditionally dispose of his property but also to choose his beneficiaries.

Where a beneficiary has been excluded he cannot challenge the disinheritance on constitutional grounds. However, this does not apply where a beneficiary has been included subject to a condition attached to the benefit if such a condition is contrary to public policy. The deed was executed in 1953 and was not against public policy at the time.

The appeal was dismissed with costs.

• See law reports 'Wills and trusts' 2018 (Jan/Feb) *DR* 36 for the WCC judgment.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administration of estates, Legal Practitioners' Fidelity Fund, civil procedure, constitutional law, contracts, criminal law, delict, development of land, family law, loss of income, medicine, minerals, motor-vehicle accidents, land reform, prescription, property, provisional sentence and servitudes. ❑

New legislation

Legislation published from 1 – 28 March 2019

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Bills

National Minimum Wage Amendment Bill B9 of 2019.

Commencement of Acts

Electoral Laws Amendment Act 1 of 2019. *Commencement:* 6 March 2019. Proc11 *GG*42289/6-3-2019 (also available in Afrikaans).

Courts of Law Amendment Act 7 of 2017, s 14. *Commencement of s 14:* 11 March 2019. Proc R12 *GG*42297/11-3-2019 (insertion of s 23A in Superior Courts Act 10 of 2013) (also available in Afrikaans).

Financial Sector Regulation Act 9 of 2017. *Amended and extended commencement dates:* See various dates in GenN142 *GG*42314/18-3-2019.

Public Audit Amendment Act 5 of 2018. *Commencement:* 1 April 2019. Proc13 *GG*42317/18-3-2019 (also available in Afrikaans).

Co-operatives Amendment Act 6 of 2013. *Commencement:* 1 April 2019. Proc14 *GG*42320/19-3-2019 (also available in Afrikaans).

Labour Laws Amendment Act 10 of 2018, ss 9 and 10. *Commencement:* 1 March 2019. GN R509 *GG*42345/28-3-2019 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983
Amendment of control measures. GN R275 *GG*42260/1-3-2019.

Agricultural Product Standards Act 119 of 1990
Amendment of regulations regarding inspections and appeals: Export. GN R278 *GG*42260/1-3-2019.

Auditing Profession Act 26 of 2005
Registration of registered auditors and candidate auditors. BN31 *GG*42304/15-3-2019.

Conservation of Agricultural Resources Act 43 of 1983
Declaration of Bankrupt Bush (*seriphium plumosum*) in all provinces of the Republic of South Africa as an indicator of bush encroachment. GN434 *GG*42323/22-3-2019.

Division of Revenue Amendment Act 14 of 2018
Amendment of allocations. GN430 *GG*42318/18-3-2019.
Electoral Act 73 of 1998
National and provincial elections of 8 May 2019: Official list of voting stations. GenN120 *GG*42281/5-3-2019.
National and provincial elections of 8 May 2019: Official list of mobile voting stations. GenN121 *GG*42281/5-3-2019.
Amendment to the regulations concerning the submission of lists of candidates, 2004. GN373 *GG*42289/6-3-2019.
Amendment to the Election Regulations, 2004. GN371 *GG*42289/6-3-2019.
Amendment to the Voter Registration Regulations, 1998. GN372 *GG*42289/6-3-2019.
Income Tax Act 58 of 1962
Determination of the daily amount in respect of meals and incidental costs for purposes of s 8(1). GN268 *GG*42258/1-3-2019 (also available in Afrikaans).
Independent Communications Authority of South Africa Act 13 of 2000
Community Broadcasting Services Regulations. GN439 *GG*42323/22-3-2019.
Position paper on Unreserved Postal Services. GN438 *GG*42323/22-3-2019.
Labour Relations Act 66 of 1995
Repeal of Code of Good Practice on Picketing (replace by the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing in 2018). GN R279 *GG*42260/1-3-2019.
Amendment of regulations (LRA Form 3.6A). GN R468 *GG*42335/27-3-2019.

Magistrates' Courts Act 32 of 1944
Variation of the Northern Cape Regional Division. GN507 *GG*42343/28-3-2019.
Creation of magisterial districts, subdistricts and establishment of district courts for the Western Cape. GenN185 *GG*42343/28-3-2019.

National Environmental Management Act 107 of 1998
Generic environmental management programme relevant to applications for substation and overhead electricity transmission and distribution infrastructure which require environmental authorisation. GN435 *GG*42323/22-3-2019.
National Environmental Management: Integrated Coastal Management Act 24 of 2008
Coastal waters discharge permit regulations. GN382 *GG*42304/15-3-2019.
National Qualifications Framework Act 67 of 2008
Amendment of the National Policy and Criteria for the Implementation of Recognition of Prior Learning. GN432 *GG*42319/19-3-2019.
National Small Enterprise Act 102 of 1996
Revised sch 1 of the definition of small enterprise. GN399 *GG*42304/15-3-2019.
Nursing Act 33 of 2005
Categories of persons to be registered to practice nursing. GN402 *GG*42308/14-3-2019 (also available in isiZulu and Sepedi).
Pharmacy Act 53 of 1974
Good pharmacy education standards. BN32 *GG*42304/15-3-2019.
Plant Improvement Act 53 of 1976
Amendment of the regulations relating to establishments, varieties, plants and propagating material. GN253 *GG*42258/1-3-2019.
Public Service Act 103 of 1994
Improvement in conditions of service: Equalisation of notches for pay progression for educator employed in terms of Employment of Educators Act 76 of 1998 from 1 July 2018. GN381 *GG*42304/15-3-2019.
Road Traffic Management Corporation Act 20 of 1999
Increase in transaction fees to be paid to the Road Traffic Management Corporation. GN376 *GG*42291/8-3-2019.

Rules Board for Courts of Law Act 107 of 1985
Designation of Magistrates' Courts for the implementation of Mediation Rules. GN508 *GG*42344/28-3-2019.

Skills Development Act 97 of 1998
Promulgation of the National Skills Development Plan 2030 (NSDP). GN375 *GG*42290/7-3-2019.
Small Claims Courts Act 61 of 1984
Determination of monetary jurisdiction for purposes of ss 15 and 16 (R 20 000). GN296 *GG*42282/5-3-2019.
Special Economic Zones Act 16 of 2014
Designation by the Minister of Trade and Industry in terms of s 24 of the Act of the Nkomazi Special Economic Zone. GN446 *GG*42323/22-3-2019.
Sugar Act 9 of 1978
Sugar Industry Agreement, 2000: Varieties of sugar cane approved for planting commencing 1 April 2019 exclusively in control areas. GN269 *GG*42258/1-3-2019.
Value-Added Tax Act 89 of 1991
Regulations prescribing electronic services for the purpose of the definition of 'electronic services' in s 1 of the Act. GN429 *GG*42316/18-3-2019.

Draft Bills

Draft Feeds and Pet Food Bill. GN291 *GG*42275/4-3-2019.

Draft delegated legislation

Amendment of reg 17 of the Numbering Plan Regulations, 2016 in terms of the Independent Communications Authority of South Africa Act 13 of 2000 to harmonize the short code '116' for child helpline services for comment. GN289 *GG*42272/1-3-2019.
Proposed rates in terms of the Landscape Architectural Profession Act 45 of 2000 for comment. BN22 *GG*42258/1-3-2019.
Proposed amendments to the Johannesburg Stock Exchange interest rate and currency derivates rules and directives in terms of the Financial Markets Act 19 of 2012. BN26 and BN27 *GG*42258/1-3-2019.
Proposed regulations in terms of the Political Party Funding Act 6 of 2018. GenN118 *GG*42273/1-3-2019.
Proposed regulations regarding fees for provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001. GN R297 *GG*42283/5-3-2019.
Revised regulations regarding fees for analysis, colour charts and appeals in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GN299 *GG*42286/8-3-2019.
Draft Urgent Amendment Regulations to the Regulations in terms of the Financial Sector Regulation Act 9 of 2017. GenN143 *GG*42314/18-3-2019 (also available in Setswana).
Draft reviewed Housing and Living Conditions Standard for Minerals Industry in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 for comment. GN449 *GG*42326/20-3-2019.
Draft amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R467 *GG*42333/26-3-2019.

Employment law update

Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at DLA Piper in Johannesburg.

Dismissal for incapacity

In *Solidarity and Another v Armaments Corporation of South Africa (SOC) Ltd and Others* [2019] 3 BLLR 248 (LAC), the South African National Defence refused to renew the employee's security clearance without giving reasons. Armscor then terminated the employee's service after 30 years because the employment contract and the Defence Act 42 of 2002 required all employees to have a security clearance. The employee challenged his termination by writing a letter to Armscor stating that he had not been provided with reasons for the refusal. Furthermore, he had not been afforded an opportunity to state his case and no pre-dismissal process had been followed with him. The employee also lodged an urgent revision of his security clearance but this remained pending.

The employee referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) where it was found that the dismissal was substantively and procedurally unfair. The CCMA ordered reinstatement and nine months' backpay as no process had been followed with the employee and Armscor should have considered a sanction short of dismissal.

On review, the Labour Court (LC) found that the dismissal was substantively fair as the employee's security clearance had been revoked in its entirety so he could not be accommodated elsewhere. The LC was of the view that it would be unreasonable to expect Armscor to keep a high earning employee in employment pending the outcome of the security clearance review process. The LC agreed that the dismissal was procedurally unfair as no process was followed with him. The reinstatement order was accordingly replaced with an order for eight months' compensation.

On appeal the Labour Appeal Court (LAC) had to determine whether the failure to have a security clearance rendered the employee's employment impossible due to incapacity. The LAC found that it was impossible to determine the fairness of the dismissal, while the grounds for the refusal of the security clearance were unknown. The dismissal was accordingly found to be substantively unfair as the incapacity would only be permanent if the outcome of the security clearance review process revealed that his security clearance was still denied. Furthermore, Armcsor had not been consistent as it had retained two employees without security clearances in the past. The LAC, however, held that an order of reinstatement was not reasonably practicable or legally competent and found that compensation equal to 12 months' remuneration was appropriate.

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Audi alteram partem vis-à-vis precautionary suspension

Long v South African Breweries (Pty) Ltd and Others; Long v South African Breweries (Pty) Ltd and Others (CC) (unreported case no CCT61/18, 19-1-2019) (Theron J with Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J and Petse AJ concurring).

Does an employee have an inherent right to be heard on why they should not be suspended, pending an employer's decision to place the employee on precautionary suspension?

This was one of three questions before the Constitutional Court (CC) in a leave to appeal application. The other issues related to the fairness of the appellant's dismissal, as well as the cost order granted by the Labour Court (LC) against the appellant. However, for purposes of this article the only topic under review herein relates to the question posed above.

Background

The appellant was employed by South African Breweries (SAB) as a district manager and part of his duties included overseeing all legal requirements in respect of SAB's fleet of vehicles were met.

On 21 May 2013 the appellant was placed on precautionary suspension pending the outcome of an investigation into a fatal accident involving one of SAB's vehicles. The vehicle was said to be in a 'state of disrepair and unlicensed'. SAB's reasons for the suspension was to ensure its investigation was unhindered.

The appellant referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), whereafter arbitration came before the third respondent commissioner. The commissioner found that while SAB had a valid reason to suspend the appellant, its actions were nevertheless unfair in that it failed to provide the appellant with an opportunity to be heard on why he should not be suspended before placing him on suspension. The commissioner in addition found the suspension was unreasonably long and had become punitive in nature and awarded the appellant two month's compensation.

In setting aside the award on review, the LC found that there was no requirement in law that an employee be afforded an opportunity to be heard before being placed on precautionary suspension. All that is required, according to the LC, was that there is an ongoing investigation and that the suspension seeks to protect the integrity of such a process.

Furthermore, the LC found that the commissioner did not properly appreciate the nature of the investigations and that the three-month period of suspension was not unreasonable or punitive under the circumstances. Finding the commissioner's decision unreasonable, the court set aside the award.

The appellant's application for leave to appeal was denied so to was its petition to the Labour Appeal Court.

Approaching the CC, the appellant maintained he had a right to be heard before being suspended and that the LC, in making a contrary finding, went against existing case law.

In its judgment refusing leave to appeal on this specific point the CC, refer-

ring to the decisions in *South African Municipal Workers' Union obo Dlamini and Others v Mogale City Local Municipality and Another* [2014] 12 BLLR 1236 (LC), *Mashego v Mpumalanga Provincial Legislature and Others* (2015) 36 ILJ 458 (LC) and *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC), held:

'In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by Mogale, Mashego and Gradwell. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally, where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound.'

Readers should note that an employer would be obliged to hear representation from an employee before taking a decision to place the employee on precautionary suspension if such an obligation is found in an employment contract, employer's policy, collective agreement or government regulation.

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Recent articles and research

By Meryl Federl

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Abbreviation	Title	Publisher	Volume/issue
CILSA	Comparative and International Law Journal of Southern Africa	Juta	(2018) 51.2
DJ	De Jure	University of Pretoria	(2018) 51.2
Obiter	Obiter	Nelson Mandela University	(2018) 39.3
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22 February (2019) 22 March
PLD	Property Law Digest	LexisNexis	(2018) 23.1 December
SJ	Speculum Juris	University of Fort Hare	(2018) 32.1
SLR	Stellenbosch Law Review	Juta	(2018) 29.3

Child law

Bekink, M 'Defeating the anomaly of the cautionary rule and children's testimony – *S v Haupt* 2018 (1) SACR 12 (GP)' (2018) 51.2 *DJ* 318.

Van der Walt, G 'Alternative care in South Africa' (2018) 39.3 *Obiter* 615.

Van der Westhuizen, C 'Medical treatment v surgery: Where does medical treatment end and surgery begin in terms of s 129 of Children's Act?' (2018) 39.3 *Obiter* 791.

Company law

Cassim, MF 'Untangling the requirement of good faith in the derivative action in company law (Part 2)' (2018) 39.3 *Obiter* 602.

Computer law

Feng, K and Papadopoulos, S 'Student (K-12) data protection in the digital age: A comparative study' (2018) 51.2 *CILSA* 261.

Njotini, MN 'Precaution against what? The electronic or e-authentication frameworks of the United Kingdom, Canada and South Africa' (2018) 51.2 *CILSA* 185.

Consumer law

Newman, S and Tait, M 'Resolving provincial cross-border disputes under the Consumer Protection Act' (2018) 39.3 *Obiter* 684.

Constitutional law

Mathenjwa, MJ and Mhlongo, L 'The distinctiveness and interrelatedness of the privileges and immunities of parliament: A comparison of the Namibian and South African jurisdictions' (2018) 39.3 *Obiter* 768.

Mbenenge, SM 'Transformative constitutionalism: A judicial perspective from the Eastern Cape' (2018) 32.1 *SJ* 1.

Okpaluba, C 'Prosecutorial negligence and negligent police investigation: An

analysis of recent Canadian and South African case law (1)' (2018) 32.1 *SJ* 33.

Contract law

Du Plessis, J 'Giving practical effect to good faith in the law of contract' (2018) 29.3 *SLR* 379.

Court procedure

Gravett, W 'Opening address: Powerful tool of persuasion or a waste of time?' (2018) 51.2 *DJ* 194.

Credit law

Renke, S and Coetzee, H 'The circumstances under which section 85(*a*) of the National Credit Act 34 of 2005 can be utilised as an avenue to access or re-access the debt relief measures in terms of the Act' (2018) 51.2 *DJ* 234.

Criminal procedure

Hoctor, S 'Of housebreaking and common purpose: *S v Leshilo* 2017 JDR 1788 (GP) 1' (2018) 39.3 *Obiter* 825.

Naudé, BC 'Extra-curial statements by a non-testifying co-accused, the Canadian Supreme Court and change in South Africa' (2018) 39.3 *Obiter* 814.

Reddi, M and Ramji, B 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?' (2018) 51.2 *DJ* 251.

Customary law

Cotton, SR and Diala, AC 'Silences in marriage laws in Southern Africa: Women's position in polygynous customary marriages' (2018) 32.1 *SJ* 18.

Jokani, M; Knoetze, E and Erasmus, D 'A criminal law response to the harmful practices of *Ukuthwala*' (2018) 39.3 *Obiter* 747.

Delict

Bhana, D and Samaradiwakera-Wijesundara, C 'Delictual interference with a contractual relationship: *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (CC)' (2018) 29.3 *SLR* 430.

Education law

Osman, F and Wilké, J 'Dress codes in schools: A tale of headscarves and hairstyles' (2018) 39.3 *Obiter* 585.

Family law

Thabane, T 'A contract of engagement as an unenforceable pactum de contrahendo under South African law: Distilling lessons for Lesotho courts' (2018) 32.1 *SJ* 54.

Human rights

Madlanga, M 'The human rights duties of companies and other private actors in South Africa' (2018) 29.3 *SLR* 359.

Insolvency law

Chitimira, H 'Re-evaluating the meaning and effect of a winding up order on the insolvent's contracts – *Ellerine Brothers v McCarthy* (245/13) [2014] ZASCA 46 (1 April 2014)' (2018) 39.3 *Obiter* 844.

Evans, R 'Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa' (2018) 51.2 *DJ* 298.

Mabe, Z 'Alternatives to bankruptcy in South Africa that provides for a discharge of debts: Lessons from Kenya' (2019) 22 March *PER*.

International law

Barrie, GN 'International law and indigenous people: Self-determination, development, consent and co-management' (2018) 51.2 *CILSA* 171.

Ibrahim, A 'Bridging the international gap: The role of national human rights institutions in the implementation of human rights treaties in Africa' (2018) 39.3 *Obiter* 701.

Jones, AG 'Intervening for democracy: The threat or use of force and crisis in The Gambia' (2018) 51.2 *CILSA* 241.

Labour law

Huysamen, E 'The future of legislated minimum wages in South Africa: Legal and economic insights' (2018) 51.2 *DJ* 271.

Khumalo, B 'Extension of collective agreements in terms of section 23(1)(*d*) of the LRA and the "knock on effect" on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2007]' (2018) 51.2 *DJ* 328.

Mhango, M and Lubisi, N 'Dismissal on the grounds of refusing to cut dreadlocks worn in observance of religious and cultural beliefs: Discriminatory or not?' (2018) 32.1 *SJ* 8.

Tenza, M 'An evaluation of the limitation of the right to strike in terms of the law of general application in South Africa' (2018) 29.3 *SLR* 471.

Mining law

Mostert, H and Wilson, LA 'Restitution and "altered priorities": How the judiciary balances the varying demands of transformation in the mineral resources context: A discussion of *Macassar Land Claims Committee v Maccsand* (CC) 2017 (4) SA 1 (SCA)' (2018) 29.3 *SLR* 420.

Tshoose, C and Khumalo, B 'Using a sledgehammer to crack a nut: The scope and powers of the mine health and safety inspectorate in light of *Anglo Ashanti Ltd v Mbonambi* (2017) 38 ILJ 614 (LC)' (2018) 39.3 *Obiter* 834.

Prescription

Schrage, E 'The comparative legal history of limitation and prescription' (2018) 39.3 *Obiter* 780.

Private international law

Fredericks, EA 'Contractual capacity and the conflict of laws in common law jurisdictions (Part 1): The United Kingdom' (2018) 39.3 *Obiter* 652.

Bouwers, G 'Brexit and the implications for tacit choice of law in the United Kingdom' (2018) 39.3 *Obiter* 727.

Property law

Botha, M 'No compensation after expropriation: A legal perspective' (2018) 23.1 December *PLD*.

Dhliwayo, P 'Reflecting on landowners' right to exclude and non-owners' access to quasi-public property: V*ictoria and Alfred Waterfront v Police Commissioner, Western Cape*' (2018) 32.1 *SJ* 66.

Greyling, J 'Urban development zone investment incentives how are they made attractive' (2018) 23.1 December *PLD*.

Rodel, C 'Silencing the alarm bells – a discussion of r 46A' (2018) 23.1 December *PLD*.

Public procurement law

Anthony, AM 'Re-categorising public procurement in South Africa: Construction works as a special case' (2019) 22 February *PER*.

Religion

Henrico, R 'Proselytising the regulation of religious bodies in South Africa: Suppressing religious freedom?' (2019) 22 March *PER*.

Rule of law

Nwabueze, CJ and Pofinet, D 'The rule of law and integrity: Appraising the place and role of anti-corruption standards in the fight against corruption within the central African economic and monetary community' (2018) 51.2 *CILSA* 207.

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Ferreira-Snyman, A 'Cooperation in outer space activities: South Africa's role as a member state of the African Union and BRICS' (2018) 51.2 *CILSA* 141.

Taxation law

Moosa, F 'Are trusts holders of fundamental rights during tax administration by SARS?' (2018) 29.3 *SLR* 453.

Trusts

Manie, L 'A note on the misinterpretation of s 13 of the Trust Property Control Act: A proposed solution' (2018) 39.3 *Obiter* 803.

Lötter, M; van den Berg, G and Strydom, S 'The express power to amend a trust deed where the trust beneficiaries have accepted the benefits reserved for them' (2018) 51.2 *DJ* 215.

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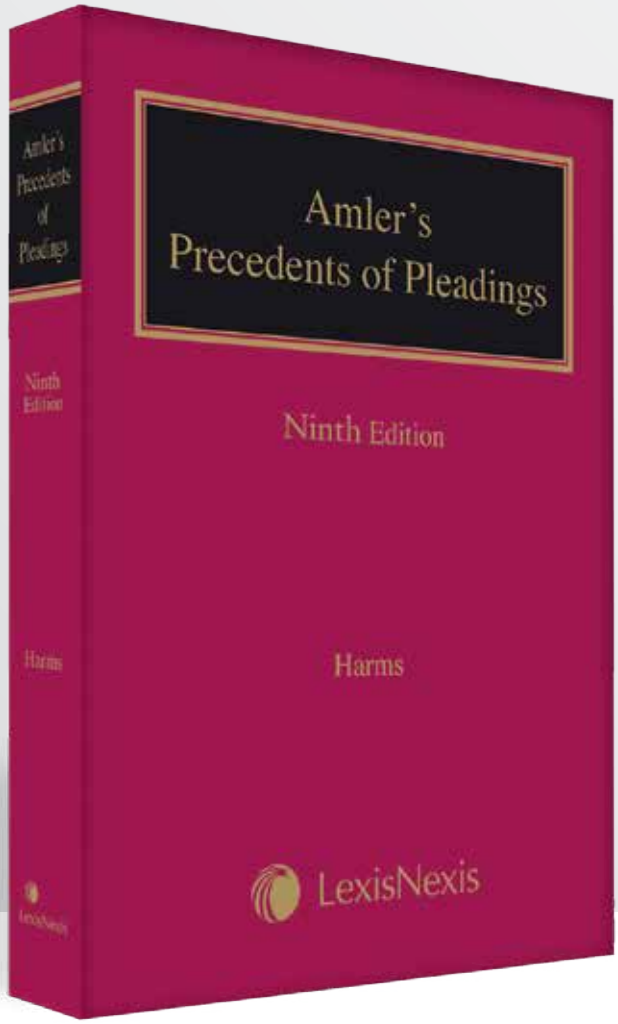

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EDITOR'S NOTES

PROPOSED AMENDMENTS TO THE LPIIF MASTER POLICY EXPLAINED

Thomas Harban, Editor

It will be remembered that the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF) issues one Master Policy (the policy) which is applied to all insured legal practitioners – please refer to clause 5 of the policy for a list of who is an insured.

The LPIIF intends making amendments to the policy in order to:

(i) Better articulate the intention behind the affected clauses;

(ii) Remove any potential ambiguity in the interpretation; and

(iii) Improve the dispute resolution mechanism in clause 40.

It must be noted that the proposed amendments do not introduce any new exclusions and that the amount of cover (limit of indemnity) and the deductible (excess) payable remain unchanged.

The proposed amendments will come into effect on 1 July 2019. We are publishing the proposed amendments at this early stage in order to give the profession and all other stakeholders sufficient notice of the conditions under which cover is to be offered under the policy in the new insurance scheme year commencing on 1 July 2019.

Any queries and/or comments regarding the proposed amendments should be directed to the LPIIF team.

The proposed amendments are as follows:

1. The name of the company has been changed from the "Attorneys Insurance Indemnity Fund NPC" to its new name, "Legal Practitioners' Indemnity Insurance Fund NPC";

2. Definitions

2.1 Definition I – reference to the Attorneys Act has been removed. Act will mean the Legal Practice Act 28 of 2014;

2.2 Definition IV – reference

EDITOR'S NOTES continued...

to section 25 of the Attorneys Act has been replaced by the corresponding section, (section 53), of the Legal Practice Act providing for the continued existence of the Fidelity Fund;

2.3 Definition VI – the explanatory note and the definition have been combined;

2.4 Definition IX – Cybercrime: clarification has been added that the hacking of any of the electronic environments is not a necessity in order for the exclusion to apply. Some practitioners were, incorrectly with respect, of the view that hacking of their electronic environments must have taken place before cybercrime exclusion will apply. In the event that your practice has cybercrime cover in place, please check the wording of that policy as well in order to ensure that there is no gap in cover;

2.5 Definition XII – Employee: reference to "candidate attorneys" has been replaced with "candidate legal practitioners" in order to include candidate attorneys and pupils in line with section 1 of the Legal Practice Act. Advocates with Fidelity Fund Certificates (FFCs) will now be covered by the policy and so will their pupils;

2.6 Definition XIV - Fidelity Fund Certificate: Reference to section 42 of the old Act has been replaced with reference the corresponding section (section 85)of the new Act;

2.7 Definition XX: Legal Services: Legal services relate to the conduct of a legal practice in terms of section 33 of the Act;

2.8 Definition XXI – Practitioner: it has been clarified that advocates practising in terms of section 34(2)(b) fall within the definition of practitioners in the policy;

2.9 Definition XXIV – Risk Management Questionnaire: (1) reference to "an advocate referred to in section 34(2)(b)" has been added; and (2) a clarification of when the questionnaire should be completed and where to obtain the information regarding the completion thereof has been included;

2.10 Definition XXVI - Senior Practitioner: a requirement for experience in professional indemnity insurance law for the Senior Practitioners to whom dispute resolution referrals are made has been added;

2.11 Clause 4 – the order of the words has been changed in order for the clause to read better;

2.12 Clause 5(d) – a clarification that advocates with FFCs will be regarded as sole practitioners for purposes of the policy has been added. This is in line with section 34(6) of the new Act. This change seeks to avoid a situation where a group of advocates with FFCs purport to practise together in some form of partnership or association and therefore assume that they are entitled to a higher limit of indemnity;

2.13 Clause 6(d) - reference to "legal representatives of the people...," has been removed as it may create confusion if interpreted as referring to legal practitioners representing the estates referred to;

2.14 Clause 16(b) - reference to section 26 of the Attorneys Act is replaced with section 55 (the section dealing with the liability of the Fund) in the new Act;

2.15 Clause 16(m) - the words "and is part of the scope of the mandate to carry out legal services" have been added in order to clarify that when the underlying mandate to carry out legal services has been has been completed, the insurer carries no obligation to indemnify an insured who thereafter act as paymasters making payments unrelated to the legal services which had been carried out;

2.16 Clause 16(o) - where new bank account details are provided to an insured, these should first be verified in terms of Rule 53.14. Insureds failing to comply with their obligations in terms of the Rules and being defrauded into paying into incorrect accounts, and thereby losing their clients' funds to cybercrime scams, will not be covered. This risk can be insured in the commercial market under the various types of policy available.Various products from banks and other service providers offer facilities which can be used to verify the banking details of the intended recipients. The banking products approved by the Fund offer a verification service;

2.17 Clause 40 – Dispute Resolution Clause – (a) we have clarified that the determination of a Senior Practitioner is not an arbitration award. This is to dispel the notion that a determination can be made an order of court as if it was an arbitration award; and (b) we have removed all reference to the Short-Term Insurance Ombudsman (STIO) as that office does not have any jurisdiction over professional indemnity claims.

For ease of reference, we have included the policy with the suggested changes underlined thereon.

Thomas Harban
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Legal Practitioners Indemnity Insurance Fund NPC
Est. 1993 by the Legal Practitioners Fidelity Fund

THE DRAFT LPIIF MASTER POLICY WITH THE PROPOSED CHANGES

PREAMBLE

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

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

DEFINITIONS:

I **Act:** The Legal Practice Act 28 of 2014;

II **Annual Amount of Cover:** The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims, Approved Costs** and **Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;

III **Approved Costs:** Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount a **Claim**;

IV **Legal Practitioners' Fidelity Fund:** As referred to in section 53 of the **Act**;

V **Bridging Finance**: The provision of short-term finance to a party to a **Conveyancing Transaction** before it has been registered in the Deeds Registry;

VI **Claim:** A written demand for compensation from the **Insured**, which arises out of the **Insured's** provision of **Legal Services.**
For the purposes of this policy, a written demand is any written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an **Insured**;

VII **Claimant's Costs:** The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer;**

VIII **Conveyancing Transaction:** A transaction which:
a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
b) involves the registration or cancellation of any mortgage bond or real right over immovable property; and/or
c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;

IX **Cybercrime:** Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence). Hacking of any of the electronic environments is not a necessity in order for the offence or the loss to fall within this definition;

X **Defence Costs:** The reasonable costs the **Insurer** or **Insured,** with the **Insurer's** written consent, incurs in investigating and defending a **Claim** against an **Insured**;

XI **Dishonest:** Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;

XII **Employee:** A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This includes in-house legal consultants, associates, professional assistants, candidate legal practitioners, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**.);

XIII **Excess:** The first amount payable by the **Insured** (or deductible) in respect of each and every **Claim** (including **Claimant's Costs**) as set out in schedule B;

XIV **Fidelity Fund Certificate:** A certificate provided for in terms of section 85 of the **Act**, read with Rules 3, 47, 48 and 49 of the South African Legal Practice Council Rules (the Rules) made under the authority of section 95(1) of the Act;

XV **Innocent Principal:** Each present or former **Principal** who:
a) may be liable for the debts and liabilities of the **Legal Practice**;
b) did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;

XVI **Insured:** The persons or entities referred to in clauses 5 and 6 of this policy;

XVII **Insurer:** The Legal Practitioners' Indemnity Insurance Fund NPC, Reg. No. 93/03588/08;

XVIII **Insurance Year:** The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;

XIX **Legal Practice:** The person or entity listed in clause 5 of this policy;

XX **Legal Services:** Work reasonably done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa in accordance with the provisions of section 33 of the **Act**. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;

XXI **Practitioner:** Any attorney, advocate referred to in Section 34(2)(b) of the **Act**, notary or conveyancer as defined in the **Act;**

XXII **Prescription Alert:** The computerised back-up diary system that the **Insurer** makes available to the legal

profession;

XXIII **Principal:** An advocate referred in section 34(2)(b) of the **Act**, sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;

XXIV **Risk Management Questionnaire:** A self-assessment questionnaire which can be downloaded from or completed on the **Insurer's** website (www.lpiif.co.za) and which must be completed annually by the advocate referred to in section 34(2)(b) of the **Act**, sole practitioner, senior partner, director or designated risk manager of the **Insured** as referred to in clause 5. The annual completion of this questionnaire is compulsory, both in terms of this policy (see clauses XXIV and 23) and the Rules made under **the Act**. For attorneys this is set out in point 15 of the application for a **Fidelity Fund Certificate** form (schedule 7A of the Rules). Advocates referred to in section 34(2)(b) of **the Act** must also complete this questionnaire annually (see point 13 of the application for a **Fidelity Fund Certificate** form (schedule 7B of the Rules)).

XXV **Road Accident Fund claim (RAF):** A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;

XXVI **Senior Practitioner:** A **Practitioner** with no less than 15 years' standing in the legal profession, with experience in professional indemnity insurance law;

XXVII **Trading Debt:** A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:

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

WHAT COVER IS PROVIDED BY THIS POLICY?

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

WHO IS INSURED?

5. Provided that each **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**, the **Insurer** insures all **Legal Practices** providing **Legal Services**, including:
   a) a sole **Practitioner**;
   b) a partnership of **Practitioners**;
   c) an incorporated **Legal Practice** as referred to in section 34(7) of the **Act**; and
   d) an advocate referred to in section 34(2)(b) of **Act**. For purposes of this policy, an advocate referred to in section 34(2)(b) of the **Act**, will be regarded as a sole practitioner.
6. The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
   a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
   b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had a **Fidelity Fund Certificate** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
   c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission giving rise to the **Claim**;
   d) the estates of the people referred to in clauses 6(a), 6(b) and 6(c);
   f) subject to clause 16(c), a liquidator or trustee in an insolvent estate, where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**.

AMOUNT OF COVER

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

INSURED'S EXCESS PAYMENT

10. The **Insured** must pay the **Excess** in respect of each **Claim,** directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable. Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Ex-**

cess and to the extent that one or more **Claims** arise from the same circumstance, act, error or omission the **Insured** must pay the **Excess** in respect of each such **Claim**;

11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission giving rise to the **Claim**, and the type of matter giving rise to the **Claim,** as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
    a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used and complied with by the **Insured**, by timeous lodgement and service of summons in accordance with the reminders sent by **Prescription Alert**;
    b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
14. No **Excess** applies to **Approved Costs** or **Defence Costs**.
15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

WHAT IS EXCLUDED FROM COVER?

16. This policy does not cover any liability for compensation:
    a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**;
    b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in section 55 of the **Act**;
    c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the **Insured**, covering a loss arising out of the normal course and conduct of the business or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;
    d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;
    e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in:
        (i) the Banks Act 94 of 1990;
        (ii) the Financial Advisory and Intermediary Services Act 37 of 2002;
        (iii) the Agricultural Credit Act 28 of 1996 as amended or replaced;
        (iv) any law administered by the Financial Sector Conduct Authority and/or the South African Reserve Bank and any regulations issued thereunder; or
        (v) the Medical Schemes Act 131 of 1998 as amended or replaced;
    f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 78(2A) of the **Attorneys Act 53 of 1979 and/or section 86(4) of the Act,** and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made.
    This exclusion (subject to the other provisions of this policy) does not apply to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;
    g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*;
    h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;
    i) directly or indirectly arising from, or in connection with or as a consequence of the provision of **Bridging Finance** in respect of a **Conveyancing Transaction.** This exclusion does not apply where **Bridging Finance** has been provided for the payment of:
        (i) transfer duty and costs;
        (ii) municipal or other rates and taxes relating to the immovable property which is to be transferred;
        (iii) levies payable to the body corporate or homeowners' association relating to the immovable property which is to be transferred;
    j) arising from the **Insured's** having given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;
    k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;
    l) arising where the **Insured** acts or acted as a business rescue practitioner as defined in section 128 (1) (d) of the Companies Act 71 of 2008;
    m) arising out of or in connection with the receipt or payment of funds, whether into or from the trust account or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence or about to come into existence and is an essential or integral part of the scope of the mandate to carry out **Legal Services**, at the time of the receipt or payment and in respect of which the **Insured** has received a mandate;
    n) arising out of a defamation **Claim** that is brought against the **Insured**;
    o) arising out of **Cybercrime**. Losses arising out of **Cybercrime** will include, but not be limited

to, payments made into the an incorrect and/or fraudulent bank account where either the **Insured** or any other party has been induced to make the payment into the incorrect bank account and has failed to verify the authenticity of such bank account.
For purposes of this Clause, "verify" means that the **Insured** must have a face to face meeting with the client and or other intended recipient of the funds. The client or other intended recipient of the funds (as the case may be), must provide the **Insured** with an original signed and duly commissioned affidavit confirming the instruction to change their banking details and attaching an original stamped document from the bank confirming ownership of the account.

p) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons* has/have a material interest and/or hold/s a position of influence or control**.
* as defined in section 2(1) of the Companies Act 71 of 2008
** as defined in section 2(2) of the Companies Act 71 of 2008
For the purposes of this paragraph, "material interest" means an interest of at least ten (10) percent in the entity;

q) arising out of or in connection with a **Claim** resulting from:
(i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;
(ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;
(iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss;
For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;

r) arising out of or in connection with any **Claim** resulting from:
(i) ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;
(ii) nuclear material, nuclear fission or fusion, nuclear radiation;
(iii) nuclear explosives or any nuclear weapon;
(iv) nuclear waste in whatever form;
regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;

s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity; and

t) **Legal Services** carried out in violation of the **Act** and the Rules.

FRAUDULENT APPLICATIONS FOR INDEMNITY

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

CLAIMS ARISING OUT OF DISHONESTY OR FRAUD

18. Any **Insured** will not be indemnified for a **Claim** that arises:
a) directly or indirectly from any **Dishonest,** fraudulent or other criminal act or omission by that **Insured**;
b) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission.
Subject to clauses 16, 19 and 20, this exclusion does not apply to an **Innocent Principal**.

19. In the event of a **Claim** to which clause 18 applies, the **Insurer** will have the discretion not to make any payment, before the **Innocent Principal** takes all reasonable action to:
a) institute criminal proceedings against the alleged **Dishonest** party and present proof thereof to the **Insurer**; and/or
b) sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives;
Any benefits due to the alleged **Dishonest** party held by the **Legal Practice,** must, to the extent allowable by law, be deducted from the **Legal Practice's** loss.

20. Where the **Dishonest** conduct includes:
a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or
b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;
The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.

21. If the **Insurer** makes a payment of any nature under the policy in connection with a **Claim** and it later emerges that it wholly or partly arose from a **Dishonest**, fraudulent or other criminal act or omission of the **Insured**, the **Insurer** will have the right to recover full repayment from that **Insured** and any party knowingly connected with that **Dishonest,** fraudulent or criminal act or omission.

THE INSURED'S RIGHTS AND DUTIES

22. The **Insured** must;
a) give immediate written notice to the **Insurer** of any circumstance, act, error or omission that may give rise to a **Claim**; and
b) notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the

Insured, of a written demand or summons/counterclaim or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification.

23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management Questionnaire** have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.
24. The **Insured:**
    - 24.1. shall not cede or assign any rights in terms of this policy;
    - 24.2. agrees not to, without the **Insurer's** prior written consent:
        - a) admit or deny liability for a **Claim**;
        - b) settle a **Claim**;
        - c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**;

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

    For the purposes of this paragraph, written notice will be sent to the address last provided to the **Insurer** by the **Insured** and will be deemed to have been received five (5) working days after electronic transmission or posting by registered mail.
28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.
29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.
30. Written notice of any new **Claim** must be given to:
    Legal Practitioners' Indemnity Insurance Fund NPC
    1256 Heuwel Avenue|Centurion|0127
    PO Box 12189|Die Hoewes|0163
    Docex 24 | Centurion
    ***Email*: claims@lpiif.co.za**
    Tel:+27(0)12 622 3900

THE INSURER'S RIGHTS AND DUTIES

31. The **Insured** agrees that:
    - a) the **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;
    - b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**;

    The exercise of the **Insurer's** discretion in terms of a) will not be unreasonable.
32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:
    - a) the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured;** and
    - b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).
33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.
34. Where the **Insurer** indemnifies the **Insured** in relation to only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.
35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to re-

port the **Insured's** conduct to the regulator and to recover any amounts that it may have incurred as a result of the **Insured's** conduct.

36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**;

37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
    a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount of Cover** provided by this policy;
    b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in respect of such **Claim**;
    c) any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.

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

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

HOW THE PARTIES WILL RESOLVE DISPUTES

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy, or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:
    a) written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at disputes@lpiif.co.za or to the address set out in clause 30 of this policy, within thirty (30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
    b) should the dispute not have been resolved within thirty (30) days from the date of receipt by the Insurer of the submission referred to in a), then the parties must agree on an independent **Senior Practitioner** who has experience in the area of professional indemnity insurance law, to whom the dispute can be referred for a determination. Failing such an agreement, the choice of such **Senior Practitioner** must be referred to the Chairperson of the Legal Practice Council to appoint the **Senior Practitioner** with the relevant experience;
    c) the parties must make written submissions which will be referred for determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter and the costs of the **Senior Practitioner** will be borne by the unsuccessful party;
    d) the determination does not have the force of an arbitration award. The unsuccessful party must notify the successful party in writing, within thirty (30) days of the determination by the **Senior Practitioner**, if the determination is not acceptable to it.

    The procedures in a) b) c) and d) above must be completed before any formal legal action is undertaken by the parties.

SCHEDULE A
PERIOD OF INSURANCE: 1ST JULY 2019 TO 30TH JUNE 2020 (BOTH DAYS INCLUSIVE)

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

SCHEDULE B
PERIOD OF INSURANCE: 1ST JULY 2019 TO 30TH JUNE 2020 (BOTH DAYS INCLUSIVE)

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

*The applicable **Excess** will be increased by an additional 20% if **Prescription Alert** is not used and complied with.
The applicable **Excess will be increased by an additional 20% if clause 20 of this policy applies.