LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

JULY 2019

SHOULD DISABILITY GRANTS BE DEDUCTED FROM LOSS OF EARNINGS CLAIMS AGAINST THE RAF?

Moving towards a guilt-free divorce

You have been served: **An update on service of referrals to the CCMA on foreign defendants**

Support services available to legal practitioners

When does a real right to a half-share of immovable property vest in a spouse?

Purchaser not obliged to make payment until recordal is complete

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Employees be aware: A discussion

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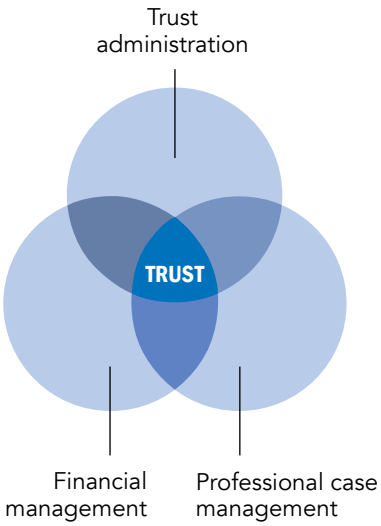

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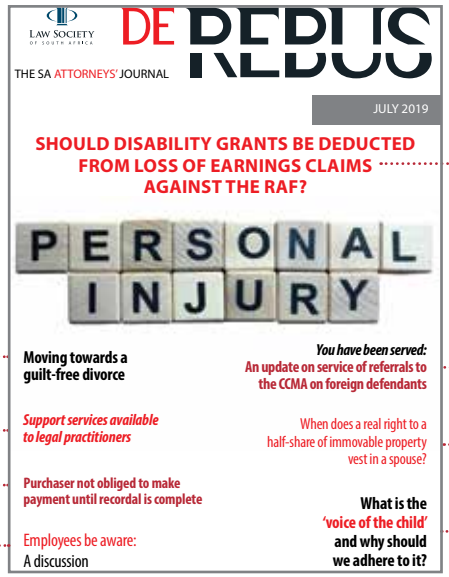

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8 Should disability grants be deducted from loss of earnings claims against the RAF?

South African courts have dealt with the question of whether disability grants should be deducted from loss of earnings claims against the Road Accident Fund (RAF) on three occasions. On two occasions, the court reached the same conclusion, while on the third, the court reached a different conclusion. Legal practitioner, **Tshepo Mashile**, discusses the concept and focuses on the case of *Kapa v RAF* (LP) (unreported case no 1414/2013, 7-12-2018) (Muller J).

10 You have been served: An update on service of referrals to the CCMA on foreign defendants

Legal adviser, **Riaan de Jager**, writes that in the article, Diplomatic law: Service of process on foreign defendants' (2017 (Dec) *DR* 34) he discussed the procedure that should be followed to serve legal process on foreign defendants. This procedure is regulated by subss 13(1) or (7) of the Foreign States Immunities Act 87 of 1981, as well as r 5(1) of the Uniform Rules of Court. In another article he wrote, 'Diplomatic law: Legal proceedings against a foreign diplomat in a South African court' (2018 (Aug) *DR* 20), a procedure was proposed on how to institute a claim against a foreign diplomat in a South African court. In the light of recent case law in the South African Constitutional Court and the Supreme Court of the United Kingdom, the views expressed, and conclusions reached in the aforesaid articles need to be reconsidered, which is the main purpose of this article.

14 Moving towards a guilt-free divorce

On divorce, the guilty party could be punished with an order of total forfeiture of marital benefits, unless the grounds for divorce was mental illness. The logic behind this principle was that a spouse should not be allowed to benefit financially from a marriage, which he or she wrecked. The legislature decided to do away with 'fault' as a ground for divorce when it enacted the Divorce Act 70 of 1979. Given South Africa's elaborate Bill of Rights that has been espoused in the Constitution one would expect that any fault in South African divorce law would have been completely done away with and archived. However, considering s 9(1) of the Divorce Act it would appear that 'fault' still has a role to play in our legal system. Executive Director, **Tshepo Munene** asks whether marital misconduct should have an influence in the division of marital property and whether this is a significant policy question in South Africa.

EDITOR:
Mapula Sedutla
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:
Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:
Kevin O' Reilly
MA (NMMU)

SUB-EDITOR:
Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:
Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:
Shireen Mahomed

EDITORIAL COMMITTEE:
Giusi Harper (Chairperson), Peter Horn, Denise Lenyai, Maboku Mangena, Mohamed Randera

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park, Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.
Tel (012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

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Cell: 074 552 0280 • E-mail: GregS@ince.co.za
Classifieds supplement: Contact: Isabel Joubert
Tel (012) 366 8800 • Fax (012) 362 0969
PO Box 36626, Menlo Park 0102 • E-mail: yp@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela
Tel (012) 366 8800 E-mail: david@lssa.org.za

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Tel: (012) 366 8800 • E-mail: david@lssa.org.za

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Law Society of South Africa

Time to change the LLB degree?

The LLB degree and its efficacy to produce suitable candidate legal practitioners has sparked a lot of discussion in the legal profession. The profession has widely expressed concern over the skills gap presented by law graduates when entering the legal profession and their ability to perform certain tasks they ought to know as graduates.

In 2012, the Council on Higher Education (CHE) and the South African Law Deans' Association (SALDA), after extensive talks, reached an agreement to conduct a national review of the LLB programme. An LLB summit was held in 2013, which was attended by stakeholders in the legal profession. During the summit, the General Council of the Bar (GCB) and the Law Society of South Africa (LSSA) also decided that a national review of the LLB programme should be conducted. The aim of the review was to strengthen the quality of legal education provision across South African universities (see 'LLB summit: Legal education in crisis?' 2013 (July) *DR* 8).

The LLB summit also proposed that the standard development process should precede the start of the proposed national review of the LLB programme. The threshold standard was envisaged to serve as a national benchmark against which all programmes leading to the LLB qualification would be measured. The qualification standard for the LLB was developed during 2013 to 2015, which was endorsed by all universities in 2015.

In 2015, a national review of the LLB qualification was conducted. The purpose of the review was to make recommendations on the re-accreditation of the existing LLB programmes or the accreditation of new LLB programmes. In April 2017, 13 programmes were conditionally accredited, and four were placed on notice of withdrawal. After improvements were made by the institutions, in November 2017 four LLB qualifications were accredited, ten received accreditation subject to meeting specified conditions, three were placed on notice of withdrawal, and one LLB qualification had its accreditation withdrawn. The accreditation of the LLB was made subject to those institutions meeting specified conditions and those whose qualification was placed on notice of withdrawal were given a further opportunity to submit improvement plans. The improvement plans will be evaluated and the decision of the accreditation of the LLB programme will be based on the improvement plans (see also 'Legal education in crisis?' 2017 (May) *DR* 3, 'CHE release full LLB review' 2017 (June) *DR* 3; 'LSSA calls on CHE to consult legal profession on LLB degree issues' 2017 (June) *DR* 19; and 'Withdrawal of accreditation - response from universities' 2017 (July) *DR* 4).

2018 Review

In November 2018, the CHE released the 'The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa' report, which has the following recommendations that have been divided into four broad themes:

• Curriculum reform

The findings indicate that there is a wide diversity of LLB curricula in South Africa. There are commonalities among the curricula, but no one curriculum closely approximates another. It is recommended that all law faculties/schools undertake a curriculum reform exercise. It is interesting to note that one of the recommendations made under this headline is to increase the duration of the LLB degree from the current four years to five years.

• Graduate attributes

The LLB standard has listed in detail the attributes expected of a law graduate. These attributes – knowledge, skills and applied competences – are a valuable and comprehensive guide for law faculties/schools to follow as they review their programmes to comply with the expectations, in respect of cultivating graduate attributes discussed in the LLB standard. The Higher Education Quality Committee (HEQC) review has made it possible to make information available that will assist faculties/schools in this important endeavour. One of the recommendations made under this headline is that clinical legal education should be compulsory for all law graduates.

• Social sensitivity

The HEQC highlighted many instances of practices at faculties/schools that were insensitive to the social and economic realities in which they functioned. These practices – often indulged in subconsciously by staff or students – need to be addressed as a matter of priority, as the academic project of producing law graduates able to fulfil a meaningful role in society cannot thrive in an atmosphere of social insensitivity.

Mapula Sedutla – Editor

• Resources

The number of law students in the system needs to be sharply reduced, so that law faculties/schools can provide substantively for the legal education required by the LLB standard, and the demands of a professional qualification at National Qualification Framework level eight. This is a recommendation that can only be attended to within the context of institutional planning.

No recommendations have been made on whether consideration should be given to a reduction in the number of law faculties/schools. It needs to be stated, though, that the gap between well-resourced and poorly resourced faculties/schools is wide. Serious attention needs to be given to means to reduce this gap in resources.

- To read the full report see: www.derebus.org.za/resources-and-documents/

Have your say

Quality legal education is paramount to the profession and the society its serves. It is important that the programme that prepares students to be members of the profession is the right one. Send us your thoughts on the state of the current LLB programme and what should be improved in the programme. #LLBDegree

Upcoming deadlines for article submissions: 22 July, 19 August and 22 September 2019. ❑

LETTERS TO THE EDITOR

PO Box 36626, Menlo Park 0102 ● Docex 82, Pretoria ● E-mail: derebus@derebus.org.za ● Fax (012) 362 0969

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.

Conveyancing examinations

I refer to the editorial 'Conveyancing examinations: A source of gatekeeping?' (2019 (March) *DR* 3).

It is my view that the inequalities that persist today have largely been attributed to Apartheid policies limiting access to quality education and the formal labour market, which served to keep people trapped in poverty. Transformation is a thorn in the side of the old Apartheid guards. I agree with the National Association of Democratic Lawyers' assertion that the conveyancing examination committee is dominated by male Afrikaners who are still stuck in the past.

We all agree that Apartheid is not a viable option and it has been denounced by the world as an evil social system aimed at barring black Africans out of the economic system. The conveyancing examination was designed to particularly keep black Africans out of the system. I remember when I was at the practical legal school back in the mid-1990s our white lecturer once told us that commercial law practice was not for black people and so we have to memorise the course notes for the Admission Examination. According to her, we were destined for criminal law practice. At the same time the Black Lawyers Association suggested that conveyancing be taught at our law school and the suggestion was shot down by the white director of the school. The discrimination in the course is based on the language used to write the examination. We are asked to choose between Afrikaans and English.

It is obvious that legal practitioners who write in English are mainly black legal practitioners and it makes it much easier to spot black candidates. This also affects white candidates who choose to write the English examination to a certain extent, but the proficiency of the language favours them. If one was to take all the examination scripts of the past five years and compare the failure rate between Afrikaans and English writers, the majority of failures would be English writers. It is not true that legal practitioners lack practical exposure. Legal practitioners have written many examinations in the past without practical exposure and not all legal practitioners will serve their articles at a law firm that has a conveyancing department.

The other problem is the enrolment forms. Legal practitioners are asked to state the name of the law firm that they are working for, their race, gender and the university they graduated from.

What is the relevancy of this? Is it not helping the examiners to discriminate against us? The highest mark I ever got was 49,7%. Really? Can a person fail by just mere 0,3%? I had a remark and was marked down. I think the message was: Never question our decision. I have been writing the examinations for many years and there are many legal practitioners who are in the same predicament as I am. This discrimination is not only in the legal profession. It is also a reality for black chartered accountants, black property evaluators, and black estate agents. This is why many black people in these professions are organising themselves to challenge the gatekeeping tendencies.

I disagree with Pumla Mncwango and Audrey Gwangwa's assertions. It is not practical exposure but pure gatekeeping and discrimination, which is the cause of the high failure rate. History will agree with me that prior to 1994 many black lawyers did not enrol for the conveyancing examination and there was no high failure rate. It began when we people of colour started to enrol for this course. We need transformation in the profession. Transformation and opening of our hearts will not lower the standard, but discrimination based on colour, language, creed, religion, gender in the legal profession is the root cause of the evil that will cast all of us asunder and dis-

harmony among the members of the legal profession.

Pule Modise, member of Black Lawyers Association and practicing attorney, Groblersdal

The Legal Practice Council issued a notice on 4 March 2019, which stated that all examinations will be presented and conducted in English only. Candidates will also be required to answer the examinations in English only. Visit www.derebus.org.za/lpc-notices to follow the developments.

– 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: derebus@derebus.org.za

Seen on social media: Responses on #NewMinisterOfJustice

De Rebus asked social media users the following:
Young legal practitioners: Give us your views on the appointment of Minister of Justice and Correctional Services, Ronald Lamola, who is 36 years old and comes from the ranks of the attorneys' profession. #NewMinisterOfJustice.

As a qualified young African attorney, it is incredibly inspiring. It really proves that our dreams are valid notwithstanding one's background. Hard work, determination and self-belief can take you places. We hope to see many such appointments in the legal fraternity in general where young people are taking leadership positions.

Motsei Rakotsoana, Senior Legal Counsel

It is great to see young leaders thrive. I hope that the new minister will make innovative decisions that will help the legal profession at grass roots level, for example, increase efficiency of courts outside of Johannesburg and Cape Town.

Candice Munien-Govender, Director, Attorney and Notary Public

Based on his political experience through the African National Congress Youth League and heading up his own law firm, I was very pleased to see that a competent individual was appointed to become the Minister of Justice. Minister Lamola is an inspiration to the youth. It will now only take time to see if he can act the part.

Rainier Bruyns, LLB student

I am excited and overwhelmed by the appointment. It is a huge burden to carry, but I trust that Ntate Ronald Lamola will display his quality skills and expertise to efficiently lead the Justice ministry.

Kamogelo Maleka
@kgolanek

I wish him all the best. Trust that he will carry out his constitutional mandate with the greatest of pride and responsibility. We need change and analysis into the issue of qualifying as a conveyancer in South Africa, especially black attorneys or legal practitioners.

Sibongile Booi
@BooiMsuthukazi

I hope he starts with the 'heavy requirements' of getting articles in law firms, like being required to have a car when you are fresh out of varsity.

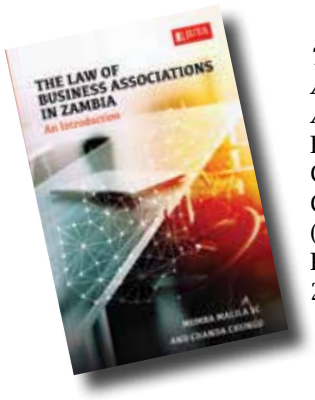
Kgorulana
@kgorulana

Very inspiring. I do hope he will bring new and fresh ideas to the legal fraternity.

Avhaathu Makhavhu
@aba2m

❑

Book announcement



The Law of Business Associations in Zambia: An Introduction
By Mumba Malila SC and Chanda Chungu
Cape Town: Juta
(2019) 1st edition
Price R 395 (incl VAT)
238 pages (soft cover)

This book sets out the history and current state of business associations law in Zambia, providing a clear overview of all relevant legislation, case law and implied policy. The book covers the different types of business associations, sole traders and sole proprietorships, partnerships, co-operative societies, registered companies and parastatal organisations. It also deals with the regulation of enterprise in both the private sector and the public sector in a balanced, clear and accessible way, giving both lawyers and non-lawyers the tools of the trade.

❑

Support services available to legal practitioners

By Thomas Harban

Legal practitioners face multiple challenges and competing (over and above the sometimes conflicting) interests on a daily basis. If not appropriately managed, the process of balancing the various challenges and interests can have a negative impact on legal practitioners (professionally and personally), their practices and the various stakeholders in the firm. The results could vary depending on the nature of the challenges faced by the legal practitioner and may lead to professional indemnity (PI) claims being brought against the firm or even action by the Legal Practice Council (the LPC) as the regulator of the profession.

There are many legal practitioners who, unfortunately, are not aware of the various support services available to them and thus have no information on who to turn to for assistance and guidance. The challenges are sometimes compounded by the fact that legal practitioners – especially sole practitioners and those practising in remote parts of the country – work independently and thus in silos with no or minimal access to information on the available support services. There may also be an assumption that appropriate support is only available at a huge financial cost to the practice.

Identifying the need for support

In assessing the information provided when practitioners notify the Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF) of PI claims brought against them, it can be noted that, in a number of instances, the claim could have been avoided if the legal practitioner and the staff in the firm had timeously made use of the support services made available to the profession. With the benefit of hindsight and an analysis of the detail gleaned in the assessment of the underlying causes of claims, we note that the risks associated with the challenges of legal practice are best faced when identified at an early stage and appropriate measures developed and implemented well before the risk materialises. In so doing, a proactive risk management approach is adopted. The proactive management of risk is part of the core elements of running a legal practice.

From time to time legal practitioners may be faced by challenges for which they do not have the required tools and/or information to appropriately deal with. The challenges facing legal practitioners are, in certain instances, compounded by the competitive and often antagonistic nature of the profession. The rapidly changing environment in which legal practice is conducted also brings new risks and challenges, including new regulatory requirements with which legal practitioners must comply. There are instances where a legal practitioner may have identified the need to reach out for appropriate help, but was either unaware of the support services available or was of the view at the time that seeking assistance or guidance would amount to a concession of failure, send an early warning to the regulator that not all is going well in the practice or that the relevant support is unaffordable to the firm. This, however, like the proverbial ostrich burying its head in the sand, is not a prudent approach to take. Challenges (and their consequences) cannot be wished away. When the warning signs of potential risk emerge, it is best to seek assistance rather than hope that the challenges identified (or the emerging early warning signs) will simply go away. Similarly, hoping to 'ride out the storm' may only exacerbate the challenges and increase the impact of the risks in the event that they materialise. The whirlpool effect must also be avoided. What the practitioner is dealing with may, in some instances, be a symptom of a greater underlying problem.

Seeking appropriate support

In dealing with PI claims brought against legal practitioners, we at the LPIIF have also noted that many practitioners are not aware of the various support services made available to the profession. These legal practitioners thus do not know where to look for help in the event that they find themselves in a position requiring assistance. Seeking appropriate assistance at an early stage will mitigate the likelihood and the impact (in the event that a risk materialises) of many of the risks faced by practitioners if appropriate corrective action is taken.

PI insurers in other jurisdictions have informed us that one of their important learnings has been that, in many instances, practitioners require a support service, which is able to consider their challenges and, where necessary and appropriate, provide guidance on possible appropriate action to be taken by the legal practitioner. The early intervention of the support service reduces the likelihood and the impact of the risk of claims and/or regulatory action against the firm. In some instances, legal practitioners may even have thoughts of giving up practice (or even abandoning their practices) when they think that there is no assistance and support available to them.

The lessons learned in other jurisdictions is that, in appropriate cases, the legal practitioner/s concerned may well be advised to consider taking actions such as closing their practice, merging with another firm or even downscaling the firm in terms of size and/or areas of operation. These are difficult but necessary considerations. Support services should not, however, be seen as a step leading to a negative outcome engaging the available support services may assist in giving guidance which, if correctly applied, could not only mitigate the risks in the practice but also provide the practitioner with the necessary tools to be used in growing the firm in a healthy and sustainable manner.

What support services are available?

It is against this background that the LPIIF established the practitioner support function. Henri van Rooyen has been appointed as the Practitioner Support Executive at the LPIIF and took up his position on 1 February. Mr van Rooyen has vast knowledge and experience in dealing with the challenges facing legal practitioners, having practiced for over 30 years and also having served on various structures in the profession, including the Council of the then Free State

Law Society, the Board of Control of the Attorneys Fidelity Fund (now called, the Legal Practitioners' Fidelity Fund (the Fidelity Fund)), the Council of the Law Society of South Africa (LSSA) and also as a non-executive director of the LPIIF. Mr van Rooyen thus brings a wealth of all-round experience gained from the position of a practitioner, the regulator, the Fidelity Fund (in respect of misappropriation of trust fund claims), the professional interest group (the LSSA) and the LPIIF (in respect of the PI claims). Mr van Rooyen is a highly experienced and qualified resource made available to legal practitioners at no cost to the firm. He can be contacted at (012) 622 3900 and his e-mail address is henri.vanrooyen@LPIIF.co.za. Legal practitioners are encouraged to consult with Mr van Rooyen in respect of any challenges they may be facing in their practices.

Some legal practitioners have indicated that they had laboured under the mistaken belief that the LPIIF is a part of the regulator and that, as such, reporting matters to the LPIIF or seeking any assistance from the PI insurance company will amount to reporting oneself to the regulator. This belief is not correct. The LPIIF is an independent entity and not part of the regulator.

The Practitioner Support Service provided by the LPIIF must be distinguished from the circumstances under which a curator for the practice is appointed in terms of the Legal Practice Act 28 of 2014 (the LPA); the two are distinct and have separate functions. The curator is appointed to take over certain affairs of the firm after an order is granted by the court in appropriate circumstances. The functions of the curator, as set out in the court order, relate to taking control of and administering the trust account, with any rights, powers and functions in relation thereto as the court may deem fit. On the other hand, the LPIIF provides the Practitioner Support Service as a proactive risk management measure made available to the profession. The Practitioner Support Executive will not take over the running of the practice and/or its trust account. The Practitioner Support Service is also not a business development service but may serve to guide practitioners to the appropriate services made available by other structures in the profession which can assist with business development services.

The Practitioner Support Service is provided by the LPIIF as part of the risk management service provided to firms, also at no cost. Risk management queries can be addressed to me at thomas.harban@LPIIF.co.za or at (012) 622 3928.

The significant changes to the profession brought with the implementation of the LPA, the rules issued in terms of the LPA and the new Code of Conduct (see www.lssa.org.za) have introduced new compliance and governance requirements for legal practitioners. The appropriate management of the trust account environment is an integral part of the proper management and administration of a legal practice and failure to comply with the requirements is a breach of the rules, which may lead to disciplinary action being taken against a legal practitioner and criminal charges being brought against the legal practitioners concerned. The compliance requirements should never be seen as a 'tick-box exercise' or simply an added level of bureaucracy imposed on legal practitioners. The compliance and governance requirements applied to legal practitioners seek, among other reasons, to assist legal practitioners in mitigating the risks associated with practice. The risk management unit of the Fidelity Fund is staffed by a number of professionals with extensive experience in managing the risks associated with the trust account environment. Queries related to the appropriate management of the trust account environment can be addressed to Simthandile Myemane, the Practitioner Support Manager at the Fidelity Fund at simthandile.myemane@fidfund.co.za.

The LPIIF team members are also available to conduct risk and practice management training for legal practitioners and their staff at their respective offices. Legal practitioners are encouraged to contact us in order to arrange mutually convenient dates and times for such training sessions.

Conclusion

It is hoped that legal practitioners will make use of these free services and thus mitigate their risks. It must be remembered that no one person has the answer to every challenge posed by legal practice and that in seeking the assistance and guidance from one of the services highlighted above, the legal practitioner has the benefit of an independent third party who brings an objective view to the risks and challenges in the firm.

Thomas Harban *BA LLB (Wits)* is the General Manager of the Legal Practitioners' Indemnity Insurance Fund NPC in Centurion. ❑

De Rebus has launched a CV portal for prospective candidate legal practitioners who are seeking or ceding articles.

How it works?

As a free service to candidate legal practitioners, *De Rebus* will place your CV on its website. Prospective employers will then be able to contact you directly.

The service will be free of charge and be based on a first-come, first-served basis for a period of two months, or until you have been appointed to start your articles.

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Please include the following in your advert –

- name and surname;
- telephone number;
- e-mail address;
- age;
- province where you are seeking articles;
- when can you start your articles; and
- additional information, for example, are you currently completing PLT or do you have a driver's licence?
- Please remember that this is a public portal therefore, **DO NOT include your physical address, your ID number or any certificates.**

An example of the advert that you should send:

25-year-old LLB graduate currently completing PLT seeks articles in Gauteng. Valid driver's licence. Contact ABC at 000 000 0000 or e-mail: E-mail@gmail.com

Disclaimer:

- Please note that we will not write the advert on your behalf from the information on your CV.
- No liability for any mistakes in advertisements or CVs is accepted.
- The candidate must inform *De Rebus* to remove their advert once they have found articles.
- Should a candidate need to re-post their CV after the two-month period, please e-mail: Classifieds@derebus.org.za

Advertisements and CVs may be e-mailed to: Classifieds@derebus.org.za

❑

Should disability grants be deducted from loss of earnings claims against the RAF?

Picture source: Gallo Images/Getty

By Tshepo Mashile

South African courts have dealt with the question of whether disability grants should be deducted from loss of earnings claims against the Road Accident Fund (RAF) on three occasions. On two occasions, the court reached the same conclusion, while on the third, the court reached a different conclusion. In the first matter, *Mullins v RAF* (ECP) (unreported case no 3650/2014, 4-8-2016) (Beshe J) Beshe J answered the question in the affirmative. In the case of *Moropane v RAF* (GP) (unreported case no 39680/2012, 27-8-2018) the question was answered in the negative. In the third case, *Kapa v RAF* (LP) (unreported case no 1414/2013, 7-12-2018) (Muller J) Muller J answered the question in the affirmative. This article focuses on the reasons for judgment in the *Kapa* case.

Facts

In the *Kapa* case, the plaintiff, instituted action against the RAF for damages as a result of injuries sustained from a motor vehicle collision, which occurred on 23 October 2011. On 13 February 2017 the RAF admitted that it was liable to compensate the plaintiff for her proven damages in totality thereof. It became common cause that she received a disability grant from the state and had suffered a total loss of earnings because of the injuries. The legal question then arose as to whether the disability grant should be deducted from the loss of earnings or whether it is *res inter alias acta* and not deductible. The parties agreed that the plaintiff's nett loss of earnings was R 918 748 if the disability grant deduction is disregarded and R 525 975 when the disability grant deduction is taken into consideration.

It was contended on behalf of the plaintiff that a disability grant should be ignored and not be deducted when determining her claim for loss of earnings and the counsel relied on the *Moropane* case in this respect. The RAF contended that the amount received by her as disability grant should be deducted when determining her claim for loss of earnings. The RAF relied on the *Mullins* case for its proposition.

The law

It is trite that a damage-causing event does not always result in only negative losses but may, in some instances, have positive benefits for the plaintiff. The inclusion or otherwise of the positive benefits of the damage-causing event has not always lent itself to a simple answer. This unresolved position owes much of its underdevelopment to two conflicting general principles in the law of damages. On the one hand, the law does not allow for double compensation as a result of a single cause of action. On the other hand, it is stated that the wrongdoer or their insurer should not escape liability on account of some fortuitous event such as the generosity of a third party (*Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) 279B – C; JM Potgieter, L Steynberg and TB Floyd *Visser and Potgieter: Law of Damages* 3ed (Cape Town: Juta) at 23).

André Mukheibir notes that there is no generally acceptable test to determine whether or not a benefit ought to be deducted ('Comparing the casuistry of compensating advantages and collateral sources' 2002 *Obiter* 330). This problem was further described as a question of demarcation in *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A) 41D – E, in other words, the question of whether or not to deduct, depends on the claim and the court's interpretation of the collateral source rule. Ultimately, the demarcation of benefits is determined by policy considerations of fairness (see *Dugmore* 42B). However, this is no easy task, and this was patently acknowledged in a separate opinion of Marais JA in *Dugmore* at 47D – E when he captured the difficulty of this balance by stating that: 'The dilemmas arise when one attempts to respect well-established principles (each of which has its own particular justification and reason for existence), but finds that in respecting one, one is spurning another, and that one's best efforts to reconcile them come to nought'.

Notwithstanding the appreciation of this difficulty and the absence of satisfactory answers to the question of deductibility of benefits, it has long been established that there are exceptions to the rule against double compensation. Examples are benefits received by the plaintiff under ordinary contracts of insurance for which the plaintiff has paid premiums; and money and other benefits received by the plaintiff as *solatium* or from the generosity of third parties

motivated by sympathy are collateral benefits in any action for damages. It is apparent from the listed and generally accepted exclusions that the established exceptions of *res inter alias acta* do not address the absence of general principles to the question of deductibility or otherwise, but rather considers a predetermined conclusion to exclude them from quantification (PL Monyamane *The nature, assessment and quantification of medical expenses as a head of delictual damage(s)* (LLM dissertation, Unisa, 2014) at 60).

However, despite the inherent dangers of casuistry and the conflict of general principles of the law of damages as highlighted, Potgieter, Steynberg and Floyd (*op cit*) submit that the application of the collateral source rule is flexible and must be considered in view of the interests of the plaintiff, the defendant, the source of the benefit, the community and other interested third parties. This echoes the view held in *Zysset* at 279A that the inquiry to determine the deductibility of benefits must necessarily include considerations of public policy, reasonableness and justice (see PL Monyamane 'Social security "benefits" and the collateral source rule – an analysis of the three Coughlan decisions' (2016) 49 *De Jure* 326).

It is important to mention that while the Constitutional Court (CC) also had the occasion to deal with a similar question of law – although in relation to foster care grants in a claim for damages as a result of loss of support arising from a motor vehicle collision in *Coughlan NO v Road Accident Fund (Centre for Child Law as* Amicus Curiae*)* 2015 (6) BCLR 676 (CC) and consequently answering the question in the negative. The CC did not, however, consider what the effect is on a claim for loss of earnings if the plaintiff is the recipient of a disability grant from the state. It held, with reference to the nature and purpose of foster care grants, that those grants, which arose from the constitutional obligation of the state to provide for children in need of care, are different from compensation. It was held that foster care grants are not paid to the children and are furthermore not predicated on the death of a parent.

Although the judgment in *Coughlan* is authority to hold that child support grants should be similarly regarded as foster care grants, the same cannot be said about disability grants. Different considerations apply to disability grants.

However, in order to determine whether payment of a disability grant amounts to double compensation, a similar approach adopted by the CC in *Coughlan* was followed *in casu*, namely:

- What is the constitutional obligation of the state in terms of s 27 of the Constitution?
- The nature and purpose of disability grants *vis-à-vis* that of compensation for loss of earnings.
- Whether there is any causal link between a disability grant and compensation for loss of earnings.

It is acknowledged in s 27(1)(*c*) of the Constitution that the state has an obligation to make social security available to everyone and if they are unable to support themselves and their dependents appropriate social assistance must be provided. The Constitution is not prescriptive as to how the state should make grants available within the available recourses, that has been left for Parliament to decide. The Social Assistance Act 13 of 2004, contains provisions that deal with the provision and administration of social assistance by the state and the qualification requirements for such assistance. The eligibility of a person to apply for a disability grant is set out in s 9 of the Social Assistance Act, which reads as follows:

'A person is, subject to section 5, eligible for a disability grant, if he or she –

(*a*) ...

(*b*) is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.'

The Road Accident Fund Act 56 of 1996 is silent on whether any form of social assistance, in particular, a disability grant, should be included or excluded from compensation awarded to a claimant. It does not follow, merely, from such silence that social grants, which are available in terms of the Social Assistance Act should simply to be ignored, even if it leads to double compensation.

The nature and purpose of a disability grant is clearly intended to give financial assistance to anyone who as a result of physical or mental disability irrespective of the reason is unfit to obtain the means to provide for their maintenance. This cannot be understood to mean that a person is only eligible if they are totally disabled. All that is required is that the disability should be of such a degree that it renders a person unable to maintain themselves by means of employment. Put differently, a person who is meaningfully employed but their remuneration as a result of their disability is so meagre that they are unable to maintain themselves should qualify.

In casu the disability grant was paid to the plaintiff in *Kapa* as a direct result of her disability, which was caused by the injuries she sustained, in the motor vehicle collision. She is regarded as unemployable and damages are claimed for loss of earnings due to injuries sustained, the result of which is a total loss of income. The physical injuries, which she sustained, rendered her totally unfit for employment and unable to maintain herself. It comes as no surprise that she qualified for a disability grant.

Conclusion

The grant is not paid to the plaintiff as a result of the generosity, benevolence or charity of the state, but as financial assistance by the state due to the injuries sustained, which caused a loss of income, but also in terms of the constitutional obligation to render social security to everyone in need of such assistance. That is of course, what her claim for compensation is all about. Thus, there is a very close link between the reason for the disability grant and the claim for loss of income. There is no doubt that the payment of the disability grant leads to double compensation.

In addition, it must be taken into consideration that the public carries a heavy financial burden towards the state. The ongoing financial woes of the RAF are notorious and well known. The funds utilised by the RAF and the funds allocated for social grants originates from the public by means of fuel levies on the one side, and taxes, on the other. Public policy, fairness and justice demand that overcompensating motor vehicle accident victims from public funds should be avoided. Fairness and justice demand that the disability grant be deducted from the RAF award to be made.

In *Esau v Road Accident Fund* (ECP) (unreported case no 3410/15, 1-6-2017) (Plasket J) the court was confronted with a request by the parties to allow for the deduction of the disability grant on the plaintiff's future loss of earnings, however, the court was not in a position to do so because of lack of evidence before the Court. According to the court, the plaintiff would continue to be eligible for a disability grant after being compensated by the RAF.

As such, the law as followed by the court in *Kapa* is that the disability grant should be taken into account when determining the plaintiff's claim for past and future loss of earnings. However, when it comes to future loss of earnings the law – as followed by the court in *Esau* – is that the RAF should adduce evidence to the effect that the plaintiff will continue to qualify for the disability grant after compensation has been paid by the RAF. The facts of each case will, therefore, always play an important role when the determination is made.

Tshepo Mashile *LLB (University of Limpopo)* is a legal practitioner at Mkhonto and Ngwenya Inc in Pretoria.

Picture source: Gallo Images/Getty

You have been served: *An update on service of referrals to the CCMA on foreign defendants*

By Riaan de Jager

In December 2017, *De Rebus* published an article on the service of legal process on foreign states and intergovernmental organisations (see Riaan de Jager 'Diplomatic law: Service of process on foreign defendants' 2017 (Dec) *DR* 34). In that article, the procedure that should be followed to serve legal process on foreign defendants was highlighted – this procedure is regulated by subss 13(1) or (7) of the Foreign States Immunities Act 87 of 1981 (FSIA), as well as r 5(1) of the Uniform Rules of Court (Rules). In another article I wrote, 'Diplomatic law: Legal proceedings against a foreign diplomat in a South African court' 2018 (Aug) *DR* 20, a procedure was proposed on how to institute a claim against a foreign diplomat in a South African court. In the light of recent case law in the South African Constitutional Court (CC) and the Supreme Court of the United Kingdom (UK), the views ex-

pressed, and conclusions reached in the aforesaid articles need to be reconsidered, which is the main purpose of this article. Below, a distinction will be made between service of referrals to the Commission for Conciliation, Mediation and Arbitration (CCMA) on foreign states, on the one hand, and service of such referrals on foreign diplomats, on the other.

Service of CCMA referrals on a foreign state

In the article, 'Dismissed by a foreign diplomatic mission: Are South African locally recruited employees without an effective remedy?' 2018 (Jan/Feb) *DR* 24, I wrote in the conclusion that the aforesaid provisions of the FSIA and the Rules do not apply when serving CCMA referrals on foreign defendants. This conclusion was based on a judgment of the Labour Appeal Court (LAC) in *Food and Allied Workers Union obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* [2016] 12 BLLR 1175 (LAC) where the LAC held at para 55 that a referral to the CCMA in terms of the Labour Relations Act 66 of 1995 (LRA) is not a process whereby legal proceedings are commenced. Although the CC was also subsequently faced with this issue in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* 2017 (4) BCLR 473 (CC), no binding *ratio decidendi* emerged from the court's decision due to the parity of votes in which none of the various judgments of the Justices secured a majority. As a result, the LAC's judgment in the *Gaoshubelwe* case remained the binding precedent on this matter.

Since those judgments have been handed down, the *Gaoshubelwe* case reached the CC and judgment was delivered on 20 March 2018 in *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* 2018 (5) BCLR 527 (CC).

In his majority judgment, Kollapen AJ held that the referral of a dispute to the CCMA for conciliation does constitute the service of a process commencing legal proceedings – he ruled in para 199 of the judgment as follows:

'I believe it does an injustice to the architecture of the LRA and the CCMA to see and characterise conciliation as anything other than the commencement of legal proceedings in an independent and impartial forum. For those reasons, I would conclude on this aspect that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings.'

As it is now settled law that the referral of a dispute to the CCMA for conciliation constitutes the service of a process commencing legal proceedings, I submit that the service of such a referral on a foreign state must be conducted pursuant to subss 13(1) or (7) of the FSIA, as well as r 5(1) of the Rules. This in effect means that any employee, or their trade union, who intends to refer a dispute to the CCMA will pursuant to r 4(5)(a) of the Rules have to have the referral and its attachments translated into an official language of the defendant state. Thereafter, the documents in question, together with the sworn translation, if necessary, and a certified copy of the referral and the translation, must be served through the Department of International Relations and Cooperation (DIRCO) on the Ministry of Foreign Affairs of the state concerned under cover of a *Note Verbale* or diplomatic note. Alternatively, the CCMA could pursuant to its r 5(4) order another manner of service. Regard should also be had to s 13(2) of the FSIA, which provides that any time prescribed by the rules of court or otherwise for notice of intention to defend or oppose or entering an appearance shall begin to run two months after the date on which the process or document is received as aforesaid.

The CCMA will arguably have to take these provisions of the FSIA into consideration before notifying the parties of a conciliation, since the defendant state will in terms of international practice require sufficient time to consider the matter at its capital and decide whether or not to take measures to enter an appearance and/or to oppose the dispute.

Service of CCMA referrals on a foreign diplomat

In the article 'Diplomatic immunity: Its nature, effects and implications' 2018 (July) *DR* 26, I discuss the immunity, which foreign diplomats enjoy in terms of customary international law in great detail. It also dealt with the issue of inviolability, which such diplomats enjoy regarding their person, correspondence and property. Based on the arguments articulated in the various articles referred to above, I reached the conclusion that service of process cannot be effected on foreign diplomats personally or through the Sheriff as a result of their personal inviolability and that service should be effected on them through diplomatic channels (ie, through DIRCO).

I submit that this view should also be reconsidered in the light of a judgment handed down by the UK Supreme Court on 18 October 2017 in *Reyes v Al-Malki and Another* [2017] UKSC 61. The relevant facts of this case are the following: Ms Reyes, a Philippine national, was employed by Mr and Mrs Al-Malki as a domestic servant in their residence in London between 19 January and 14 March 2011. Her duties were to clean, to help in the kitchen at mealtimes and to look after the children. At the time, Mr Al-Malki was a member of the diplomatic staff of the Embassy of Saudi Arabia in London. Ms Reyes alleged that during her employment, the Al-Malkis maltreated her by requiring her to work excessive hours, failing to give her proper accommodation, confiscating her passport and preventing her from leaving the house or communicating with others. Ms Reyes began proceedings in the UK Employment Tribunal in June 2011, alleging direct and indirect race discrimination, unlawful deduction from wages and failure to pay her the national minimum wage. The main issues on the appeal before the UK Supreme Court concerned the effect of art 31(1)(c) of the Vienna Convention on Diplomatic Relations of 1961 (Convention), which contains an exception to the immunity of a diplomat from civil jurisdiction where the proceedings relate to 'any professional or commercial ac-

tivity exercised by the diplomatic agent in the receiving state outside his official functions.'

One of the questions that arose for determination in the *Reyes* case was whether the claim form was validly served on the Al-Malkis. A number of modes of service were attempted, but the only one, which was relied on is service by post to their private residence in accordance with r 61(1)(a) of the Employment Tribunal Rules of Procedure. The Al-Malkis argued that the rule cannot authorise service on a diplomatic agent because this would violate their person contrary to art 29 of the Convention and their residence contrary to art 30.

The Supreme Court, *per* Lord Sumption (with whom Lord Neuberger concurred), held in para 16 of its judgment as follows:

'The person of a diplomatic agent is violated if an agent of the receiving state or acting on the authority of the receiving state detains him, impedes his movement or subjects him to any personal restriction or indignity. It is arguable that personal service on a diplomatic agent would do that, although it is not an argument that needs to be considered here. Premises are violated if an agent of the state enters them without consent or impedes access to or from the premises or normal use of them: See article 22 relating to the premises of a mission, which is applied by analogy to a diplomatic agent's private residence under article 30(1). The delivery by post of a claim form does not do any of these things. It simply serves to give notice to the defendant that proceedings have been brought against him, so that he can defend his interests, for example by raising his immunity if he has any. The mere conveying of information, however unwelcome, by post to the defendant, is not a violation of the premises to which the letter is delivered. It is not a trespass. It does not affront his dignity or affect his right to enter or leave or use his home. It does of course start time running for subsequent procedural steps and may lead to a default if no action is taken. But so far as this is objectionable, it can only be because there is a relevant immunity from jurisdiction. It is not because the proceedings were brought to the diplomatic agent's attention by post. Otherwise the same objection would apply to any mode of service which starts time running, including service through diplomatic channels as proposed by the Secretary of State.'

'One of the questions that arose for determination in the Reyes case was whether the claim form was validly served on the Al-Malkis. A number of modes of service were attempted, but the only one, which was relied on is service by post to their private residence in accordance with r 61(1)(a) of the Employment Tribunal Rules of Procedure.'

The court thus held that the service of process on diplomatic agents by way of registered post does not infringe their personal inviolability, nor that of their residence. I submit that the reasoning of the court in the *Reyes* case is a correct interpretation of current diplomatic law and that the South African courts will most likely follow this judgment and come to a similar conclusion.

It is noted that r 5(1)(c) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration specifically provides for the service of documents by e-mailing a copy thereof to the person's e-mail address. It is worth noting that the CCMA Rules were amended with effect from 1 April 2015 to incorporate some of the provisions of Chapter III, Part 2 the Electronic Communications and Transactions Act 25 of 2002. Furthermore, the Uniform Rules of Court were also amended on 27 July 2012 to include r 4A, which now allows for service by facsimile, registered post and e-mail.

Although the court in the *Reyes* case did not specifically address the issue of service of process by way of e-mail, I submit that the reasoning of the court regarding service by registered post will similarly apply to service by e-mail – the conveying of information by e-mail is not a violation of the premises to which the correspondence is delivered. It is also not a trespass and does not affront a diplomat's dignity or affect his right to enter or leave or use his home.

Conclusion

In light of the aforesaid, I am of the view that the service of CCMA referrals, which has been held to constitute 'legal process', must now be served on foreign states pursuant to subss 13(1) or 13(7) of FSIA and that such referrals can now validly be served on diplomats by way of registered post and e-mail, since such manner of service will not infringe the inviolability they enjoy.

Riaan de Jager *BLC LLB LLM (UP) Advanced Diploma (Labour Law) (UJ)* is a legal adviser at the Union for the Local Employees in Missions Accredited to South Africa (ULEMASA) and a former Principal State Law Adviser (International Law), attached to the Office of the Chief State Law Adviser (International Law) at the Department of International Relations and Cooperation in Pretoria. ❑

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Moving towards a guilt-free divorce

By Tshepo Munene

Before the Divorce Act 70 of 1979 (the Divorce Act) was promulgated, the grounds of divorce in South Africa (SA) were –

- malicious desertion;
- adultery;
- incurable mental illness; and
- imprisonment for at least five years after having been declared a habitual criminal.

On divorce, the guilty party could be punished with an order of total forfeiture of marital benefits, unless the ground for divorce was mental illness. The logic behind this principle was that a spouse should not be allowed to benefit financially from a marriage, which he or she wrecked (see HR Hahlo *The South African Law of Husband and Wife* 5ed (Cape Town: Juta 1985) at p 430). The legislature decided to do away with 'fault' as a ground for divorce when it enacted the Divorce Act. Given SA's elaborate Bill of Rights that has been espoused in the Constitution one would expect that any fault in South African divorce law would have been completely done away with and archived.

However, considering s 9(1) of the Divorce Act it would appear that 'fault' still has a role to play in our legal system. In terms of s 9(1) the court may order a forfeiture of benefits by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

Whether marital misconduct should have an influence in the division of marital property is a significant policy question in SA. At present, a majority of court decisions hold that marital misconduct is a factor to be considered. Most of these decisions were very influential in the development of how s 9(1) is to be applied. See for example *Singh v Singh* 1983 (1) SA 781 (C), *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C), *Wijker v Wijker* 1993 (4) SA 720 (A), and *Binda v Binda* 1993 (2) SA 123 (W). An evaluation of these cases is not important for this discussion. What is important to note is what some of the pre-Constitution cases have said about 'fault' in relation to the section. In *Klerck v Klerck* 1991 (1) SA 265 (W) the court held that the legislature had unequivocally turned its back on the 'guilt element' and that it would be surprising if that rejected element would be allowed in through the back door in terms of s 9(1). In an even earlier case, the then Appellate Division (now Supreme Court of Appeal (SCA)) in the case of *Beaumont v Beaumont* 1987 (1) SA 967 (A) held that: 'In many, probably most, cases, both parties will be to blame, in the sense of having contributed to the break-down of the marriage. In such cases, where there is no conspicuous disparity between the conduct of the one party and that of the other, our courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the "no-fault" system of divorce'.

Was s 9(1) really aimed at punishing the guilty party?

The generally accepted principle that a spouse could not forfeit that which they had brought into the marriage was introduced as early as 1904 in *Celliers v Celliers* 1904 TS 926 at 926 – 927. In *Gates v Gates* 1940 NPD 361 at 365 – 366, almost 40 years before the promulgation of the Act, the court expressed the opinion that the wife's domestic contributions should be taken into account in the determination of the respective contributions to the joint estate, by virtue of the fact that they were a cost-saving exercise for the benefit of the earning spouse. Considering the historical role of women, it is

clear that s 9(1) was aimed at creating some type of proprietary equality for women and not necessarily to create the notion of guilt.

Recent case law

On 26 August 2015 the Gauteng Division of the High Court in Pretoria had to decide whether a wife who had cheated on her husband several times deserved to be punished by forfeiting her marital benefits in *MC v JC* 2016 (2) SA 227 (GP). After asking the legal representatives to present legal arguments on the constitutionality of s 9(1), the court concluded that the section may be unconstitutional for punishing the guilty party.

Counsel for the wife made the most compelling arguments. Among others, he argued that the right to dignity as contained in s 10 of the Constitution entails the right not to be punished for actions that are legally neutral (ie, not unlawful). Such punishment would constitute an infringement into a person's capacity to make choices. The right to dignity implies that a person's capacity to make choices must be protected from unwarranted intrusions and thus also the freedom to contract. He further argued that the section may infringe the rights to privacy and property contained in ss 14 and 25 of the Constitution respectively. The right to privacy goes against exposing and scrutinising the private affairs of a person that is legally neutral for the sake of making a moral judgment. On the other hand, the right to property provides that no law may permit arbitrary deprivation of property. In this case, it could be argued that s 9(1) allows the arbitrary deprivation of the wife's property.

Unfortunately, the court did not make a final ruling on the constitutionality of s 9(1) because counsel did not follow certain filing procedures. However, it did find that the wife had contributed to the marriage and that she should not forfeit the assets, which came about as a result of her contributions.

In the case of *KT v MR* 2017 (1) SA 97 (GP), that was decided on 10 August 2016 by the Gauteng Division of the High Court in Pretoria, the court focused mainly on the duration of the marriage. Both the husband and wife were not guilty of misconduct in that matter. However, their marriage only lasted for 24 months and was characterised by squabbles throughout the duration. The court reasoned that 'the longer the marriage the more likely it is that the benefit will be due and proportionate, and, conversely, the shorter the marriage the more likely the benefit will be undue and disproportionate'. The court also took into account the fact that the husband had built a substantial estate before entering into the marriage. Furthermore, the wife had sold the property that she brought into the marriage and had used the money for her sole benefit. It ordered partial forfeiture against the wife.

The SCA also recently had a bite at the cherry on this issue. In the case of *BS v PS* 2018 (4) SA 400 (SCA) was decided on 28 March 2018, the court had to consider an appeal from the Eastern Cape Division of the High Court in Grahamstown, which had decided that the wife had to forfeit 80% of the marital benefits due to an alleged affair on her part. The SCA found that the High Court erred in placing all the blame on the wife due to the alleged affair. It made its decision without considering the constitutionality of s 9(1) of the Act. Instead, it focused on the circumstances of the case and the duration of the marriage. It was common cause that the wife paid 80% of the household's expenses as she earned a higher salary than the husband. Furthermore, the parties had been married for 28 years. Based on those considerations the wife's appeal succeeded.

Should s 9(1) be removed from the Act in its entirety?

In the article by Bertus Preller 'Adultery and the Forfeiture of Assets in a Divorce' (www.divorcelaws.co.za, accessed 6-6-2019) Mr Preller based his arguments on *MC v JC* and the recent Constitutional Court (CC) decision in *DE v RH* 2015 (5) SA 83 (CC) that s 9(1) is archaic and outdated. In *DE v RH* the CC found that the claim for damages against a third party that has committed adultery with a spouse was no longer part of our law in light of changing public policy, social norms and international attitude towards adultery. The court went on to state that the law cannot be held responsible to shore up or sustain an otherwise ailing marriage. Therefore, it remains the primary responsibility of the parties to maintain their marriage. Many lessons can be drawn from *DE v RH* in trying to solve the problem arising from s 9(1).

Mr Preller rightly concludes that the fault principle must be completely removed from the Divorce Act in clear and unambiguous terms. In his opinion, its retention only serves to afflict divorce law with confusion and uncertainty. Unfortunately, Mr Preller does not consider whether the problem could be addressed by removing some provisions from the section or whether it ought to be deleted altogether. Below, I will show that there are some worst-case scenarios, which would not be safeguarded if the whole section were to be deleted.

In an earlier article by Magdaleen de Klerk 'Fair divorce: Misconduct does not play a role in forfeiture claims' 2014 (April) *DR* 37, the author correctly concludes as follows: 'A party cannot forfeit what he or she has contributed towards the marriage. The court must uphold the law and not make a moral judgment'. She also did not opine on whether there are any good provisions that can be left intact in the section.

Suggested way forward

In the most recent case out of a series of cases considered in preparing this article, the Gauteng Division of the High Court in Pretoria ordered a full forfeiture of benefits against a wife where the duration of the marriage was very short and the wife had not contributed anything to the joint estate. The decision was made in *M v M* (GP) (unreported case no 14836/2007, 20-4-2018) (Ledwaba DJP) and was marked as unreportable. The parties were married to each other in community of property and the matrimonial assets comprised of two properties and the husband's pension fund. The husband had purchased the immovable property before meeting the wife and during the marriage, he continued to contribute to the bond payments alone. He had also been contributing to his pension fund for many years before meeting the wife. The parties' marriage lasted for less than two years and both parties accused each other of having affairs outside the marriage.

Just as in the *KT v RM* and *BS v PS* cases, the court made its decision based on the duration of the marriage and the circumstances, which gave rise to the breakdown thereof. I submit that misconduct should be removed as one of the factors to be considered when granting forfeiture of benefits. However, the courts should be free to order forfeiture of benefits based on the duration of the marriage and the circumstances around the marriage. In this regard, it goes without saying that the courts must also consider the duration that the parties may have lived together before they were married and the contribution that each one of them made to the marriage.

Will this infringe the parties' freedom to contract? Marriage is not a type of contract that anyone enters into with the precision of a business contract. It is a lifelong bond based on feelings of love and commitment in which parties declare to be with each other for better or for worse and till death do they part. No one should be held bound to such commitments where the intention was clearly not to uphold them. Therefore, it is only fair and equitable for the court to order forfeiture where the intention to stay committed was defeated by a marriage of short duration, and the defendant did not contribute to the joint estate.

Tshepo Munene *LLB (Unisa)* is the executive director of Caselaw Consultant and the founder of www.familylaw.bar in Midrand.

THE LAW REPORTS

Heinrich Schulze *BLC LLB (UP) LLD (Unisa)* is a professor of law at Unisa.

May 2019 (3) South African Law Reports (pp 1 – 339);
[2019] 2 All South African Law Reports April (pp 1 – 305)

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:

GP: Gauteng Division, Pretoria
LCC: Land Claims Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Company law

Business rescue proceedings: The appeal in *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others* 2019 (3) SA 97 (SCA) arose from a failure by the GP to determine an agreed on separated issue *in limine* in two related applications and counter-applications. The court *a quo*, after a delay in adjudicating the separate issue, went on not to decide that issue, but determined the merits of the principal dispute, without affording an opportunity to the parties to present argument thereon. Suffice it to mention here that the underlying dispute concerned a breach of loan agreements concluded between the respondent lender (Absa) and the appellant borrowers and sureties for the money so borrowed from Absa. A detailed discussion of the facts falls outside the scope of the present discussion. The court *a quo* had granted the following orders, namely –

- finally liquidating a pair of relating companies;
- setting aside a resolution placing one of them in business rescue; and
- dismissing applications to intervene.

On appeal to the SCA, the appellants sought the setting aside of the orders for failure on the High Court's part to determine a separate issue; and further, that the matter be remitted to the High Court.

Swain JA held that the SCA should decide the following separated issue, firstly, whether the companies' business rescue practitioner could use property of one of them (rental income), in which Absa had a security interest, without Absa's consent; and secondly, if Absa withheld consent, whether the business rescue practitioner could nonetheless use it. The court pointed out that s 134(3) of the Companies Act 71 of 2008 provides, *inter alia*, that a company in business rescue may dispose of property in which a third party has a security interest if –

(i) the third-party consents; or
(ii) the proceeds would discharge the secured debt; and
(iii) the company promptly pays over proceeds equivalent to the debt.

The court accordingly answered issues (i) and (ii) above in the negative. As to (ii), it held that there would not be prompt paying over of proceeds, which would discharge the debt. (The practitioner proposed periodic payments from the rental income which would only eventually discharge the debt.) The answers were supportive of the High Court's final liquidation order.

Further, so the court reasoned, in application proceedings, circumspection was to be exercised in separating issues for preliminary determination.

The appeals were accordingly dismissed with costs.

Contract law – lease

Notice in terms of the Rental Housing Act: In *Luanga v Perthpark Properties Ltd* 2019 (3) SA 214 (WCC) the court confirmed that the notice period under the Rental Housing Act 50 of 1999 must run from the beginning to the end of the month and not randomly.

This case concerned an appeal against an eviction order. It deals with the interpretation of s 5(5) of the Rental Housing Act, which states that on the expiration of a lease, the tenant stays on in the property on the same terms and conditions, except that 'at least one month's written notice must be given of the intention by either party to terminate the lease'. The crisp question concerned the meaning of 'one month' in the present case.

Luanga was ordered to vacate certain residential property owned by Perthpark. On 19 July 2016 the lessees were informed that their leases would not be renewed. Luanga remained on the premises after 28 February 2017. Perthpark informed Luanga on 4 May 2017 that the lease was immediately cancelled and that they had to vacate the property by 5 June 2017.

Luanga did not vacate the property, and an application for eviction was made and granted in September 2017. On appeal of the order, Luanga argued that, first, the notice of termination of a monthly lease must run concurrently with the period of the lease and expires at the end of a month; and secondly, there was not sufficient information in the court to conduct an inquiry for purposes of s 4(6) and (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

As for the first point, if the lease was not validly terminated, that would mean that the eviction fails because the occupier is not an unlawful occupant for purposes of PIE. The landlord bears the onus of proving the lawful termination of the lease.

Davis AJ held that the one-month notice is written in peremptory language in the Rental Housing Act and, therefore, must be properly complied with.

Section 5(5) of the Rental Housing Act speaks of one calendar month. In common law the meaning of 'month' in indefinite period contracts of lease runs from the beginning of each month, and as such the notice must be given at the end of the month, to terminate the contract at the end of the next month.

The Rental Housing Act, not explicitly amending the common law, should therefore, be interpreted in light of the common law. This means that the termination must happen at the end of a month, to end at the next month. This is in line with the Constitutional values that affords protection of both the landlord and tenant and serves to create legal certainty.

Since the notice was not properly given in terms of the mandatory provisions of the Rental Housing Act, it is void *ab initio*. Luango is, therefore, still a lawful tenant in terms of PIE.

The second point is, therefore, only *obiter*, but the court reiterated that the duty in terms of PIE rests on all parties. This means that if Luango's attorneys had relevant information that could aid the court in coming to a decision about the eviction, that they have a duty to share it.

Delict

Attack by dog at public facility: The facts in *Carelse v City of Cape Town (Eksteen and Another as third parties)* [2019] 2 All SA 125 (WCC) were as follows: In December 2013, at the Harmony Day Camp, Strand (the Park) operated by the defendant (the City), the plaintiff (Carelse) was swimming in one of the swimming pools of the public facility, when she was attacked by a dog. Carelse sued the City for damages. She averred that the incident was caused wrongfully and negligently by the City's employees by, *inter alia*, failing to ensure that no dogs were allowed on the premises.

While disputing liability, the City claimed a contribution from the first and second third parties (the owner and the person in control of the dog, respectively) in the event of it being held liable.

The parties agreed that the issue of liability had to be adjudicated first, and the question of quantum would stand over for later determination, if necessary.

Vos AJ listed a number of issues that fell to be decided, only two of which merit our attention here, namely whether –

- the City acted in a wrongful and negligent manner; and
- the third-party owner of the dog was liable to make a contribution to the City.

In determining whether the City acted in a wrongful manner, the court noted that on the day of the incident, the City owed a legal duty to Carelse to ensure her safety at the park. It was common cause that the Park was operated, managed and controlled by the City's employees, and that it had three entrances for access by visitors. However, only the main entrance was access-controlled in order to prevent alcohol, drugs, firearms and dogs from being brought into the park. It was irrational and ineffectual to manage, supervise and conduct strict access control at only one entrance, while conducting no supervision or access control at the other entrances. The City could have put up signboards at the other entrances, warning visitors not to bring dogs onto the premises, or placed officials at those entrances to control access. It did not do so. The City knew that visitors and dogs entered the park through the two unmanned entrance areas but took no

reasonable steps to prevent that. It, therefore, breached its legal duty and acted wrongfully. Further, in failing to take steps to prevent the risk of dog attacks, the City acted negligently.

The City's claims against the third-party owner of the dog were then addressed. The claim against the owner of the dog was based on the *actio de pauperie*. The action lies against the owner in respect of harm (*pauperies*) done by domesticated animals acting from inward excitement (*sponte feritate commota*). In those circumstances, the animal is said to act *contra naturam sui generis* in that its behaviour is not considered typical of a well-behaved animal of its kind. Based on that principle, the court concluded that the first third party was liable to make a contribution to the City for 50% of any damages that the plaintiff might prove.

The City was thus liable for such damages as Carelse may prove. The owner of the dog is liable to contribute 50% of the proven damages, to the City. The City was ordered to pay Carelse's costs while the owner of the dog is liable to pay the costs of the City only involving the third-party notice proceedings against him on an undefended basis.

Liability for an omission – causation: The appeal in *Western Cape Department of Social Development v Barley and Others* 2019 (3) SA 235 (SCA) arose from the death of a five-month-old baby girl, Ava Barley (Ava), at a day care (early child development facility (the facility)). As a result of Ava's death, her parents (the Barleys), instituted a claim against the operator of the facility, the third respondent (Moore) for her wrongful causing of Ava's death. Ava rolled off a bed and became stuck between the bed and pedestal and asphyxiated. They also claimed damages from the appellant (the department) for psychiatric damages to themselves stemming from Ava's death. The latter claim was based on the department's omission to perform a regulatory function in respect of the facility, namely the processing of Moore's application to register it.

The court *a quo* allowed both claims.

On appeal, Dambuza JA held that the department's omission was not wrongful. The relevant factors and the regulatory framework pointed away from such a conclusion. Breach of a statutory duty, such as that on which the claim against the department was founded, is not per se wrongful for the purposes of determining delictual liability. It is merely a relevant factor in the determination of wrongfulness.

The court further held that the omission was not a cause of Ava's death and the Barleys' resultant psychiatric injuries. The contention that a visit by the department's officials would have caused Moore to observe a safer sleep routine for Ava, found no support in the evidence.

The appeal was accordingly upheld, and the court *a quo*'s order replaced with the following order: Moore was liable for the Barleys' damages as a result of the wrongful death of Ava; and the Barleys' claims against the department be dismissed.

- See law reports 'Delict' 2017 (Dec) *DR* 44 for WCC judgment.

Insurance law

Purpose of a reinstatement value conditions clause: The facts in *Watson and Another v Renasa Insurance Company Limited* [2019] 2 All SA 280 (WCC) were as follows: Watson (the insured) insured his factory and machinery with Renasa Insurance (the insurer). The factory and machinery were destroyed in a fire. The insurance policy contained a reinstatement clause in terms of which the insured was entitled to the replacement value of the damaged property. This is known as a so-called reinstatement value conditions clause (RVC clause).

The application of the RVC clause was subject to the following condition: 'The "work of replacement or reinstatement" [by the insured] must be commenced and carried out with reasonable dispatch, otherwise no payment beyond the indemnity value will be paid'.

It is trite that the insurer had delayed payment while investigating the cause of the fire. Eight years after the property had been damaged, the insurer still had to reject or accept the claim.

In an earlier trial, on the merits of the claim, and in particular the insurer's defence that the insured deliberately set fire to the property, the court had found in favour of the insured. On appeal to the SCA the insurer's appeal was rejected with costs.

The present litigation dealt with the *quantum* of the insured's claim. The insurer's defence was that following the fire, the insured had not incurred any expenditure or commenced reinstatement. As a result, so the insurer argued, it was not liable to pay in terms of the insurance policy. The insured, in turn argued that despite his best efforts to reinstate, he was unable to do so.

Cloete J, after hearing the evidence of both parties regarding the insured's strategy following the fire, held that the insured immediately started taking steps to get the factory back on its feet. He incurred some R 900 000 in expenses over a period of seven months, including retaining all his employees, repairing the electricity and alarm, and obtaining quotations for replacement machinery within days of the fire.

The court further confirmed that the insured continued to engage with the insurer, trying to extract an answer on the question whether his claim would be accepted or rejected. After the SCA's decision on the merits of the claim, the insured attempted to revive his business, but without a formal acceptance of his claim by the insurer, the insured failed to obtain the necessary funding from a bank.

The court held that there remained little else that the insured could further do to demonstrate his desire and intention to recommence the business.

The insurer has failed to pay, or tendered to pay, what it regards as its uncontested liability in respect of the indemnity value of the machinery destroyed by the fire.

Payment of the indemnity value of the insured machinery provides the very mechanism that is available to an insurer in terms of a reinstatement clause in the policy to ensure compliance by the insured with the requirements of the RVC clause.

The insurer was ordered to pay the insured the sum of R 17,9 million for reinstatement as at the date of the fire, plus interest at the rate of 15,5%.

Land law

Statutory protection of tenure: The facts in *Oranje and Others v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) were as follows: The first appellant (Oranje) is a 51-year-old farm worker. He, his wife and their two adult children reside on the farm Kaaimansgat (the farm), which is owned by the first respondent (Rouxlandia). Oranje was born on the farm and has lived there most of his life. Oranje suffered serious injuries while driving a tractor in the course and scope of his employment. There was a dispute as to whether Oranje's negligence was the cause of the accident, but nothing turns on this. Both Oranje and his wife were later, declared medically unfit to work.

Oranje thus qualified as an occupier in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). Oranje's residence in the home on the farm was dependant on his employment as a farm manager, and when he ceased to be one, Rouxlandia asked him to relocate to other accommodation on the farm. Rouxlandia successfully applied to the LCC compelling Oranje to move to other accommodation on the farm. Oranje appealed to the SCA.

Nicholls AJA held that an occupier could resist relocation where the proposed alternative accommodation was such that it would impair his dignity. Suitable alternative accommodation is defined in s 1 of ESTA as 'alternative accommodation which is safe and overall not less favourable than the occupiers' previ-

ous situation'. In the present case Oranje's new house was not a manager's house, but a smaller five-roomed house. It had been newly painted and had running water, a flush toilet and an inside bathroom. The criteria for suitability had been fulfilled.

Oranje's entitlement to the particular house that he wished to occupy was contractually linked to his employment as a manager, which had now ended due to his ill health. Neither his long-term security of tenure, nor his continued residency on the farm was threatened.

The appeal was dismissed. No order as to costs was sought by either party.

Practice – civil procedure

Effect if summons not signed by Registrar: The decision in *Motloung and Another v Sheriff, Pretoria East* 2019 (3) SA 228 (GP) concerned an action for damages arising out of an alleged failure of the defendant (the Sheriff) to serve summons, which had been issued by the plaintiffs against the Road Accident Fund. The plaintiffs further argued that the failure to serve the summons resulted in their (ie, the plaintiffs') claim becoming prescribed in terms of the Prescription Act 68 of 1969.

The Sheriff raised a special plea that because the summons was not signed by the Registrar, the summons was a nullity and, as such, the Sheriff was in law neither required nor permitted to serve same. The Sheriff further pleaded that the summons which constituted a nullity would not have interrupted prescription and that it could not be said that the failure to serve a nullity had caused the plaintiffs any loss.

Baqwa J held that r 17(3) of the Uniform Rules of Court requires both a signature of the Registrar and that the Registrar should issue the summons. Absent one or two of the signature or the issuance, the summons is visited with nullity.

From a number of earlier decisions, it is clear that if the summons is a nullity for lack of signature by the Registrar, the service of a nullity would not constitute an action and by necessary inference, would not result in the suspension of prescription.

The court accordingly ordered that the Sheriff's special plea is upheld, and the plaintiffs' action is dismissed with costs.

Procedural law

***Locus standi* of a minister to lodge an *ex parte* application for the winding-up of a company:** The decision in *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs and a related matter* [2019] 2 All SA 1 (SCA) concerned three main legal issues:

- The first touched on the requirements for a valid *ex parte* application.
- The second concerns the 'just and equitable principle' of winding-up a company.
- The third issue was whether the minister had *locus standi* to institute these proceedings in the public interest in terms of s 157(1)(*d*) of the Companies Act 71 of 2008 (the Act).

For space consideration the present discussion will be restricted to the third issue only.

Two solvent companies were placed under final liquidation at the instance of the Minister of Water and Environmental Affairs. The said companies were the appellants in the two appeals before SCA. The appellant in the first appeal was a company (Redisa) responsible for the implementation of a waste tyre recycling scheme. On 29 November 2012, the minister approved an industry waste tyre management plan that Redisa had conceptualised and submitted to her under the National Environmental Management: Waste Act 59 of 2008. The plan operated indefinitely, subject to a review conducted every five years. The first was in November 2017. Redisa contracted the appellant in the second appeal (KT) to manage the implementation of the plan. Although

approving the above and commending the plan, the minister shortly thereafter sought and obtained an *ex parte* urgent provisional winding-up order; first against Redisa and then against KT, on the same basis. Final winding-up orders were granted against both entities, on just and equitable grounds. The appellants applied for leave to appeal against the judgment and orders on several grounds. The court *a quo* granted leave to appeal to the SCA only on the ground that the court *a quo* had erred in conferring standing on the minister, purportedly in terms of s 157(1)(*d*) of the Act, to wind up the two solvent companies.

The main issue that Cachalia JA had to decide, was whether the minister was properly held to have standing to institute these proceedings in the public interest in terms of s 157(1)(*d*) of the Act. It had important consequences for the winding-up of solvent companies. Section 157(1)(*d*) entitles a creditor to apply to court to wind up a company on the ground that it is just and equitable to do so, and s 81(1)(*d*)(iii) of the Act permits the company, a director or a shareholder to apply for the winding-up on the same basis. The minister was neither a creditor, nor a director or shareholder of Redisa or of KT, and did not purport to represent their interests or step into their shoes. She had no standing to wind up a company in the interests of any of those persons or for the companies themselves. Consequently, the minister argued that a public-interest litigant with standing in terms of s 157(1)(*d*) is entitled to rely on any of the substantive grounds for liquidating a solvent company set out in s 81(1) of the Act. An earlier decision that granted the minister the right to seek provisional orders clearly did not consider any of the criteria relevant to the determination of whether the applications were genuinely in the public interest. The minister had alternative remedies available to her under the Act to address her concerns and made out no case for resorting to the drastic remedy of a winding-up without having considered the extensive alternative remedies. It was also not in the public interest for the minister to be allowed to seek Redisa's liquidation because the company was an organ of state and s 40 of the Intergovernmental Relations Framework Act 13 of 2005 became applicable. Thus, the minister as a representative of the national government, had a duty to avoid legal proceedings against Redisa by attempting to settle the dispute first through recourse to other remedies before resorting to litigation.

The appeal was upheld with costs by the majority of the court.

Tax law

Deductions for future expenditure: In *Commissioner, South African Revenue Services v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA) the court considered the scope of s 24C of the Income Tax Act 58 of 1962 (the Act).

The facts were as follows: The respondent (Big G Restaurants (Big G)) is a franchisee that operates Spur and Panarottis restaurants in terms of various franchise agreements with the Spur Group (Pty) Ltd. In terms of the agreements, Big G pays the Spur Group a monthly franchise fee. Big G is also obligated to refurnish and upgrade its restaurants from time to time in accordance with the Spur Group requirements. For this reason, Big G claimed a deduction, from gross income, in accordance with s 24C of the Act in respect of future expenditure (refurbishments) on contract (the franchise agreement).

The appellant (the Commissioner) denied the deduction. The Cape Town Tax Court ruled that the income from operating the franchise business were amounts received or accrued in terms of the franchise agreement as envisaged by s 24C. It further ruled that the cost of refurbishment was incurred in performance of the obligations under the franchise agreement.

On appeal, the Commissioner argued that the income against which the future expenditure may be deducted as envisaged in s 24C must be income and obligations deriving from the same contract.

Schippers JA pointed out that s 24C of the Act provides for a two-stage test. First, it must be determined if income was received by or has accrued to the taxpayer in terms of an agreement. Secondly, the agreement in terms of which income was received by or has accrued to the taxpayer must put an obligation on the taxpayer to incur future expenditure.

The argument by Big G that the words 'in terms of' in s 24C must be given a wide interpretation namely that Big G's income was earned 'pursuant to' or 'in accordance' with the franchise agreement, is not sound. The phrase 'obligations under such contract' obviously means under the same contract.

According to the explanatory memorandum, the purpose of s 24C is to address situations where a contract, typically a construction contract, provides for an advance payment to enable the recipient to finance the performance of its obligations under the contract (eg, to purchase materials). It is clear that the deduction for future expenditure envisaged in terms of s 24C requires that the income and the obligation must originate from one and the same contract.

Big G does not receive any advance payment in terms of the franchise agreements. Any such payment would in anyway go against the nature of a franchise agreement. The franchise agreement is not a source of income. Instead, it enables Big G to exploit the branding of Spur and Panarottis to provide food to its customers. The income derives from the selling of food and not from the franchise agreement.

The appeal was thus upheld with costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, civil procedure, company law, competition law, constitutional law, criminal law, discovery and inspections, evidence, immigration, insolvency and business rescue, international agreements, local authorities, magistrates' courts, mining and minerals and practice.

Employees be aware: A discussion

By Ntombifikile Zulu

Steenkamp and Others v Edcon Ltd (CC) (unreported case no CCT29/18, 30-4-2019) (Basson AJ (Mogoeng CJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring))

The matter concerns the leave to appeal against the judgment of the Labour Appeal Court (LAC) refusing the applicants condonation for the late filing of an application in terms of s 189A(13) of the Labour Relations Act 66 of 1995 (LRA). Prior to this application, the applicants brought an application before the Constitutional Court (CC), which was dismissed on the grounds that the dismissal pursuant to the notice defaulting s 189A(8) of the LRA did not result in the invalidity of the dismissal. Subsequently the applicants brought an application in terms of s 189A(13) of the LRA before the Labour Court (LC) claiming compensation in terms of s 189(13)(*d*) on the basis that their retrenchments were procedurally unfair. Because the applicants were out of time – as the LRA requires such application to be brought within 30 days – they applied for condonation. The reason for the delay was that the applicants pursued an overturned legal strategy. On this basis, the LC granted condonation for the applicants and granted leave to appeal to the LAC. The LAC overturned the decision of the LC and dismissed a condonation application on the basis that a 'failed legal strategy is doom' and cannot be a solid ground to grant condonation.

The CC was called on to decide on two issues, first, whether it was appropriate for the LAC to overturn the decision of the LC wherein they launched their procedurally unfair dismissal claim years outside the 30 days statutory prescribed time period and where the cause of action relied on was found to be flawed. Secondly, whether compensation for procedural unfairness can be claimed as self-standing remedy in the context of s 189A(13)(*d*) of the LRA.

In dealing with the first issue the court singled out two requirements for granting condonation, namely where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. The court held that in assessing whether it would be in the interests of justice to grant or refuse condonation, the court must take all factors into consideration. The court took into account not only the broader objects of the LRA but the nature, purpose and functioning of s 189A(13) of the LRA. It referred to the case of *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) where it was stated that the primary object of the LRA is expeditious resolution of disputes in the context of labour disputes. In giving effect to this primary object, the LRA imposes strict time limits within which various applications and referrals must be launched. The court noted that non-adherence to the time limits may be condoned, provided that –

- the explanation for non-compliance is compelling;
- the case for attacking a defect in the proceedings would have to be cogent; and
- the defect would have to result in a miscarriage of justice if it were to stand.

The court further held that consideration as to whether the delay was a result of a deliberate, wilful decision not to comply with a lawful and binding award in terms of the LRA was also a crucial factor. The court emphasised that because the procedure in s 189A(13) is supposed to be speedy and pre-emptive, granting condonation is restricted.

The court looked at the nature, purpose and function of s 189A(13), which provides for consultative framework. It held that for the purpose of this section even a short delay of five months is considered too long. This is because the purpose of this section is remedial in nature and 'intent no doubt is to allow for early corrective action so that the process failure will not escalate into a substantive injustice'. The court found that the delay would make the purpose of the process fruitless, which is to allow the LC to intervene with a consultation process and to make an appropriate intervention to remedy procedural flow. The section grants the LC power to make an order compelling the employer to comply with a fair procedure. In a situation/circumstance where employees are already dismissed, the court can order reinstatement of such employees to allow for the consultation process to run its course. However, in an instance where these orders are not suitable, the court where appropriate may order compensation in terms of subs (*d*).

With regards to the issue of whether compensation can be claimed as a self-standing remedy, the court held that it cannot. The court reasoned that compensation is an exceptional remedy, which is granted only where the primary remedies provided in s 189A(13)(*a*) – (*c*) are inappropriate. The court concluded that the main purpose of the section and its remedies is to 'get the retrenchment process back onto a track that is fair'. It follows that even the remedy of compensation must be read in the context of the short term remedies and in light of the jurisdictional restriction provided for under s 189(A)(13). Compensation in terms of s 189(A)(13)(*d*) cannot be the primary relief. The court concluded that the LC did not exercise its discretion judicially and the interference of the LAC was justified.

The CC set a precedent that compensation cannot be a self-standing ground and dependent on the inappropriateness of remedies provided in s 189A(13)(*a*) – (*c*). This case is also important in that it emphasised the imperative of relying on the LRA rather than the common law grounds. What is clear from this judgment is that relying on correct grounds in the lower court is essential as the court would be reluctant in granting condonation for non-adherence to the stipulated time period.

Ntombifikile Zulu *LLB LLM (Business Law) (UKZN)* is a registrar at the KwaZulu-Natal Division of the High Court in Pietermaritzburg. ❑

By Lulama Lobola

When does a real right to a half-share of immovable property vest in a spouse?

Fischer v Ubomi Ushishi Trading CC and Others
2019 (2) SA 117 (SCA)

The issue before the Supreme Court of Appeal (SCA) in *Fischer* was whether a real right to a half-share in immovable property vests in a spouse immediately on the dissolution of a marriage in community of property, pursuant to a court order incorporating a settlement agreement in terms of which one spouse waives their half-share in the property in favour of the other, or whether that right only vests after endorsement of transfer in the Deeds Registry. An ancillary issue concerned the nature of the right acquired by the spouse by virtue of a court order.

Facts

Mr and Mrs Haynes (the second and third respondents respectively) were the registered owners of Erf 31865 Goodwood (the property). Their marriage in community of property was dissolved by a divorce order dated 10 December 2012. In terms of the settlement agreement incorporated in the divorce order, Mr Haynes waived his half-share in the property in favour of Mrs Haynes.

The appellant, Mr Fischer having obtained judgment against the first respondent, Ubomi Ushishi Trading CC and Mr Haynes in 2015, applied to the Western Cape Division of the High Court in Cape Town as the court *a quo*, for an order declaring Mr Haynes' undivided half-share in the property executable, as the Deeds Registry still reflected him as co-owner of the property. Opposing the application, Mrs Haynes argued that she had acquired full ownership of the property when the divorce order was granted. Alternatively, her personal right to full ownership of the property preceded Mr Fischers' claim.

The High Court

In its judgment the court considered two cases. In *Corporate Liquidators (Pty) Ltd and Another v Wiggill and Others* 2007 (2) SA 520 (T) it was held that where parties enter into a settlement agreement regarding the division of their assets, which is made an order of court, as contemplated in s 7(1) of the Divorce Act 70 of 1979 (the Divorce Act), ownership of the immovable property vests immediately. In *Middleton v Middleton and Another* 2010 (1) SA 179 (D) the court, however, held that a settlement agreement only creates a personal right for the transfer of ownership as the divorce order cannot vest ownership without transfer or delivery. Following the reasoning in the *Corporate Liquidators* case the court *a quo* dismissed the application.

Judgment

In a unanimous judgment, the SCA noted s 16 of the Deeds Registries Act 47 of 1937 (DRA) is the starting point in determining when ownership vests on divorce, the section provides:

'How real rights shall be transferred –

Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar …'.

Section 16 confirms the principle that transfer of immovable property must take place before the registrar of deeds where the land is situated, ensuring sufficient publicity. The section also plays a central role in the registration system in that it provides for derivative acquisition by requiring execution and attestation of the deed to be in the presence of the registrar this simultaneously also provides for acquisition of ownership in derivative form, in that the moment at which the registrar attests the deed is also regarded as the moment of registration of transfer.

Thus, on a proper construction of s 16 and our common law, as was noted by Innes CJ in *Lucas' Trustee v Ismail and Amod* (1905) TS 239 at 242 derivative acquisition of ownership in land requires registration of transfer.

Mrs Haynes' acquisition of the half-share in the property was derivative, arising from the settlement agreement made an order of court, this gave her a personal right to enforce registration of transfer of the property into her name.

Following from the above, the SCA found that the court *a quo* erred in its reliance on the *Corporate Liquidators* case, as in that judgment the court overlooked the common law principles of co-ownership and the applicable provision of s 26 of the DRA, which both require that co-ownership in land is only terminated on attestation of the deed of partition transfer by the registrar. The SCA thus found that the reasoning in *Middleton* was correct.

Furthermore, s 16 on its plain wording is concerned with the transfer of real rights in land. In enacting the saving provision, '[s]ave as otherwise provided in this Act or in any other law', the SCA noted that the legislators contemplated a law dealing with the transfer of real rights in land. Consequently, s 7(1) of the Divorce Act is not such a law, as that section merely authorises a court to make an order regarding the division of the assets of the parties, making no mention of the transfer of real rights in land.

It was on these grounds that the SCA found that the court *a quo* erred in its finding that on the granting of the divorce order ownership of the half-share in the property immediately vested in Mrs Haynes.

The appeal, however, failed on the alternative argument, that Mrs Haynes' personal right to full ownership of the property preceded Mr Fischers' claim. As at the time that Mrs Haynes acquired the personal right to compel transfer of the half-share of the property into her name, there was no greater or competing right to defeat her claim. There was additionally no suggestion that the agreement was concluded improperly so as to de-

feat the rights of creditors. The appeal was, therefore, dismissed with costs.

Conclusion

The unanimous judgment by the SCA reaffirms the position in our law that on the dissolution of a marriage in community of property, pursuant to a court order incorporating a settlement agreement in terms of which one spouse waives his half-share in the property in favour of the other, that agreement although binding on the parties does not by itself vest ownership in the other spouse, but merely creates a personal right to enforce transfer. This as vesting requires endorsement of transfer in the Deeds Registry. This can have significant implications not only for creditors and the registered owners, as was illustrated in this case but any other third party they may transact with.

Lulama Lobola *BA LLB (UCT)* is a legal practitioner at Herold Gie Attorneys in Cape Town. ❑

By Kgomotso Ramotsho

Purchaser not obliged to make payment until recordal is complete

Amardien and Others v Registrar of Deeds and Others (Women's Legal Trust Amicus Curiae) 2019 (2) BCLR 193 (CC)

In the case of *Amardien and Others v Registrar of Deeds and Others (Women's Legal Trust as* Amicus Curiae) 2019 (2) BCLR 193 (CC), the Constitutional Court (CC) was called on to interpret s 129(1) of the National Credit Act 34 of 2005 (NCA) and ss 19, 20 and 26 of the Alienation of Land Act 68 of 1981 (ALA). The court was engaged because statutory interpretation of these provisions raises a constitutional issue directly pertaining to s 26 of the Bill of Rights and had a significant effect on the applicants' right of access to housing. The court previously held that the interpretation of s 129(1) of the NCA raised a constitutional issue.

Facts

In 1998, the City of Cape Town established a housing initiative to deliver government subsidised housing to poor members of the Cape Town community. The Cape Town Community Housing Company (the fifth respondent), was the driving force for the delivery of the subsidised housing. It receives housing subsidies on behalf of the delivery of beneficiaries and applies those subsidies toward the construction of new houses. The subsidies are used to reduce the purchase prices of the houses. The applicants were all beneficiaries of government subsidised housing and concluded instalment sale agreements with the fifth respondent as the seller between December 2000 and February 2001.

The relevant terms of these agreements are set out in clauses 4, 8 and 17 of the instalment sale agreements. The applicants were, in terms of clause 4, required to make payment in instalments on the last day of each month for a period of four years, while clause 17 sets out the steps to be followed by the seller if the purchaser breaches the terms of the agreement or fails to comply with the seller's notice to remedy the breach.

In terms of clause 8, the fifth respondent was obliged to record these agreements with the Registrar of Deeds in accordance with the ALA. This obligation arises from s 20 of the ALA, which is headed 'Recording of contract', read with s 26, which places restriction on the receipt of consideration by virtue of certain deeds of alienation. These sections provide:

'20. Recording of contract –

(1)(*a*) A seller, whether he is the owner of the land concerned or not, shall cause the contract to be recorded by the registrar concerned in the prescribed manner provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded in terms of this section.

…

26. Restriction on the receipt of consideration by virtue of deeds of alienation –

(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until –

(*a*) such erf or unit is registrable; and

(*b*) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected'.

The applicants moved into their respective homes at various times between 2000 and 2003, only to discover that the buildings were of an inferior quality. According to the applicants, they spent substantial amounts of money repairing these homes, with little assistance from the fifth respondent. As a result, the applicants paid their instalments with varying levels of regularity. In addition, the applicants advanced the following reasons for this:

- the instalments were higher than what the applicants expected;
- the building standards were inferior quality;
- the fifth respondent had failed on numerous occasions to respond to the applicants' complaints; and
- the fifth respondent had extremely poor accounting and record keeping practices making it onerous for the applicants to calculate the outstanding amounts.

The fifth respondent failed in its contractual and statutory duty to record the instalment sale agreements. Despite the ALA's statutory bar, the fifth respondent continued to receive payment from those applicants who continued paying. It eventually recorded each of the instalment sale agreements with the Registrar of Deeds on 1 April 2014 – more than ten years after these agreements were originally concluded.

On 25 April 2014, the fifth respondent sent notices in terms of s 129(1) of the NCA (s 129 NCA notices) to the applicants, informing them (among other things) that firstly, they were in arrears in terms of their respective instalment sale agreements and provided them with various options to bring the payments up to date. Secondly, the applicants were threatened with cancellation of the instalment sale agreements in the event they failed to respond to the notice within ten days of receipt and failed to remedy the default of their payment obligations in terms of the instalment sale agreements within 20 days. Lastly, the applicants were informed that their instalment sale agreements had been recorded in terms of s 20 of the ALA.

On 23 June 2014, the fifth respondent sold the applicants' home to S & N Trust (the Trust). At that stage, the fifth respondent had not cancelled the instalment sale agreements, nor had it submitted an application to the Registrar of Deeds for cancellation of the recording of the agreements. The fifth respondent only submitted an application for cancellation of the instalment sale agreements in April 2015. The Registrar of Deeds cancelled the recording of these agreements on 4 May 2015. On 5 May, the properties were transferred to the Trust.

In 2016, the applicants launched an application in the Western Cape Division of the High Court in Cape Town against the respondents. They sought a declarator that the actions of the fifth respondent in cancelling the instalment sale agreements had been unlawful. They also sought the review and setting aside of the cancellation of these agreements by the Registrar of Deeds; and a declarator that the subsequent sale of the properties by the fifth respondent to the Trust was unlawful and hence void.

The High Court considered three issues:

- whether the applicants had been in breach of their payment obligations under their respective instalment sale agreements;
- whether the applicants had been given notice in terms of s 129(1) of the NCA; and
- assuming notice had been given, whether the extent of arrears had been indicated.

On the first question, the High Court held that although the instalments had not been due and payable until the instalment sale agreements were recorded, that did not prevent them from becoming due. The court held that the effect of s 26 of the ALA was only to prevent the creditor from receiving consideration until it had attended to promptly recording the instalment sale agreements. It did not affect the terms of agreements and accordingly did not prevent the amounts from becoming due under the instalment sale agreements. The High Court held that at the moment of recordal, all the outstanding amounts became immediately payable and since the applicants were in arrears under the instalment sale agreements and accordingly in default thereof, these agreements were amenable to cancellation by the fifth respondent.

Regarding the alleged conflict between the NCA and the ALA, the High Court held that s 129(1) of the NCA substantively overrides s 19 of the ALA. It noted that it is plainly equivalent to s 129 read with s 130 of the NCA, they inconsistently provided for notice to be given as the section required a different number of days' notice before cancellation for breach of agreement can be effected. The court thus held that s 172(1) of the NCA read with sch 1 provides that where there is a conflict, the NCA prevails over those of ch 11 of the ALA. In the result, the High Court held that the fifth respondent was permitted to cancel the agreement subject to compliance with only s 129(1) of the NCA and not s 19 of the ALA.

On the question of whether the extent of the arrears had been indicated, the High Court held that it was not essential for s 129 NCA notices to set out the amounts in which the applicants were in arrears. The High Court held that the applicants' counsel did not refer to any authority in support of the argument that particulars of the arrears were an essential ingredient of a s 129 NCA notice, neither were there any provisions in the NCA nor the regulations thereto that required this. The court further held that the legislative purpose set out in s 3 of the NCA would not be frustrated if the particulars of the arrears were not included.

The High Court relied on *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another* 1986 (1) SA 729 (A) and held that 'the applicants were, notionally at least, in as good a position to determine for themselves how much they owed under the contracts.' Furthermore, if the applicants were uncertain about the amounts, the notice afforded them the opportunity (directly or through intermediary) to make the necessary inquiries or engage with the substantive issue. If the amount was lacking information that the applicants required, the fifth respondent would have bound to provided it on request.

The High Court dismissed the application with costs. An application for leave to appeal was also subsequently dismissed. The applicants petitioned the Supreme Court of Appeal for leave to appeal. On 28 July 2017, that application was dismissed.

Judgment

The CC, among other things, had to consider some of the following issues:

- Should leave to appeal be granted?
- What is the effect on the purchaser's obligation of the seller's failure to record an instalment sale agreement as required by s 20 of the ALA?
- Does s 129(1) of the NCA require a credit provider to state the amount alleged to be owing in the notice it sends to a consumer.
- Should the new evidence that the fifth respondent seeks to have admitted in this court be admitted?

- What is appropriate remedy in this case?

The CC said in order to determine the effect on the purchaser's obligations, the following legal questions must be answered:

- At what point are purchaser's obligations, in relation to late recordal of agreements in terms of s 20 of the ALA, activated?
- Secondly, can notice of recordal and cancellation of agreement be provided at the same instance?
- Thirdly, which provisions of the NCA and ALA govern cancellation as a remedy?

The CC said s 19 of the ALA limits the right of the seller to take legal action and outlines those limitations. On the other hand, s 129(1) of the NCA specifies certain obligations the creditor must fulfil before it can proceed to the stage of legal enforcement or unilateral cancellation. The purchaser has to be afforded an opportunity to consider certain steps. Therefore, the requirements of the ALA and the NCA do not conflict, and there is no need to have recourse to sch 1 of the NCA. In fact, in instances where they both apply, they can and should be read together: A seller must comply with the NCA in informing the purchaser of the default, and they must inform a purchaser in terms of s 19 if they are going to rely on the remedies in terms thereof if entitled to do so. The two pieces of legislation, specifically s 19 of the ALA and s 129 of the NCA, serve different purposes.

The CC said even if the s 129 NCA notice can additionally serve the purpose of s 19 of the ALA it does not, on the facts here, suffice. The actual notice falls short of requirements set out in s 19 of the ALA. Having regard to both the plain meaning of s 20 read with s 26 of the ALA and the case law referred to, the effect of the late recordal is clear. The payments under the instalment were not arrears as contended by the fifth respondent.

The CC held that the cancellation of the instalment sale agreements was premature. The effect of this is that the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements are invalid.

The CC granted leave to appeal. The order of the Western Cape Division of the High Court in Cape Town is set aside and replaced with:

'(a) The application is upheld with costs.

(b) The cancellation of the instalment sale agreements by the Cape Town Community Housing Company (Pty) Limited is unlawful and is set aside.

(c) The cancellation of the recordal of the instalment sale agreements by the Registrar of Deeds is set aside.'

The application of the Cape Town Community Housing Company (Pty) Limited to adduce new evidence was dismissed with costs and the Cape Town Community Housing Company (Pty) Limited was ordered to pay costs.

Kgomotso Ramotsho *Cert Journ (Boston) Cert Photography (Vega)* is the news reporter at *De Rebus*. ❑

New legislation

Legislation published from 2 – 31 May 2019

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

Commencement of Acts

Financial Sector Regulation Act 9 of 2017, ss 2(*a*) and (*c*), 3(*c*), 17, 20, 21(*b*), 24, 39 and 42. *Correction of commencement date:* '1 April 2019' to be replaced with '1 September 2019'. GN657 *GG*42454/10-5-2019.

Promulgation of Acts

Carbon Tax Act 15 of 2019. *Commencement:* 1 June 2019. GN800 *GG*42483/23-5-2019 (also available in Afrikaans).

Customs and Excise Amendment Act 13 of 2019. *Commencement:* 1 June 2019. GN497 *GG*42480/23-5-2019 (also available in Afrikaans).

Division of Revenue Act 16 of 2019. *Commencement:* 2 May 2019. GN636 *GG*42439/2-5-2019 (also available in Sesotho).

Financial Matters Amendment Act 18 of 2019. *Commencement:* 23 May 2019. GN799 *GG*42482/23-5-2019.

Marine Spatial Planning Act 16 of 2018. *Commencement:* To be proclaimed. GN 641 *GG*42444/6-5-2019 (also available in Siswati).

National Health Laboratory Service Amendment Act 5 of 2019. *Commencement:* To be proclaimed. GN640 *GG*42442/6-5-2019 (also available in Sepedi).

National Research Foundation Amendment Act 19 of 2018. *Commencement:* To be proclaimed. GN637 *GG*42441/6-5-2019 (also available in Afrikaans).

Powers, Privileges and Immunities of Parliament and Provincial Legislatures Amendment Act 9 of 2019. *Commencement:* 6 May 2019. GN639 *GG*42443/6-5-2019 (also available in Afrikaans).

Public Audit Excess Fee Act 20 of 2019. *Commencement:* To be proclaimed. GN798 *GG*42481/23-5-2019 (also available in Afrikaans).

Selected list of delegated legislation

Basic Conditions of Employment Act 75 of 1997

Determination in terms of s 50. GN692 *GG*42474/24-5-2019.

Broad-Based Black Economic Empowerment Act 53 of 2003

Codes of good practice on Broad-Based Black Economic Empowerment: Amended code series 000, statement 000. GenN306 *GG*42496/31-5-2019.

Codes of good practice on Broad-Based Black Economic Empowerment: Amendment of sch 1. GenN303 *GG*42496/31-5-2019.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Annual increase in medical tariffs for medical services providers: Wound care. GenN250 *GG*42431/3-5-2019.

Increase in monthly pensions and amendment of the manner of calculating compensation. GN627 *GG*42431/3-5-2019.

Continuing Education and Training Act 16 of 2006

Policy framework for administration and management of student admissions in Technical and Vocational Education and Training Colleges. GN813 *GG*42496/31-5-2019.

Employment of Educators Act 76 of 1998

Improvement in conditions of service:

Annual cost-of-living adjustment for educators. GN689 *GG*42474/24-5-2019.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Repeal of regulations under repealed Food, Drugs and Disinfectants Act 13 of 1929. GN656 *GG*42453/10-5-2019.

Amendment of regulations relating to the reduction of sodium in certain foodstuffs and related matters. GN812 *GG*42496/31-5-2019.

Labour Relations Act 66 of 1995

Designation of services as essential services: Road traffic infringement management services, certain services at boarding schools and certain services at private health and welfare centres, detections and reporting of fires services, wholesale and supply of cash services. GenN271 *GG*42464/17-5-2019.

Legal Metrology Act 9 of 2014

Amendment of regulations relating to the tariff of fees charged for services rendered in terms of the Act by the National Regulator for Compulsory Specifications. GN630 *GG*42431/3-5-2019.

Medicines and Related Substances Act 101 of 1965

Exemption of medical devices and in-vitro diagnostics from certain provisions. GN R685 *GG*42465/17-5-2019.

Fees payable. GN695 *GG*42474/24-5-2019.

Mine Health and Safety Act 29 of 1996

Guidance note on medico-legal investigations of mine deaths. GN651 *GG*42451/10-5-2019.

National Environmental Management: Air Quality Act 39 of 2004

Amendment of listed activities and associated minimum emission standards. GN687 *GG*42472/22-5-2019.

National Health Act 61 of 2003

Procedural regulations pertaining to the functioning of Office of Health Standards Compliance and Handling of Complaints by Ombud: Code of conduct for inspectors. GN817 and GN818 *GG*42496/31-5-2019.

National Road Traffic Act 93 of 1996

Determination and implementation of curriculum for traffic officers. GN802 *GG*42487/27-5-2019.

National Regulator for Compulsory Specifications Act 5 of 2008

Amendment of regulations relating to the payment of levy and fees with regard to compulsory specifications. GN631 *GG*42431/3-5-2019.

Public Finance Management Act 1 of 1999

Amendment of sch 3. GN693 *GG*42474/24-5-2019.

South African Schools Act 84 of 1996

Amendment of the national norms and standards for school funding. GN642 and GN643 *GG*42445/65-2019.

Draft delegated legislation

- Policy framework to address gender-based violence in the post-school education and training system in terms of the Continuing Education and Training Act 16 of 2006 for comment. GenN635 *GG*42437/2-5-2019.
- Applications for professional body recognition and the registration of professional designation (Environmental Assessment Practitioner) in terms of the National Qualifications Framework Act 67 of 2008 for comment. GN629 *GG*42431/3-5-2019.
- Draft National Climate Change Adaptation Strategy in terms of the National Environmental Management: Air Quality Act 39 of 2004. GN644 *GG*42446/6-5-2019.
- Procedures to be followed for the assessment and minimum criteria for reporting of identified environmental themes in terms of s 24(5)(*a*) and (*h*) when applying for environmental authorisation in terms of the National Environmental Management Act 107 of 1998 for comment. GN648 *GG*42451/10-5-2019.
- Amendment of the OR Tambo International Airport Special Economic Zone in terms of the Special Economic Zones Act 16 of 2014 for comment. GN654 *GG*42451/10-5-2019.
- Minimum Standards for the Consideration of Environmental Aspects in the Preparation and Review of Municipal Spatial Development Framework in terms of the National Environmental Management Act 107 of 1998 for comment. GN647 *GG*42451/10-5-2019.
- Licensing exemption and registration notice in terms of the Electricity Regulation Act 4 of 2006 for comment. GN659 *GG*42456/13-5-2019.
- Proposed resource split in traditional linefish and squid fishing sectors prosed classification of white mussel, oysters and hake handline fishing as small-scale fishing in terms of the Marine Living Resources Act 18 of 1998 for comment. GN660 *GG*42457/13-5-2019.
- Publication of fees in terms of the National Road Traffic Act 93 of 1996 for comment. GN661 *GG*42459/15-5-2019.
- Proposed regulations pertaining to financial provisioning for rehabilitation and remediation of environmental damage caused by reconnaissance, prospecting, exploration, mining or production operations in terms of the National Environmental Management Act 107 of 1998 for comment. GN667 *GG*42464/17-5-2019.
- Priority housing development areas in terms of the Housing Act 107 of 1997 for comment. GN671 *GG*42464/17-5-2019.
- Intention to amend list of activities, which result in atmospheric emissions that have or may have significant detrimental effect on environment in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN686 *GG*42472/22-5-2019.
- Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R754 *GG*42475/24-5-2019.
- Rules for national language bodies and rules for provincial language committees in terms of the South African Language Board Act 59 of 1995 for comment. GN688 *GG*42474/24-5-2019.
- Draft amendments to the code of conduct made under the Private Security Industry Regulation Act 56 of 2001. GenN294 *GG*42496/31-5-2019.
- Proposed prohibition notice regarding use of nitrofurans, nitromidazoles, carbadox and diethylstilbestrol in food producing animals in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for comment. GN807 *GG*42496/31-5-2019.
- Proposed regulations regarding stock remedies in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for comment. GN808 *GG*42496/31-5-2019.

❑

Employment law update

Monique Jefferson *BA (Wits) LLB (Rhodes)* is a legal practitioner at DLA Piper in Johannesburg.

Discrimination for false allegations of racism and insubordination

In *Legal Aid South Africa v Mayisela and Others* [2019] 5 BLLR 421 (LAC), the Labour Appeal Court (LAC) had to determine whether an employee's dismissal for false allegations of racism and insubordination was fair. In this regard, the Commission for Conciliation, Mediation and Arbitration (CCMA) had found that the dismissal was substantively and procedurally fair. On review, the Labour Court (LC) upheld the finding that the dismissal was procedurally fair but found that the dismissal was substantively unfair because the employee had incorrectly been found guilty of six of the nine charges. The matter was remitted to the CCMA and another commissioner ordered reinstatement.

The employee's dismissal stemmed from a low performance score that the employee obtained in his performance assessment. He challenged this and his supervisor provided him with the documentation on which the score was based and invited him to make representations on the score. She said that she may change the score based on his submissions. The employee refused to set up a teleconference call to discuss his performance and his supervisor perceived this as being obstructive and insubordinate. The employee on the other hand said that he had been willing to discuss his performance, but his supervisor had not followed up and arranged a call or meeting. The supervisor provided an e-mail as proof that she had indeed followed up on the meeting. The employee had responded stating that he wanted an explanation for his score in writing so that he could use this for his grievance. He went on to state 'I don't feel safe in my work anymore as an African manager' and 'I honestly think that Africans are being vilified … under the coded name of poor performance.' The supervisor's response to this was to again emphasise the importance of a meeting and thereafter the employee could refer a grievance. The employee again refused to have a teleconference call or to pursue a grievance and said that he would approach constitutional bodies such as the Public Protector and South African Human Rights Commission.

The LC was of the view that the employee was not required to attend the meeting and that the supervisor was side-stepping the issue and there was no need for a meeting. The LAC concluded that it is not up to the employee to determine how management should conduct performance assessments as this fell within management's prerogative. The LAC furthermore rejected the LC's finding that there needed to be a policy regulating such a meeting.

The LAC found that the LC had incorrectly determined that the employee was not guilty of some of the charges against him. In this regard, the employee had been grossly insubordinate as he had refused to attend meetings to discuss his performance. He had also accused his superior of conducting a witch hunt and had screamed and shouted at her. Furthermore, the employee had attacked the character of his superior and accused her of racism. The LC adopted a lenient approach with regards to the charge in which the employee accused his superior of racism as the LC seemed to be of the view that an employee could perceive a poor performance assessment as being as a result of racism. The LAC did not agree and emphasised that there needs to be a basis for alleging racism. In this case, the allegations of racism were unfounded and were a personal attack on the manager, which impacted her dignity. Furthermore, the employee had not followed an appropriate procedure to deal with the alleged racism but instead threatened to refer the matter to Parliament and the Public Protector, which was tantamount to intimidation. The supervisor later scheduled a meeting, which the employee did not attend and then he responded with a threatening e-mail alleging that she was intimidating and harassing him and that he withdrew his intention to meet with her until she showed him respect.

It was held that the LC should not have interfered with the commissioner's findings and the appeal was accordingly upheld. It was emphasised that unjustified

allegations of racism against a superior in the workplace can have a very serious and damaging impact on the work environment and can undermine management's authority. It is, therefore, important that there are compelling reasons for the allegations and an appropriate process has been followed. Unfounded allegations of racism warrant disciplinary action.

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

Limitations on awarding protected promotions

Ekurhuleni Metropolitan Municipality and Another v SALGBC and Others (LC) (unreported case no JR369/15, 10-5-2019) (Whitcher J).

Having worked for the applicant municipality for 15 years, during which time he was appointed to act in the post of Operations Officer on numerous occasions, the employee applied for the post in 2013.

However, when he was not shortlisted for the post, the employee referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration claiming the municipality acted unfairly by failing to short-list him.

The arbitrator agreed with the employee's argument and awarded him a protected promotion as from the date the municipality appointed the second applicant to the post.

A protected promotion is a remedy awarded to employees who successfully prove they ought to have been promoted but for the unfair conduct of the employer. The result of a protected promotion is that the employee retains the position occupied prior to applying for a promotion but is awarded the same remuneration and benefits they would have received had they been appointed to the position. The employee's status is also elevated to the status concomitant to the post applied for.

Against this award the municipality approached the Labour Court to review and set aside the arbitrator's findings.

In examining the evidence presented by the parties at arbitration, the court found the employee had presented a *prima facie* case in establishing an unfair labour practice – he met all the requirements for the post with regard to both qualification and experience, whereas the successful incumbent did not meet the minimum qualifications nor had the required experience. In its defence, the municipality side-stepped the evidence presented by the employee and argued that the appointment was made strictly in accordance with its equity plan. In doing so, the municipality downplayed the minimum requirement set out in the advert.

The court found the arbitrator's finding that the municipality had committed an unfair labour practice, was not susceptible to being reviewed and set aside. The municipality focused solely on demographics and failed to appreciate the fact that affirmative action measures only apply when both candidates are suitably qualified for the post in question.

On the issue of protected promotion, the court held:

'The only ground of review which has merit lies against the arbitrator's decision to award protective promotion. In *KwaDukuza Municipality v SALGBC and Others* (2009) 30 ILJ 356 (LC) the court ruled that so-called protected promotion is merely a disguised form of compensation, which may not be granted in the absence of proof that the employee has suffered an actual loss and is unlawful if it exceeds the one-year limit on compensation prescribed by the LRA. The award of protected promotion was substituted by an award of compensation equal to 5 months' salary.

In the present case, while I accept that Mr Pieterse is highly qualified and experienced and was not granted a fair chance to compete for the post, there is insufficient evidence on record to hold that, but for the municipality's unfair conduct, he would have been promoted. There is no evidence on record about the merits or otherwise of the other candidates who applied for the post. Moreover, in the end, the prerogative to appoint lies with employers, as long as they comply with the basic tenets of fairness, which is, adhere to the minimum requirements of the post, and, where appropriate, grant suitable candidates a fair opportunity to compete for the post.

The appropriate remedy at the time of the arbitration was an order directing the applicant to redo the appointment process from the shortlisting stage, and this still appears to be the most sensible and practical approach considering Mr Pieterse was still acting in the post at the time of the arbitration.'

The court confirmed the award insofar as the finding that the municipality had committed an unfair labour practice, however, substituted the remedy of protected promotion with a finding that the municipality redo the appointment process from the short-listing stage.

Commentary

It may be useful to expand on the 'but for' test adopted by the court.

Under circumstances where an employee successfully proves that their employer acted unfairly by not shortlisting them for a position applied for, an arbitrator would seldom (if ever), award the employee a protected promotion.

Without the employee being subjected to a final interview and even possibly undergoing psychometric tests and being ranked or compared against others who took part in the same process; there is nothing that the arbitrator can rely on to justify a finding that the employee would have been appointed had they been shortlisted. In *Sun International (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (LC) (unreported case no JR939/2014, 18-11-2016) (Lagrange J) delivered on 18 November 2016, the court held that an employee claiming they ought to have been appointed to the position applied for, bears the onus to establish that 'but for' the employer's unfair conduct, they would have been appointed.

In adopting this approach and applying the 'but for' test, the court in the judgment under review found that there was no evidence before the arbitrator to sustain the argument that 'but for' the municipality's unfair conduct in not shortlisting the employee – he would have been appointed to the position of Operations Officer. It was for this reason that the court set aside the remedy of a protected promotion. ❑

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

Send your comprehensive question to Moksha Naidoo at: derebus@derebus.org.za

What is the 'voice of the child' and why should we adhere to it?

By Marici Corneli

The participation of a child in matters affecting them in a divorce or separation is mandatory according to the Children's Act 38 of 2005 (the Children's Act).

The 'best interest of the child' and the 'voice of the child' concept is used, so that an understanding about the child and their capacity can be formed by the court. It is advised to involve a child in the decisions that affect them from the start of the parents' divorce or separation.

Protecting a child from harmful exposure to anger, confrontation and messy details of their parents' divorce is important.

The focus of the 'voice of the child' is to –

- understand the child's world and all their role-playing systems;
- understand the child's socio-emotional functioning within these systems; and
- hear the child's emotional experience of these systems.

Sections 6(2)(*a*), 7(1)(*a*) – (*n*), 10 and 31(1)(*a*) of the Children's Act addresses the best interest of the child standard and the right of the child to participate and express their views in all matters that affect them, as well as their right to be heard in official proceedings in motion.

Section 10 of the Children's Act reads:

'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

Section 31(1)(*a*) of the Children's Act reads:

'Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (*b*) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.'

The 'voice of the child' practitioner's mandate when performing a 'voice of the child' exercise is to:

- **See** the world through the eyes of the child.
- **Explore** and **understand** all the aspects and factors that influence the child's world and to understand the current way they experience being in that world.
- **Convey** and **inform** by ensuring that the child's needs and/or wishes are communicated and understood by the parents.
- **Induce change** by informing both the parents and the child regarding the decision-making process with creative solutions to challenging situations.

According to the article 'Child participation' on the World Vision International website (www.wvi.org, 31-5-2019), child participation is one of the core principles of the United Nations Convention on the Rights of the Child, which asserts that 'children and young people have the right to freely express their views and that there is an obligation to listen to children's views and to facilitate their participation in all matters affecting them within the families, schools, local communities, public services, institutions, government policies, and judicial procedures. At World Vision, we consider child and youth's meaningful, safe, and appropriate participation a key strategic priority for ensuring sustained child well-being and creating democratic societies with informed and engaged citizens.

We believe that children and young people can play a significant role as agents of transformation with the capability to engage in decision-making processes, in accordance with their evolving capacities and gradually increasing autonomy. When children and young people learn to communicate opinions, take responsibility and make decisions, they develop a sense of belonging, justice, responsibility and solidarity.'

Divorce statistics

The importance of a child's view is even more important when we look at the divorce statistics released by Statistics South Africa in the 'Marriages and Divorces 2016 Report' released in May 2018:

- The statistics show that 25 236 divorces took place in 2016 and that 44,4% of divorces were marriages that lasted less than ten years.
- The highest portion of divorces occurred to couples who had been married for five to nine years.
- 13 922 (55%) of divorces include minors (children under 18).

Growing concerns on the effect of divorce

There are a number of growing concerns, regarding the effects of divorce on the child. These effects include –

- feelings of anxiety and feelings of having no control, which include changes, uncertainty, and conflict;
- feeling unsafe – the fight, flight or freeze scenario;
- psychosomatic symptoms;
- grief and loss;
- insecurity, for example, separation anxiety;
- fear of abandonment and personal rejection;
- loneliness, helplessness and depression;
- isolation;
- escape into fantasy;
- guilt;
- low self-esteem or an unhealthy sense of self;
- dissociation;
- regression versus hyper maturity.

There is a need for a child to be raised within a stable family environment and, where this is not possible, in one resembling – as closely as possible – to a caring family environment.

A child should be protected from any physical or psychological harm that may be caused by:

- maltreatment, abuse, neglect, exploitation, degradation, violence or other harmful behaviour; or
- any family violence involving the child or a family member.

In the article 'Voice of the Child Reports ensure kids' perspectives are represented' (www.advocatedaily.com, accessed 31-5-2019) Jennifer Samara Shuber says '"Children get input into the decisions being made, but they are not the decision-makers. I make that very clear to the children I work with," says Shuber. "They do not get to decide. That fact is a relief to most children, as they do not want the responsibility, and it should not be foisted on them. Rather, their parents must step up and act like adults, which includes making tough decisions about parenting.

Children are the focus of a custody and access dispute, but we have only recently understood the importance of hearing from them on these issues," says Shuber. "Particularly as kids get older, they develop more of a voice. In order to craft child-focused arrangements and plans, understanding the child's views and preferences is essential, so the Voice of the Child Report has been developed. This is all done in the larger context of collecting as much information as possible on the child's best interests."'

Factors that need to be considered when determining the 'best interest of the child' and a 'voice of the child' report

- The personal relationship between:
  – the child and the parents, or a specific parent; and
  – the child and any other caregiver or person relevant in the circumstances.
- The attitude of the parents, or a specific parent, towards:
  – the child; and
  – exercising of parental responsibilities and rights.
- The capacity of the parents, or a specific parent, or any other caregiver or relevant person to provide for the needs of the child, including emotional and intellectual needs.
- The effects of any change in the child's circumstances, including:
  – any separation from both or either of the parents; or
  – any sibling or other child, caregiver or relevant person, with whom the child has been living.
- Practical difficulties and expense that could influence contact with either or both parents, and whether it will substantially affect the child's right to maintain personal relations and direct contact with either or both parents on a regular basis.
- Specific needs of the child:
  – to remain in the care of the child's parent(s), family and extended family; and
  – maintain a connection with the child's parent(s), family, extended family, culture or tradition.
- The child's:
  – age, maturity and stage of development;
  – gender;
  – background and any other relevant characteristics;
  – the child's physical and emotional security, as well as their intellectual, emotional, social and cultural development;
  – any disability the child may have; and
  – any chronic illness from which the child may suffer.

How does the 'collaborative child focussed mediation' process and the 'voice of the child' work?

- **Step 1(a)** – mediation, which includes a team of two co-mediators who mediate with the parents, and they involve a 'voice of the child' professional.
- **Step 1(b)** – an introductory session with the mediator and parents.
- **Step 2** – individual sessions with the child and the 'voice of the child' practitioner (one to three sessions).
- **Step 3** – feedback to the parents in the mediation or when the mediator, parents and 'voice of the child' professional are present. The voice of the child professional will give feedback to the parents in the mediation and together as a team they will consider the elements on the table and custom make a parenting plan.
- **Step 4** – the 'voice of the child' practitioner writes the report and the mediator attaches the report to the parenting plan.
- **Step 5** – reunification and facilitation-mediator will inform the child of the decisions that affects them and explain the parenting plan when the parents and 'voice of the child' professional are present.
- **Step 6** – signed parenting plan, completed Form 8 or 9 and 10 and the 'voice of the child' practitioner's report are handed in at the Office of the Family Advocate for approval.

More about the introductory session between parents and 'voice of the child' professionals

The main goal of an introductory session is to gather information, provide forms, discuss the mandate and to share concerns. The session will consist of:

- Brief marital history and overview of most significant events (what has led to the divorce?).
- Has the child been exposed to trauma? How much does the child know and what have they seen?
- How did the parents tell the child that they are going to get divorced?
- What are the current living arrangements and contact with both parents?
- What is the child's current functioning and holistic overview?
- Discuss the sequence of events (separation, relocation).
- Discuss the intermediate contact plan.
- What contact have the parents suggested?

The individual sessions with the child aim to:

- build a rapport with the child;
- explain to the child what the purpose of the sessions are;
- explain your role as the 'voice of the child' practitioner or mediator;
- have the child understand that important decisions need to be made and that they will be a part of those decisions; and
- by using the 'voice of the child' toolkit and other 'voice of the child' techniques, the 'voice of the child' practitioner will gain a holistic view of the child, by taking a picture through their lens to determine the impact that the changes in the family structure has on the child.

Important aspects that need to be explored in these sessions:

- Sense of self – discuss the child's self-concept, self-statements, temperament, interests, talents, what they are good at, possible unresolved negative life events that has not been integrated, main source of emotional support.
- Child's relationship with significant people – what are the interactions between the mother and father, siblings and any important adults in their life (grandparents, aunts, uncles) like?
- Child's functioning at school – ask about their peer relationships, their ability to socialise and interact with others. Focus on their academic functioning, academic self-concept, the child's ability to follow rules and function within a set

structure. Find out about their extra-curricular activities, after-care, homework and their parent's involvement therein.
- Child's views about the divorce – ask the child what they know and understand, and what their view is on how their parent's relationship disintegrated. How was this communicated to them? Discuss new partners and how they feel about the situation.
- The child's views on contact with their parents and other significant people in their lives – how do they feel about the transfer between two houses and ask whether they want to change anything about the current contact arrangements.
- What would the child like to change about their current situation?
- What needs to happen, for the child to cope better with the changes?
- Risk factors – discuss various types of abuse, namely, alcohol and drug abuse, verbal, physical, and emotional abuse. Speak about conflict, alienation and a parent's mental state.
- Ask permission to share the information that you have collected with the child's parents. Make a list with the child of what will be communicated to the parents and the suggestions that will be made.

Feedback session's main goal: Communicate the child's needs

During the feedback session with the parents, communicate the child's needs and capacity. Provide feedback with examples and pictures. Discuss important aspects that will influence the parenting plan such as the relationships with the parents and discuss practical arrangements. The role of the 'voice of the child' professional is to empower and support the child's needs and wishes. Sometimes parents have their own needs, which are not aligned with those of the child. Speak about possible points of conflict that need to be mediated. Work on an action plan and discuss the next steps towards a parenting plan, facilitation and reunification with the parents.

The aim of 'voice of the child' report

The report must –
- comply with the prescripts of the Children's Act;
- act as a roadmap to establish guiding principles which will assist in reaching the eventual goal of acting in the best interest of the minor child involved;
- give a clear indication of the voice and needs of the minor child;
- serve the best interests of the minor child to avoid the risk of further litigation (s 7(*n*) of the Children's Act) or exposure to further chronic parental conflict based on the inability or unwillingness of the parents to co-parent peacefully; and
- include the requirements of s 33(2) of the Children's Act.

Child participation does not mean the child has the right to demand a particular outcome or course of action. The parents, mediator and 'voice of the child' professional must still mediate and reach an outcome that is in the child's best interests.

Child participation contributes to a child's development of individual identity, competence, responsibility and a child's sense of self-esteem and confidence.

It can also be helpful to remind parents of why it is important to find 'satisfying solutions' to the issues concerning the child.

Marici Corneli *BIuris (UP)* is the Director at Family Assist and a Mediator at Mediationworx in Pretoria.

By Meryl Federl

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
DJ	De Jure	University of Pretoria	(2019) 52.1
EL	Employment Law	LexisNexis	(2019) 35.2
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2019) 16.1 April
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
PLD	Property Law Digest	LexisNexis	(2019) 23.1 March
SJ	Speculum Juris	University of Fort Hare	(2018) 32.2
THRHR	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg	LexisNexis	(2019) 82.2
TSAR	Tydskrif vir Suid-Afrikaanse Reg	Juta	(2019) 2

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Freedman, W 'A critical analysis of the escape rule' (2019) 2 *TSAR* 374.

Child law

Mezmur, BD 'Don't try this at home? Reasonable or moderate chastisement, and the rights of the child in South Africa with *YG v S* in perspective' (2018) 32.2 *SJ* 75.

Constitutional law

Modiri, JM 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post"-Apartheid constitutionalism' (2019) 52.1 *DJ* 27.

Quinot, G and van der Sijde E 'Opening at the close: Clarity from the Constitutional Court on the legal cause of action and regulatory framework for an organ of state seeking to review its own decisions?' (2019) 2 *TSAR* 324.

Rautenbach, IM 'Overview of Constitutional Court judgments on the Bill of Rights – 2018' (2019) 2 *TSAR* 303.

Consumer law

Naude, T and de Stadler, E '"Innovative orders" under the South African Consumer Protection Act 68 of 2008' (2019) 22 April *PER*.

Credit law

Fritz, C and van Heerden, CM 'Interaction between the National Credit Act and the Value-Added Tax Act where goods are surrendered or repossessed' (2019) 82.2 *THRHR* 311.

Criminal law

Barrie, GN 'Section 12(1)(*a*) of the Regulation of Gatherings Act 205 of 1993 declared unconstitutional – criminal sanction an unjustifiable limitation on the

exercise of the right to assemble' (2019) 2 *TSAR* 405.

Broughton, DWM 'Accusatorial (adversarial) process as a procedural safeguard in the face of adverse pre-trial publicity' 2019 82.2 *THRHR* 213.

De Villiers, WP 'Permanent stay of prosecution – *S v Brooks*' 2019 82.2 *THRHR* 332.

Neethling, J 'Vonnisbespreking: Onregmatige arrestasie en daaropvolgende gevangehouding: Die kousaliteitskwessie' (2019) 16.1 April *LitNet*.

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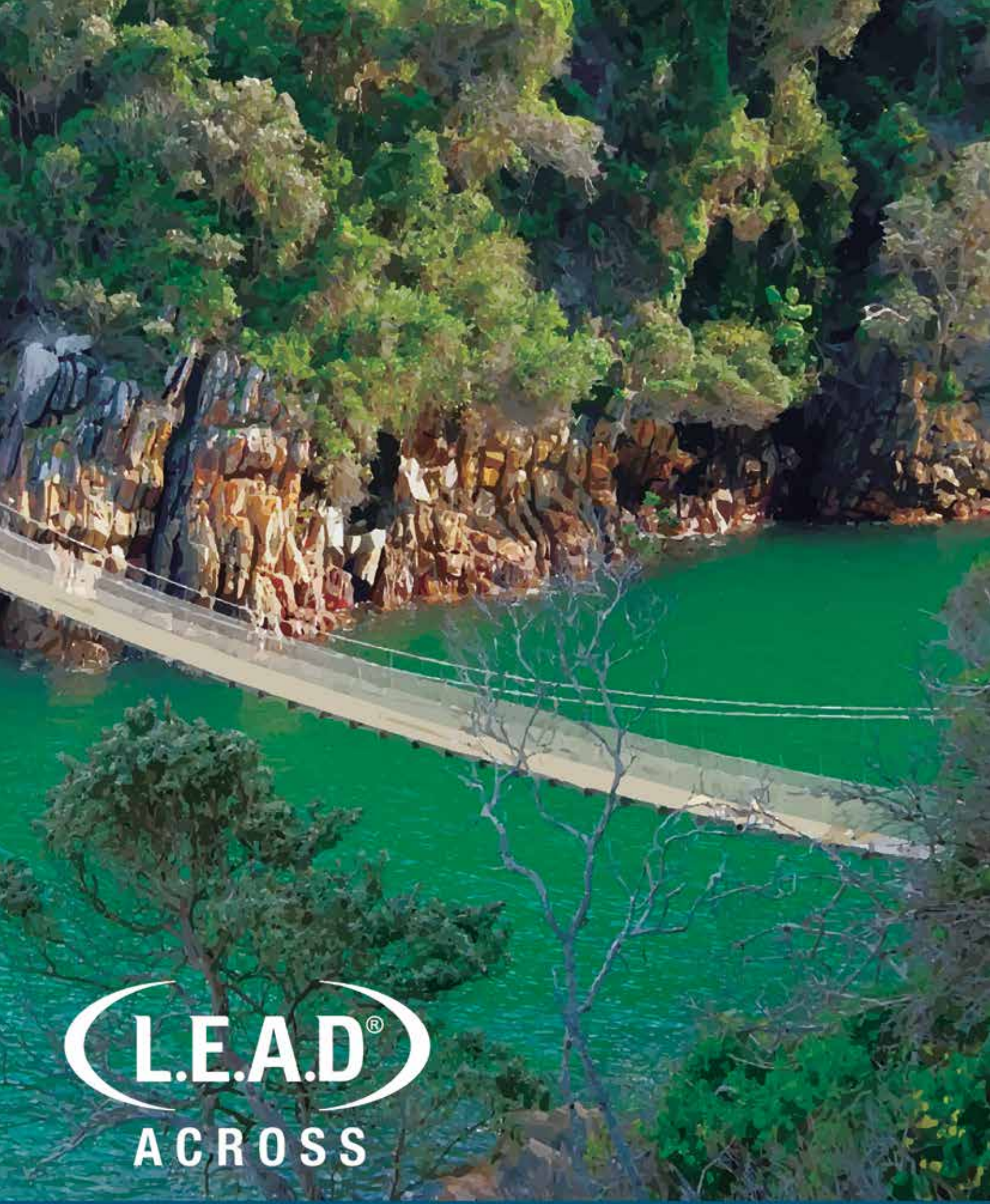
Meryl Federl *BA HDip Lib (Wits)* is an archivist at the Johannesburg Society of Advocates Library. E-mail: merylfederl@yahoo.co.uk



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Anthony V. Elisio

South African attorney and member of the Italian Bar, who frequently visits colleagues and clients in South Africa.

Rome office
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00187 Rome, Italy

Tel: 0039 06 8746 2843
Fax: 0039 06 4200 0261
Mobile: 0039 348 514 2937
E-mail: avelisio@tin.it

Milan office
Galleria del Corso 1
20122 Milan, Italy

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What does *De Rebus* need from you?
For those seeking or ceding their articles, we need an advert of a maximum of 30 words and a copy of your CV.

Please include the following in your advert –
- name and surname;
- telephone number;
- e-mail address;
- age;
- province where you are seeking articles;
- when can you start your articles; and
- additional information, for example, are you currently completing PLT or do you have a driver's licence?
- Please remember that this is a public portal, therefore, **DO NOT include your physical address, your ID number or any certificates.**

An example of the advert that you should send:
25-year-old LLB graduate currently completing PLT seeks articles in Gauteng. Valid driver's licence. Contact ABC at 000 000 0000 or e-mail: E-mail@gmail.com

Advertisements and CVs may be e-mailed to: Classifieds@derebus.org.za

Disclaimer:
- Please note that we will not write the advert on your behalf from the information on your CV.
- No liability for any mistakes in advertisements or CVs is accepted.
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A Gawie le Roux enterprise

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Course in Conveyancing Practice (*Closing dates for early registration)

First Semester

✓	Venue and Language	Dates	*Early reg.
	Cape Town (English)	5 – 8 Feb	15 Jan
	Pretoria (English)	5 – 8 Feb	15 Jan
	Johannesburg (English)	12 – 15 Feb	22 Jan
	Pretoria (Afrikaans)	12 – 15 Feb	22 Jan
	Durban (English)	19 – 22 Feb	29 Jan
	Port Elizabeth (English)	19 – 22 Feb	29 Jan

Language preference for conveyancing notes Afrikaans ☐ English ☐

Second Semester

✓	Venue and Language	Dates	*Early reg.
	Johannesburg (English)	9 – 12 July	18 June
	Pretoria (English)	9 – 12 July	18 June
	Cape Town (English)	16 – 19 July	25 June
	Pretoria (Afrikaans)	16 – 19 July	25 June
	Bloemfontein (English)	16 – 19 July	25 June
	Durban (English)	23 – 26 July	2 July

Course in Notarial Practice (*Closing dates for early registration)

First Semester

✓	Venue and Language	Dates	*Early reg.
	Johannesburg (English)	21 – 22 Feb	31 Jan
	Pretoria (Afrikaans)	25 – 26 Feb	4 Feb
	Pretoria (English)	28 Feb – 1 Mrt	7 Feb
	Durban (English)	4 – 5 March	11 Feb
	Bloemfontein (English)	5 – 6 March	12 Feb
	Cape Town (English)	7 – 8 March	14 Feb

Language preference for notarial notes Afrikaans ☐ English ☐

Second Semester

✓	Venue and Language	Dates	*Early reg.
	Johannesburg (English)	24 – 26 July	3 July
	Pretoria (English)	31 Jul – 2 Aug	10 July
	Durban(English)	31 Jul – 2 Aug	10 July
	Cape Town (English)	6 – 8 Aug	16 July
	Pretoria (Afrikaans)	12 – 14 Aug	22 July

Registration is subject to the "Registration Rules" as stated on our website www.aktepraktyk.co.za

"For those serious about conveyancing"

A joint publication of the Legal Practitioners' Fidelity Fund and the Legal Practitioners' Indemnity Insurance Fund NPC
(A Non Profit Company, Registration No. 93/03588/08)

RISKALERT

JULY 2019 NO 3/2019

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Legal Practitioners' Indemnity Insurance Fund: 1256 Heuwel Avenue, Centurion 0127• PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900
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Legal Practitioners Indemnity Insurance Fund NPC
Est. 1993 by the Legal Practitioners Fidelity Fund

LEGAL PRACTITIONERS FIDELITY FUND
SOUTH AFRICA
Your Champion in the Legal Profession Since 1941

EDITOR'S NOTES

In the May 2019 edition of the *Bulletin* we published the Master Policy with the proposed amendments tracked thereon. We also invited input and comment from the stakeholders.

The Master Policy has now been finalised and the policy wording for the 2019/2020 scheme year is published in this edition of the *Bulletin*. Practitioners are, once again, requested to read the policy carefully in order to understand the terms and conditions under which indemnity is provided by the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF).

We wish to draw particular attention to the exclusion of cybercrime (clause 16(o)). Risk management steps must be taken by practitioners within their practices to mitigate cyber risk. Regard can be had to the August 2018 edition of the *Bulletin* for some suggestions of the steps that practitioners can consider implementing in their practices in order to mitigate against this risk. When dealing with requests purporting to be instructions to change beneficiary banking details, regard must be had to the obligations on the practitioner to verify the banking details of beneficiary- Rule 54.13 imposes an obligation on the practitioner to verify the banking details of clients. The new policy also explains the steps practitioners can take to verify the banking details of intended recipients. Reliance cannot be placed on the email purporting to be from the client or other intended recipient of the funds. Cybercrime is on the increase internationally and there are several insurance products available in the commercial market in order to cover this risk.

Thomas Harban,
Editor

Clause 16(m) excludes indemnity where the receipt or payment of funds is unrelated to an existing instruction to provide legal services. This exclusion applies in those circumstances where, for example, practitioners act as paymasters or simply a conduit for funds.

The Executor Bond policy is also published in this edition of the *Bulletin*. Bonds will not be issued to attorneys who fail to comply with the terms and conditions. Attorneys must give the LPIIF regular updates on the status of the estates they are administering. A separate estate late bank account must be opened as prescribed in section 28 of the Administration of Estates Act 66 of 1965.

We wish you a claim-free 2019/2020 scheme year.

Thomas Harban
Telephone: (012) 622 3928
Email: thomas.harban@LPIIF.co.za

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

THE 2019/2020 LPIIF MASTER POLICY

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;
        (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 **In-**

sured 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/coun-

terclaim 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 report the **Insured's** conduct to the regulator and to

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

36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**;
37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:
    a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount of Cover** provided by this policy;
    b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in 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.

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

THE 2019/2020 EXECUTOR BOND POLICY

1. GENERAL PROVISIONS

1.1 The Legal Practitioners Indemnity Insurance Fund (herein after referred to as the LPIIF) will provide a bond only to the executor of a deceased estate, the administration of which is subject to the provisions of South African Law, and who is an attorney practising in South Africa with a valid Fidelity Fund Certificate.

1.2 The LPIIF will, in its sole discretion, assess the validity of and risk associated with the information supplied in the application, and any other relevant information at its disposal, which includes the manner in which the administration of previous estates in respect of which bonds have been issued, in deciding whether or not to issue a bond to an applicant.

1.2.1 If the applicant disputes the LPIIF's rejection of the application, such dispute will be dealt with in the following order:

1.2.2 written submissions by the applicant should be referred to the LPIIF Executive Committee at disputes@lpiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the communication from the LPIIF rejecting the application;

1.2.3 should the dispute not have been resolved within thirty (30) days, then such dispute will be referred to the Sub- Committee appointed by the LPIIF's board of directors for a final determination.

2. EXCLUSIONS

Before completing the application, please note that a bond will NOT be issued where:

2.1 the applicant would be appointed in any capacity other than as the executor;

2.2 the day to day administration of the estate would not be executed by the applicant, partners or co-directors or members of staff under the applicant's, partners or co-directors' supervision, within the applicant's offices;

2.3 the administration of the estate would be executed by any entity other than the legal firm of which the applicant is part;

2.4 the co- executor is not a practising attorney;

2.5 any claim involving dishonesty has been made against the applicant or any member of his or her firm. We reserve the right not to issue any bonds to the applicant or any firm in which the applicant is/ was a partner or director or member of staff at the time of the alleged dishonesty or thereafter;

2.6 the applicant or his or her firm has not provided the LPIIF with all updates or the required information in respect of previous bonds, or complied with the Terms and Conditions;

2.7 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;

2.8 the applicant is an unrehabilitated insolvent, suspended or interdicted from practice, or where proceedings have commenced to remove him or her from the roll of practicing attorneys;

2.9 the applicant has either been found guilty by a court or a professional regulatory body of an offence or an act involving an element of dishonesty, or by reason of a dishonest act or breach of a duty, been removed from a position of trust.

3. TERMS AND CONDITIONS

3.1 An applicant must complete the prescribed application form, and provide the LPIIF with all the relevant supporting documents. A copy of the application form is attached as annexure "A".

3.2 In the case of an application for co-executorship, each applicant must sign and submit a separate application form and also sign the Undertaking (Form J262E). Each applicant will be jointly and severally responsible for adhering to all the terms and conditions contained in this application.

3.3 The applicant undertakes:

3.3.1 to finalise the administration of the estate for which the bond is requested, within twelve (12) months from date of issue. In the event that the administration takes longer than twelve (12) months, the executor shall provide written reasons for the delay and evidence thereof, not later than thirty (30) days before the expiry of the twelve (12) month period;

3.3.2 to provide the LPIIF with information and access to records and correspondence relating to each estate for which the LPIIF has issued a bond, as if the LPIIF were in a similar position to the Master o≠f the High Court or any beneficiary. In this regard:

3.3.2.1 a copy of the letters of executorship must be provided to the LPIIF within thirty (30) days of being granted by the Master. Failure to provide the letters of executorship or any written reasons and evidence on why the letters cannot be provided within the thirty (30) days will result in no further bonds being issued and an application to the Master of the High Court to have the applicant removed as an executor;

3.3.2.2 a separate estate bank account must be opened as required in terms of Section

28 of the Administration of Estates Act 66 of 1965 and proof of such account must be submitted to the LPIIF within thirty (30) days of being appointed as executor. When completing the application for a Fidelity Fund Certificate, all funds and property held in respect of estates must be accounted for and a detailed list setting out the particulars thereof must be provided to the LPIIF;

3.3.2.3 copies of the provisional and final liquidation and distribution accounts must be provided to the LPIIF, within six (6) months from the granting of the letter of executorship. Alternatively proof of an application for and the granting of an extension or condonation by the Master of the High Court must be provided. Failure to comply with this provision will result in an application to the Master of the High Court to have the applicant removed as executor.

3.3.2.4 if applicable, within 30 days of the final liquidation and distribution account having being approved, the executor must formally apply to the Master of the High Court for a reduction of the value of the bond and provide proof of such application to the LPIIF within 30 days of doing so.

3.3.2.5 the Master's filing slip or release must be provided to the LPIIF within 30 days of issue by the Master.

3.3.3 to ensure that all insurable assets in the estate are sufficiently and appropriately insured, within 24 hours of receipt of the letters of executorship, and to provide the LPIIF with proof of such insurance within 30 days of such appointment. The insurance must remain in place for the duration of the administration of the estate, failing which the applicant and his firm will be personally liable for any loss or damage that may result from the absence of such insurance;

3.3.4 to keep the LPIIF fully informed about the progress of the administration of the estate - in the same way as he or she would inform the Master of the High Court or any beneficiary, of the progress of the administration;

3.3.5 to inform the LPIIF within 30 days of becoming aware of a change in his or her status as a practitioner or of any application for removal or suspension as attorney or executor or any similar office;

3.3.6 If an applicant or a firm reaches 75 % of the R20 million limit (that is, R15 million) as specified in clause 4 and clause 3.1.1 is applicable, the applicant or firm shall provide the LPIIF, within thirty (30) days from request, with a written plan evidencing how the reduction of the exposure in respect of active bonds older than twelve (12) months will be achieved. Failure to comply with this provision will result in no new bonds being issued.

3.4 Once a bond has been issued, the applicant will not seek to reduce its value, unless the Master of the High Court is satisfied that the reduced security will sufficiently indemnify the beneficiaries and has given written confirmation of such reduction. A copy of such written confirmation must be provided to the LPIIF within thirty (30) days of it being provided.

3.5 The applicant consents to the LPIIF making enquiries about his or her credit record with any credit reference agency and any other party, for the purposes of risk management.

3.6 The applicant consents to the relevant law society or regulator giving the LPIIF all information in respect of the applicant's disciplinary record and status of good standing or otherwise.

3.7 The applicant undertakes to give the LPIIF all information, documents, assistance and co-operation that may be reasonably required, at the applicant's own expense. If the applicant fails or refuses to provide assistance or co-operation to the LPIIF, and remains in breach for a period of thirty (30) days after receipt of written notice from the LPIIF to remedy such breach, the LPIIF reserves the right to:

3.7.1 report the applicant to the law society or regulator having jurisdiction over the executor; and/or

3.7.2 request the Master to remove him or her as the executor.

3.8. The applicant accepts personal liability for all and any acts and/or omissions, including negligence, misappropriation or maladministration committed or incurred whether personally or by any agent, consultant, employee or representative appointed or used by the applicant in the administration of an estate.

3.9 In the event of the LPIIF's having made a payment in respect of a claim arising out of a fraudulent act or misappropriation or maladministration, it reserves the right to take action to:

3.9.1 institute civil and/or criminal proceedings against the applicant; and/or

3.9.2 report the applicant to the law society or regulator having jurisdiction over the executor.

3.10 The other partners or directors of the firm must sign a resolution acknowledging and agreeing to the provisions set out in that resolution. A copy of such resolution is attached as annexure "B".

3.11 If there is any dispute between the LPIIF and the executor as to the validity of a claim by the Master of the High Court, then such dispute will be dealt with in the following order:

3.11.1 written submissions by the executor should be referred to the LPIIF's internal dispute team at dispute@lpiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the written communication from the LPIIF, which has given rise to the dispute;

3.11.2 should the dispute not have been resolved within

thirty (30) days from the date of receipt by the LPIIF of the submission referred to in 3.11.1, then the parties must agree on an independent senior estates practitioner with no less than 15 years standing in the legal profession, to which the dispute can be referred for a determination. Failing an agreement, the choice of such senior estates practitioner will be referred to the president of the law society (or his/her successor in title) having jurisdiction over the executor;

3.11.3 the parties must make written submissions which will be referred for a determination to the senior estates practitioner referred to in 3.11.2. The costs incurred in so referring the matter will be borne by the unsuccessful party;

3.12 A copy of the executor's current Fidelity Fund Certificate must be submitted annually within (thirty) 30 days of issue, but no later than the end of February each year.

4. LIMITS

4.1 The value of any bond is limited to **R5 million** per estate. The cumulative total of all bonds issued to any one firm will not exceed **R20 million** at any given time.

4.2 If a practitioner is part of or holds himself or herself out to be part of, more than one firm simultaneously, such practitioner and all the entities associated with that practitioner will hold a maximum cumulative total of **R20 million** in bonds at any given time.

4.3 In the case of co-executorship, each executor needs to meet the criteria as specified in this document. The limits will apply as mentioned in 4.1 and 4.2 above as if there were no co-executorship.

4.4 No new bonds will be issued where the applicant or the firm has failed to adhere to any of the provisions of this policy.

5. SOLE RECORD OF THE AGREEMENT

5.1 This document constitutes the sole record of the agreement between the LPIIF, the firm and the applicant in relation to the bond to which this document applies.

5.2 This document supersedes and replaces all prior commitments, undertakings or representations, (whether oral or written) between the parties in respect of this application.

5.3 No addition to, variation, novation or agreed cancellation of any provision of this document shall be binding upon the LPIIF unless reduced to writing and signed by or on behalf of both parties, by authorised persons.

5.4 If there are any material changes to the information contained in this application, the applicant undertakes to inform the LPIIF in writing within fifteen (15) days of such change.

6. DOMICILIUM

The parties choose as their *domicilia citandi et executandi* for the service of notices given in terms of this agreement and all legal processes, the following addresses:

6.1 LPIIF: 1256 Heuwel Avenue
Centurion
0157
Email: courtbonds@lpiif.co.za

6.2 The Applicant: The address provided in the application form.

6.3 Notices or legal processes may be delivered by hand or sent by electronic mail to the above addresses. The date of receipt by the addressee will be the date of hand delivery or transmission.

6.4 Either party may change its *domicilium* by giving the other party written notice of such change.

7. DECLARATION

If the bond is granted, I agree:

7.1 to fully comply with the terms and conditions contained in clause 3;

7.2 that all estate funds will be invested strictly in terms of the Administration of Estates Act 66 of 1965, the Legal Practice Act 28 of 2014 and the rules and regulations as promulgated in respect thereof;

7.3 to furnish the LPIIF with the annual audit certificates completed by my or our external auditors, verifying the continued existence of the property or funds under my control as executor within thirty (30) days of such certificate being issued;

I hereby confirm that I have read, understand and agree to be bound by the terms and conditions contained in this document.

DATED AT .....

ON THIS ..... **DAY OF** ..... **20.....**

.....

.....
WITNESS (Full names & signature)

.....

.....
WITNESS (Full names & signature)

.....

.....
APPLICANT (Full names & signature)

ANNEXURE A:
APPLICATION FORM FOR EXECUTOR BOND

1	APPLICANT		
1.1	Surname :		
1.2	Full names :		
1.3	Identity number :		
1.4	Practitioner number :		
1.5	Fidelity fund certificate number :		
1.6	Residential address :		
	Code :		
1.7	Cell number :		
1.8	Work telephone number :		
1.9	Work email address :		
1.10	Are you a practising attorney?	YES:	NO:
1.11	When were you admitted as an attorney?		
1.12	Have you previously been appointed as an executor, curator, liquidator or trustee?	YES:	NO:
(a)	If, YES, please provide a list for the past 3 years :		
	_____		
	_____		
	_____		
	_____		

1.13	Have you ever been removed from office in respect of an appointment referred to in 1.12?	YES:	NO:
(a)	If YES, please provide details :		
	_____		
	_____		
	_____		
	_____		
1.14	Has the Master ever disallowed your fees relating to an appointment referred to in 1.12?	YES:	NO:
(a)	If YES, please provide details :		
	_____		
	_____		
	_____		
	_____		
1.15	Number of years' experience as an executor :	Years:	
	· If less than 2 years', provide proof of experience, education or mentorship.	Months:	
1.16	PLEASE ATTACH APPLICANT'S ABRIDGED CURRICULUM VITAE		
1.17	Are you being appointed as an agent or executor?	Agent	
		Executor	
1.18	By whom are you nominated?	In terms of a will	
		Family	
		Master	
		Court Order	
		Other Details _____	
1.19	Are you the SOLE executor of this estate? · If NO, the co- executor, who must be a practising attorney, should complete a separate application form. · J262 E must be co-signed by both applicants.	YES	NO

1.20 Are you / is your firm personally responsible for the day to day administration of the estate?	YES	NO
1.21 Has a claim been made against you or the firm relating to a previous estate administrated by you or the firm?	YES	NO
(a) If YES, please provide details : _____ _____ _____ _____		
1.22 Do you have any direct or indirect interest in this estate other than executor fees?	YES	NO
(a) If YES, please provide details : _____ _____ _____ _____		
1.23 Have you made application for an executor bond with an institution other than the LPIIF in the past three years?	YES	NO
a) If YES, state name of institution (s) and estate name(s) : _____ _____ _____ _____		
1.24 Has any previous application for an executor bond with the LPIIF or other institution been declined?	YES	NO
a) If YES, please provide details : _____ _____ _____ _____		
1.25 Have you ever been declared insolvent or has your personal estate been placed under administration? • If YES, please provide proof of rehabilitation or release from administration.	YES	NO
1.26 Have you (or the person who will be assisting with the estate within your firm) :		
1.26.1 ever been found guilty (by a court of law or professional regulatory body) of an offence involving an element of dishonesty ?	YES	NO
1.26.2 been struck off the roll of practising attorneys or suspended or interdicted from practice?	YES	NO
1.26.3 any outstanding criminal cases or civil lawsuits or any regulatory disciplinary matters pending?	YES	NO
a) If YES, please provide details : _____ _____ _____ _____		
1.27 Is there any other material factor that you wish to bring to the LPIIF's attention? _____ _____ _____ _____ -- _____ _____ _____ _____		

2	FIRM		
2.1	Name of firm :		
2.2	Firm number :		
2.3	Number of partners/ directors :		
2.4	Physical address :		
			Code
2.5	Postal address :		
			Code :
2.6	Telephone number :		
2.7	Fax number :		
2.8	Does your firm have misappropriation of trust monies insurance? • If YES, please, state insurer and the limit of Indemnity. _____	YES	NO
3	DECEASED		
3.1	Surname :		
3.2	Full names :		
3.3	Identity number :		
3.4	Date of birth :		
3.5	Date of death : • A copy of the death certificate must be attached to this application form.		
3.6	At which Master's office was the estate reported?	Province : _____	
		Division : _____	
3.7	Master's reference/Estate number :		
3.8	Did the deceased die testate or intestate? • If testate a copy of the will must be attached to this application form.	Testate	
		Intestate	
3.9	In terms of the inventory please advise the following : • A copy of the inventory must be attached to this application.	Assets : R _____	
		Liabilities : R _____	
3.10	Would appropriate insurance for the insurable assets in the estate be in place on your appointment? • *Please refer to clause 3.3.3 of the terms and conditions.*	YES	NO

The following documents are required for a bond to be issued:

1. A covering letter on the applicant's official company letterhead;
2. Proof of practice or firm number;*
3. Proof of practitioner or member number;
4. The original form J262E (Bond of Security) which must be completed and signed by the applicant, whose signature must be attested to by two witnesses;
5. Copy of the will (if applicable);
6. Copy of certified death certificate (a copy of the death notice, if there is no death certificate);
7. Copy of court order (if applicable);
8. Inventory or statement of assets & liabilities of the estate;
9. Copy of any directions from the Master as to the security required;
10. Proof of Master's estate reference number;
11. Nomination forms by the beneficiaries/person appointing the applicant as executor;
12. The executor's acceptance of trust as executor;
13. A certified copy of the executor's identity document;
14. The executor's current fidelity fund certificate;
15. If applicant is not a director/partner a letter on the firm's letterhead signed by one of the partners confirming that the appointee is employed by the firm and has been authorised to apply for bonds of security in the name of the firm and to administer the estate on behalf of the firm. This letter must be accompanied by the certified current fidelity fund certificate of the partner/director;
16. Applicant's abridged curriculum vitae (CV);
17. A resolution as contemplated in clause 3.10 of the terms and conditions, where applicable.

The application documents may not be faxed or emailed.

The application forms and requirements are available on our website www.lpiif.co.za.

**This may be obtained from your law society. Change to Provincial Council / Regulator*

Alternatively you may contact:

- Ms Haniffah Mbela on 012 622 3926 - email haniffah.mbela@lpiif.co.za
- Ms Patricia Motsepe on 012 622 3927 - email patricia.motsepe@lpiif.co.za
- Mr Sifiso Khuboni on 012 622 3935 - email Sifiso.khuboni@lpiif.co.za

I hereby declare that to the best of my knowledge and belief, the information provided in this application is true in every respect, and will form the basis of the agreement between myself and the LPIIF. If any information herein is not true and correct, or if any relevant information has not been disclosed, the LPIIF will be entitled to make use of all rights and remedies available to it in terms of the law.

DATED AT ..... ON THIS .... DAY OF ..... 20.....

.....

WITNESS (Full names & signature)

.....

WITNESS (Full names & signature)

.....

APPLICANT (Full names & signature)

ANNEXURE B:
RESOLUTION IN TERMS OF CLAUSE 3.10

In the matter of: Estate Late _____

_____ [the firm of attorneys]
herein represented by :

1._____;

2._____;

3._____;

4._____;

5._____;

Full names of directors or partners signing. (Attach a list if necessary.)

who warrant/s that they or she or he are/is duly authorised to act on behalf of the firm and to bind it in terms of this resolution;

and who, by signing this document, undertake/s and agree/s unequivocally that the firm of attorneys together with each and every director or partner listed above, will be jointly and severally liable to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) for the fulfilment of the terms and conditions set out in 1 and 2 below.

1. The firm and its directors or partners will provide full co-operation to the LPIIF in the event of any claim being made against the LPIIF in respect of any fraudulent act, misappropriation or maladministration committed by the firm, or its present or former director or partner or present or former employee, arising out of the administration of an estate in respect of which the LPIIF has issued an executor bond.

2. The firm and its directors or partners will provide full assistance to the LPIIF:

   1.1 to institute and prosecute to completion any criminal or civil proceedings brought against any person referred to in 1 above or any individual or entity connected to any fraudulent act, misappropriation or maladministration resulting in a claim for which the LPIIF may have to pay compensation;

1.2 to report any attorney or candidate attorney to the relevant law society or regulator on the request of the LPIIF within thirty (30) days;

3. The directors or partners renounce the legal benefits of "order", "excussion", "division", "cession of action", *"non numeratae pecuniae", "non causa debiti", "errore calculi",* "revision of accounts" and all or any exceptions which could or might be pleaded to any claim.

_____
Director/Partner 1 Signature

_____
Director/Partner 2 Signature

_____
Director/Partner 3 Signature

_____
Director/Partner 4 Signature

_____
Director/Partner 5 Signature