

## THE TERMINATION OF CONSENT OF LAWFUL OCCUPIERS

*Parental rights in  
known sperm donor agreements*

**Indigenous communities and  
land claims – a discussion**

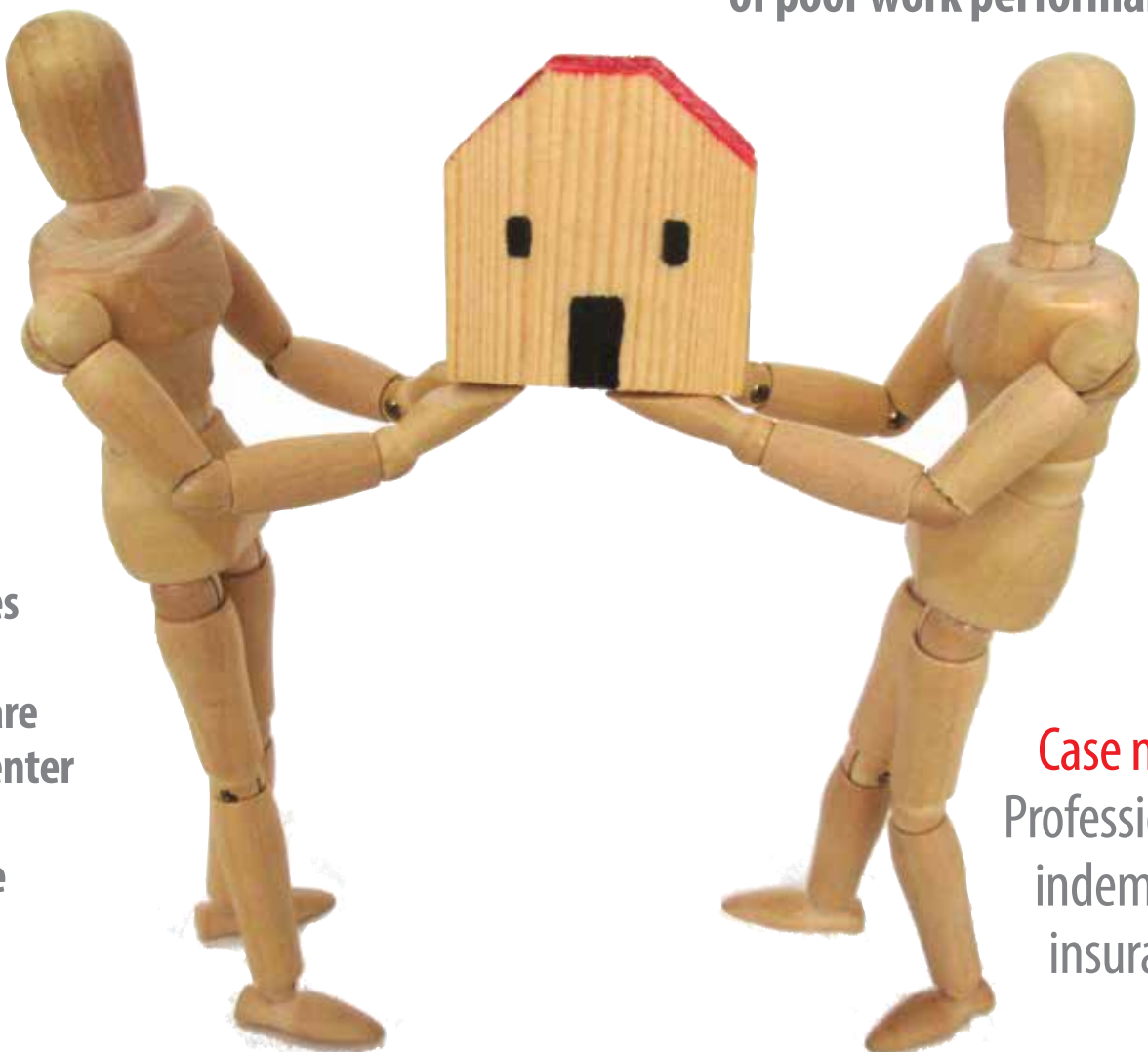
*Makate v Vodacom: Intellectual property in  
mist of a contractual dispute*

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institutions** are  
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legal practice

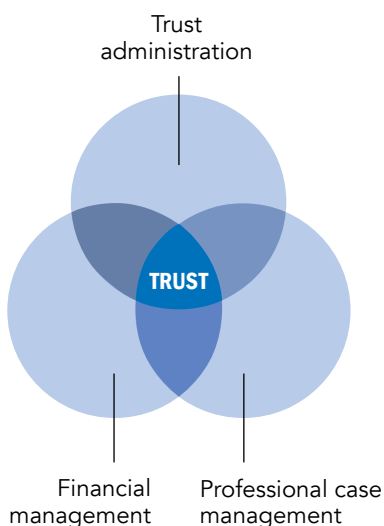
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# DE REBUS

THE SA ATTORNEYS' JOURNAL

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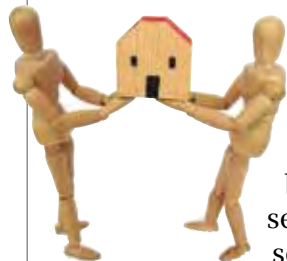


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### 8 The termination of consent of lawful occupiers



Consent is the necessary condition to perform certain acts lawfully, and to gain or lose a particular legal status. Issues pertaining to consent are widespread in everyday social relations and in commercial operations. This article, written by legal practitioner, **Johan van der Merwe**, aims to explore the legal requirements necessary to terminate the consent of lawful occupiers. To place this issue in proper context, the article commences with a broad but brief review of the concept of consent. Mr van der Merwe further discusses, consent in property law.

### 11 Parental rights in known sperm donor agreements

Legal practitioner, **Herbert James David Robertson** writes that the South African family law fraternity is familiar with surrogacy agreements. The surrogacy agreement has been incorporated into South African family law with the introduction of s 40 of the Children's Act 38 of 2005 (the Children's Act) on 1 July 2007. However, the so-called 'known sperm donor agreement' seems to be a novel issue to our corner of the world, with the legality and effect thereof still to be determined. A known sperm donor agreement, in essence, provides for a sperm donor neither to hold parental rights nor responsibilities towards a child born between the parties. The focus of the article is the known sperm donor agreement's legality and effects, which are still to be determined in South African law.

### 14 Indigenous communities and land claims – a discussion

There have been various attempts by South African courts to define the term 'community' but a consensus remains elusive. In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC) Moseneke DCJ held that there was no reason to limit the meaning of the word 'community' in s 2(1)(d) of the Restitution of Land Rights Act 22 of 1994 by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy and that bonds of custom, culture and hierarchical loyalty may be helpful to establish a group's shared rules relating to access and use of land. But far more essential, the court held, was whether the community retained much of their identity and cohesion of an erstwhile clan. In this article, Professor Emeritus of the Law Faculty of the University of Johannesburg and former Dean of the UJ Law faculty and senior law adviser to the Department of Foreign Affairs, **George Barrie** writes about the term community and discusses the views from Canada and Australia.

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# Have your say on legal costs

In the March editorial 'Show me the money: A discussion on access to justice v legal fees' in 2019 (March) DR 3, I wrote a report on a meeting that was held between the Law Society of South Africa (LSSA) and the South African Law Reform Commission (SALRC) to discuss issues connected with legal costs and s 35 of the Legal Practice Act 28 of 2014 (LPA). The LSSA wrote to the Justice Minister requesting the suspension of subss 35(1), (2), (3) and (7) up to and including (12), which deal with fees for legal services until the SALRC has completed its investigation on legal fees and there has been proper consultation. This means that only subss (4), (5) and (6) of s 35 have come into operation.

The SALRC was established by the South African Law Reform Commission Act 19 of 1973 as an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis. The SALRC has released 'Issue paper 36 project 142: Investigation into legal fees', which details the organisations' study on -

- factors and circumstances giving rise to legal fees that are unattainable for most people;
- desirability of establishing a mechanism responsible for determining legal fees and tariffs;
- litigious and non-litigious matters;
- attorney-and-client costs and contractual freedom;

- contingency fee agreements; and
- legislative and other interventions to improve access to justice by members of the public.

To read the full issue paper see [www.derebus.org.za/resources-and-documents](http://www.derebus.org.za/resources-and-documents).

In a letter to the LSSA, the SALRC stated:

'The investigation into legal fees and tariffs payable to legal practitioners is prescribed by legislation. Section 35(4) and (5) of the Legal Practice Act, No.28 of 2014, which came into operation on 1 November 2018, mandates the SALRC to investigate and report back to the Minister with recommendations on the circumstances giving rise to legal fees that are unattainable for most people; legislative and other interventions in order to improve access to justice by members of the public; and the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners. If the SALRC considers such a mechanism to be necessary and desirable, it is required to apply its mind on the composition of the mechanism that is contemplated and the process it should follow in determining fees and tariffs.

Furthermore, the SALRC is required to consider the desirability of giving users of legal services the option to pay less or in excess of any amount that may be set by the mechanism and the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when



Mapula Sedutla - Editor

that client secures that legal practitioner's services.

In doing this, the SALRC must be guided by best international practices; the public interest; the interests of the legal profession; and the use of contingency fee agreements as provided for in the Contingency Fees Act, No.66 of 1997.

The issue paper is the first document published by the SALRC during the course of this investigation and, therefore, does not contain any recommendations for law reform. The paper aims to announce the investigation, initiate and stimulate debate, seek proposals for reform, and will serve as a basis for further deliberation by the SALRC.

The issue paper contains questions aimed at discovering the issues at hand and the extent of the need for law reform. The SALRC specifically requests input and comment on the issue paper as a whole, including the questions which are posed in it.'

Legal practitioners are urged to have their say on this important issue of legal fees and in particularly s 35 of the LPA. Send your comments to following address:

- **The Secretary - South African Law Reform Commission**  
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Pretoria  
0001
- **Tel:** (012) 622 6349/6314/6313
- **Fax:** 086 759 8597
- **E-mail:** [lmngoma@justice.gov.za](mailto:lmngoma@justice.gov.za); or [legalcosts@justice.gov.za](mailto:legalcosts@justice.gov.za)
- **Website:** [www.justice.gov.za/salrc/index.htm](http://www.justice.gov.za/salrc/index.htm)



**Upcoming deadlines for article submissions: 22 July, 19 August and 16 September 2019.**

## Twitter comments

**De Rebus**  
@DeRebusJournal

In the May editorial, Editor, Mapula Sedutla, asked:  
Are the conveyancing examinations a source of gatekeeping into the specialised field?  
Below are comments received on Twitter.

**MT Cicero**  
@cicero1974

SA is reputed to have one of the best deeds registration systems in the world based largely on the exceptional degree of accuracy associated with it. Conveyancing is a specialist field which requires the highest standard of practice and lower standards cannot be allowed.

**LAWRENCE**  
@LAWRENC25055815

Gate keeping is just a ruse perpetuated by those who do not want to work hard to pass this specialized exam. I am happy the LPC has decided that the exam will be written in English only to equalize the playing field. It is not easy to qualify as a specialist. Further this matter was not given the requisite attention at the recent LSSA conference as it was glossed over in order to pander to certain interests.

**Emmanuel Malangu**  
@MalanguEmmanuel

This article is an eye opener and should be published. It's quite a concern that there is a high rate of failure for these examinations. A lot of issues need to be addressed.

**xSofonix**  
@Sofonix

An introductory module must be introduced in the LLB program and not only in PLT

**Be a part of the discussion, give us your thoughts on Twitter using #conveyancingmatters**

# Makate v Vodacom: Intellectual property in mist of a contractual dispute



By  
Anathi  
Njokweni,



Masisange  
Mketsu  
and



Thandanani  
Cwele

The case between *Makate and Vodacom (Makate v Vodacom Ltd 2016 (4) SA 121 (CC))* is mostly categorised as a contractual dispute. The case stems from an oral agreement, for use of the idea behind Vodacom's product now famously known as 'Please Call Me'. The agreement was concluded between Mr Makate and then Director of Product Development and Management at Vodacom, Mr Geissler. The Constitutional Court (CC) upheld the agreement as a valid and enforceable contract. The court reasoned that Mr Geissler had ostensible authority to conclude a valid contract with Mr Makate. Accordingly, the court ordered that, Vodacom, the principal of Mr Geissler, negotiate compensation with Mr Makate and if the parties could not agree on the amount, the Chief Executive Officer of Vodacom had to determine a reasonable amount within a reasonable time.

In the history of the *Makate* case, intellectual property rights, particularly patent rights have received only passing treatment. For example, despite Vodacom having acknowledged Mr Makate as the brains behind the idea, the company later accused him of having stolen the idea from an MTN patent (patent number ZA2002/04150) protecting a similar product, which was launched a month earlier than the analogous Vodacom product. Similarly, Mr Kahn, who was a co-inventor in the MTN pat-

ent also supported this view. However, Mr Kahn stated that a wrong patent was the subject of the testimony at the trial court and that the correct patent number is ZA2002/05184. In the trial court, Mr Makate employed the services of an expert witness, Mr Zatkovich, to deal with the defence's accusation that his idea lacked originality. With reference to the MTN granted patent number ZA2002/04150, the court accepted Mr Zatkovich's testimony that the objectives of Mr Makate's idea were met by the 'Please Call Me' product but differed from the MTN patent. This evidence was never challenged or dismissed as irrelevant to the matter at hand. Seemingly, there is a need to give clarity on the issue raised by Vodacom and Mr Kahn. In an attempt to provide clarity on the issue of patent rights arising from the *Makate* case, the authors of this article give an overview of the South African patent prosecution system, outlining what constitutes infringement ('stealing') and when infringement proceedings may be instituted with reference to the cited MTN patents and the 'Please Call Me' idea.

In terms of the South African Patents Act 57 of 1978 (the Act), a patent application may be filed as a provisional or complete application. A provisional application must fairly and conceptually describe an invention and secures a date of filing (priority date). An applicant can subsequently file a complete applica-

tion, which must be accompanied by at least one claim, a full specification sufficiently describing an invention and a priority date claim if one is available. Alternatively, an applicant has an option of filing one complete international application under the Patent Cooperation Treaty (PCT) to seek simultaneous protection for an invention in any of the PCT contracting states. Eighteen months from the earliest priority date, the International Bureau (IB) publishes the specification of a PCT application, together with a search report and a written opinion on the patentability of a claimed invention. An applicant has 30 or 31 months from the earliest priority date to approach their contracting states of choice to seek grant of an application. It is important to stress that at this stage one is still dealing with a patent application and not with a patent.

The patent, which was the subject of the testimony in the trial court, had been filed as a provisional application (application number ZA99/7346) on 26 November 1999, citing Mr Kahn as one of the inventors. Subsequently, PCT application was filed on 23 November 2000, claiming the priority date of the South African provisional application. The contents and details of the application by all accounts remained confidential and only became public knowledge on publication by the IB on 31 May 2001 (publication number WO 01/39 468 A1). Later, a complete patent application was filed



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in South Africa on 24 May 2002 and a patent was granted on 30 July 2003 with patent number ZA2002/04150. The patent later lapsed in 2003, due to the non-payment of renewal fees.

With reference to the patent claimed to be of correct relevance by Mr Kahn, the application (application number ZA2001/0609) for the patent was filed on 22 January 2001. Subsequently, a PCT application was filed at the IB on 22 January 2002, which was made open to public inspection on 25 July 2002 (publication number WO 02/058 417 A1) and granted in South Africa with publication number ZA2002/05184 on 26 March 2003.

This patent also lapsed in 2007 due to non-payment of renewal fees. Only on 30 July 2003 and 26 March 2003 did patent rights accrue for the respective MTN patents in South Africa. This view is derived from s 44(3) of the Act, which provides that a patent shall have effect from the date of publication, which is also the grant date.

On grant, the effect of a patent is to exclude third parties from 'making, using, exercising, disposing or offering to dispose of, or importing the invention' in South Africa for the duration of the patent (s 45(1) of the Act). Any of the

forementioned acts constitute infringement, unless such acts are committed on a non-commercial scale for the purpose contemplated in s 69A of the Act.

However, there is a nine-month moratorium from the date of grant within which no infringement proceedings may be instituted. Therefore, in principle, infringement proceedings could only have been instituted from 30 April 2004 and 26 December 2003 for the ZA2002/04150 and ZA2002/05184 patents respectively. However, at the relevant date the ZA2002/04150 patent had lapsed.

At this point, it is important to remember that it was never disputed that Mr Makate pitched the 'Please Call Me' idea to Vodacom in November 2000. In fact, Vodacom even relied on this fact to raise a defence that Mr Makate's claim had prescribed in terms of s 11(d) of the Prescription Act 68 of 1969 (see *Makate v Vodacom (Pty) Ltd* (GJ) (unreported case no 08/20980, 1-7-2014) (Coppin JJ)).

Based on the foregoing analysis, it is difficult to understand how an infringement action could have been brought to court. It thus becomes apparent that Mr Makate could not have infringed the MTN patents as there were no patent rights to infringe. In addition, Mr Makate

could not have derived the 'Please Call Me' idea from the subject matter of MTN's patent applications because these applications became public information after Mr Makate had pitched the idea to Vodacom.

**Disclaimer:** This article only reflects personal opinions of the authors. It is not intended to be legal advice and is not attributable to the employer of the authors. The authors consciously decided not to comment on whether the MTN patents met patentability criteria and the possible reasons behind the lapsing thereof. Answers to this question require a detailed technical explanation but are nonetheless simple to arrive at using the information cited in this article.

**Anathi Njokweni PhD Biotechnology (UWC), Masisange Mketsu MSc Biochemistry (UWC), and Thandanani Cwele PhD Chemistry (UKZN) are patent searchers at the Companies and Intellectual Property Commission in Pretoria.**



By  
Petrus  
Khumalo

## When is it not required to warn an employee of poor work performance?

**I**t is uncommon that, an employer dismisses an employee for poor work performance without a formal notification or reasonable opportunity to improve their performance. This may, however, happen in two circumstances, namely –

- where the manager or a senior employee is qualified by their knowledge/experience and is capable of establishing for themselves whether or not they complied with the requirements; and
- where the degree of professionalism is so high that any deviance from the required standards would be so serious that non-compliance would justify dismissal (see *Brereton v Bateman Industrial Corporation Ltd and Others* (LAC) (unreported case no JA80/99, 7-2-2002) (Zondo JP) at 49).

### The Labour Relations Act

In South Africa the law differentiates be-

tween dismissal for poor performance for an ordinary employee and that of a senior manager or executive. In sch 8 of the Labour Relations Act 66 of 1995 (LRA) Code of good practice: Dismissal, in item 9, the guidelines are provided to deal with 'cases of dismissal for poor work performance.' These guidelines apply to ordinary employees to ensure that the later dismissal of the employee based on poor work performance is procedurally fair. Item 9 states: 'Any person determining whether a dismissal for poor work performance is unfair should consider –

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not –
  - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

- (ii) the employee was given a fair opportunity to meet the required performance standard; and

- (iii) dismissal was an appropriate sanction for not meeting the required performance standard.'

When the guidelines for procedural fairness are applied to a person who is a senior executive, a more flexible approach is adopted. Normally, an employer should be concerned about the employee's poor work performance, provide the employee with a reasonable opportunity to improve their performance before considering dismissing the non-performing employee. However, these requirements do not always apply to senior managers or executives.

### The Brereton case

The Labour Appeal Court (LAC) in *Brereton* gave guidance as to the manner in which executive-level dismissal



cases should be approached. The case related to the dismissal of the manager (Mr Brereton) on the grounds that he displayed inadequate managerial ability and incompetency in his role as Executive Chairman of Batecor in particular in relation to taking effective corrective action against Computer Alliance (Pty) Ltd. The judgment focused on two situations, '[t]he first question to be considered is whether it is incumbent upon his employer to warn him that his performance is falling short of the standard required of him and so afford him an opportunity to rectify the position before steps are taken to terminate his employment.

It has been recognised by the courts that in respect of this requirement, ... the position of a senior manager differs from that of an ordinary employee. Because of his situation and the overall view of the business which he enjoys as a result thereof, he will ordinarily be aware of the shortcomings in his performance and the adverse consequences

to the business resulting therefrom. He will likewise himself appreciate the necessity to remedy the position without it being drawn to his attention by another. It would be pointless to insist upon his being warned of a situation of which he must already be fully aware' (see *Brereton* at para 44 to 45). In this regard, the court was making a distinction between managers who are capable of establishing themselves, whether or not they have complied with the requirements, and an ordinary employee.

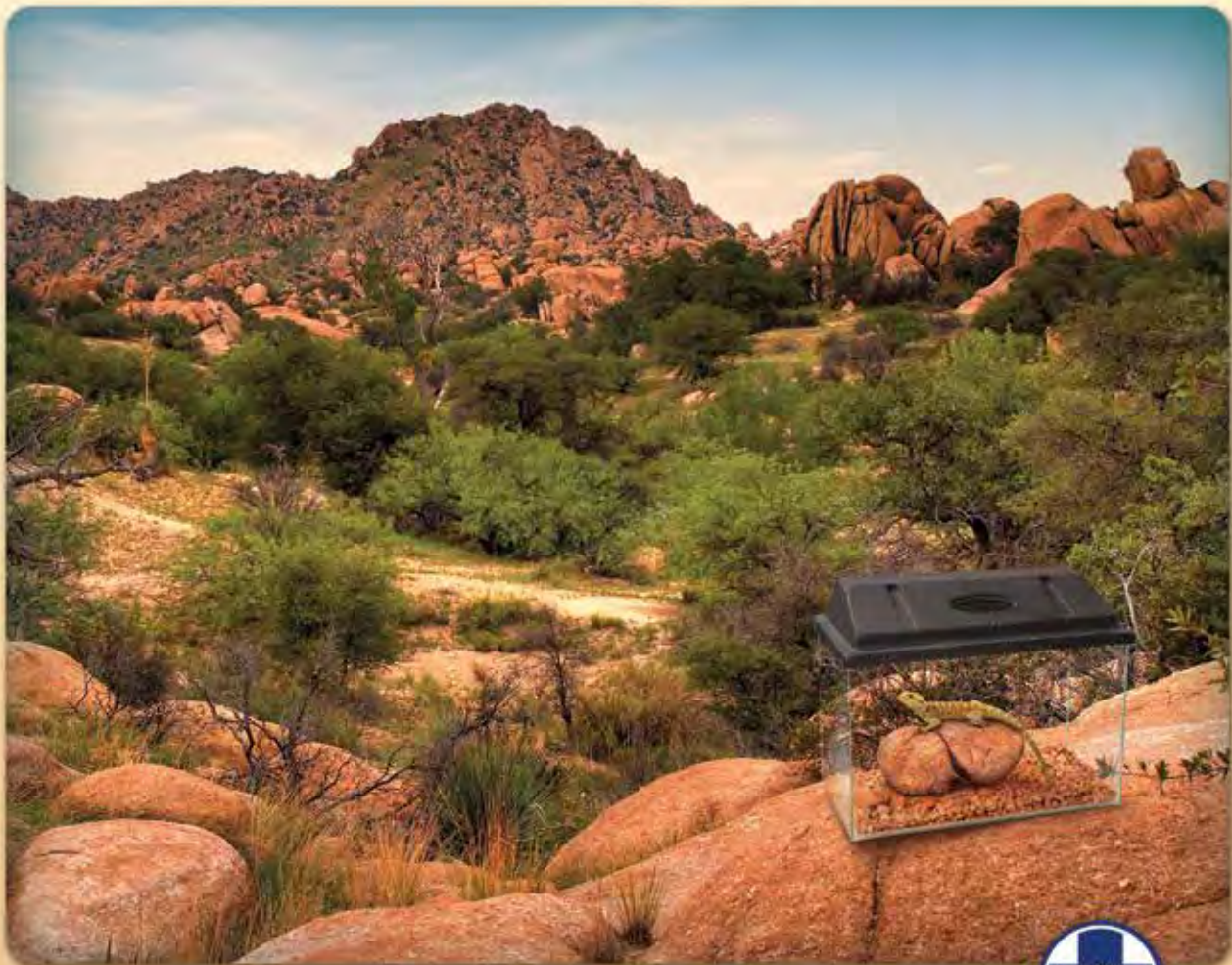
'The second situation recognised by the courts in which the necessity for a warning may be dispensed with is where the poor performance of the officer concerned is so gross, and its consequences so serious, that it would be unfair to require the employer to suffer any further delay in terminating his employment' (see *Brereton* at para 46). In this regard the court points out that the continuation of the employee in this position would prejudice the employer and pos-

sibly lead to more harm to the employer than is necessary.

## Conclusion

Though it may be uncommon to dismiss an employee without a notification of their poor work performance, as far as possible an employer is entitled to dismiss such an employee without any fair hearing or formal inquiry. Therefore, the duty lies with the senior manager or executive that they are qualified, have the knowledge and experience and is capable of establishing whether or not they complied with the requirements. Typically, as a senior manager or executive, the standard of professionalism is so high, that any deviance from the required standards would be so serious that it could lead to a dismissal.

**Petrus Khumalo LLB (UP) is a candidate legal practitioner at Schoeman-Law Inc in Cape Town.**



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# The termination of consent of lawful occupiers

By  
Johan  
van der  
Merwe



Consent is the necessary condition to perform certain acts lawfully, and to gain or lose a particular legal status. Issues pertaining to consent are widespread in everyday social relations and in commercial operations. This article aims to explore the legal requirements necessary to terminate the consent of lawful occupiers. To place this issue in proper context, the article commences with a broad but brief review of the concept of consent.

Examples of consent, which in turn give rise to various legal provisions and sanctions, include to –

- determine the validity of an agreement;

- agree to purchase movable or immovable property;
- enter into wedlock;
- allow a document to be published;
- allow a sterilisation or other medical procedure to take place;
- agree to have sexual intercourse;
- allow your child to go on a camping trip;
- participate in a high-risk game or in sports;
- agree to a judgment being taken against you; or
- give someone permission to reside on land.

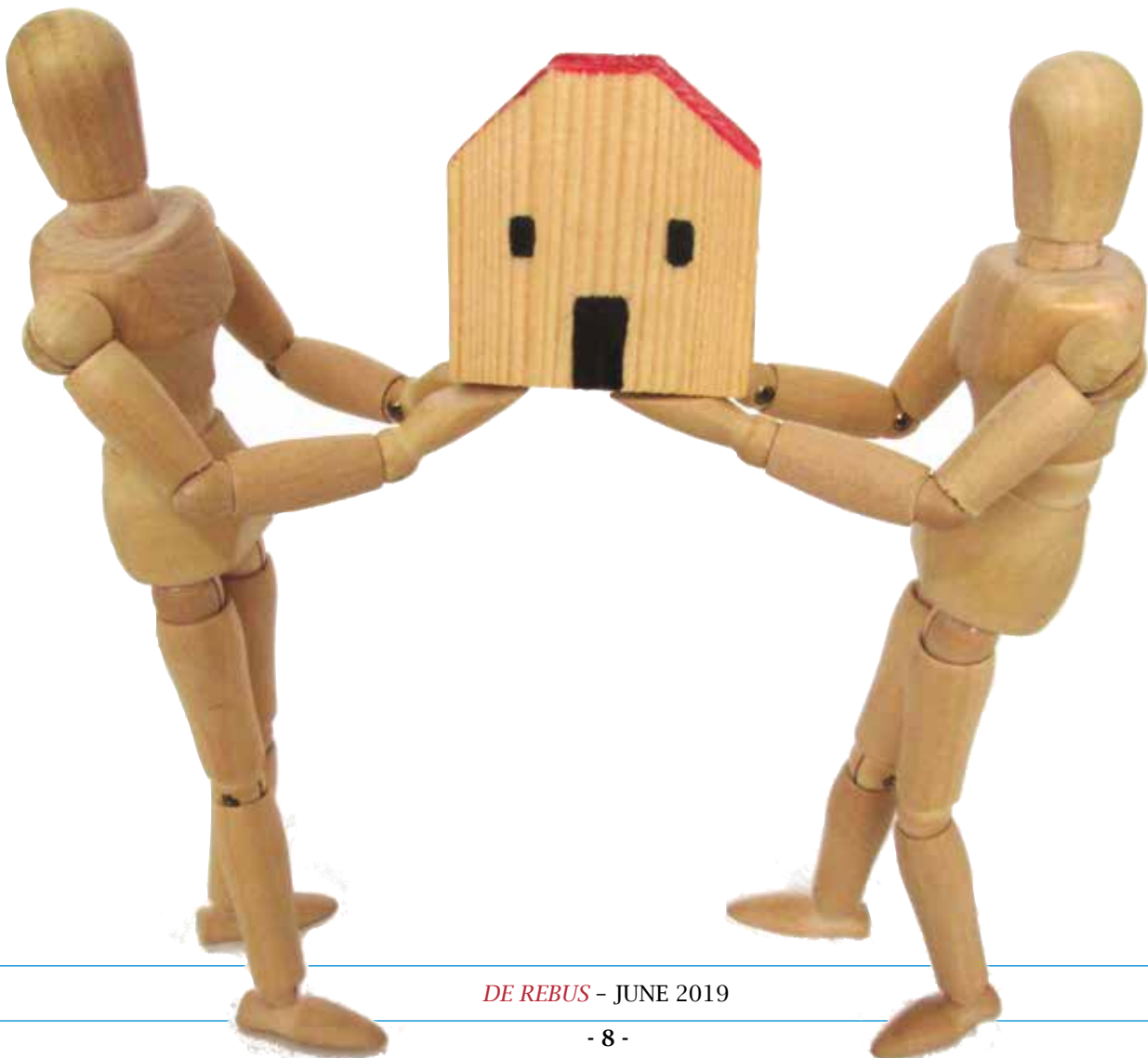
Once consent has been established, far-reaching consequences follow. Con-

sent is, for example, a good defence in an action in delict for harm done, as captured by the maxim *volenti non fit iniuria*.

## Question of law and fact

Whether consent is a legal requirement in any given case is a legal question, but '[w]hether there is consent is a factual question' (see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre of Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at para 83).

The 'giving' of consent is often confused with, and likened to, a gift, but it is not a gift. While consent is often a



Picture source: Gallo Images/Getty



product of the conscious mind that can be communicated, it can also be the state of the subconscious mind that can be deduced or deemed or implied by conduct: Consent can be ‘actual or presumptive’ (see *Klaase and Another v Van der Merwe NO and Others* 2016 (6) SA 131 (CC) at para 64). ‘Express consent and tacit or implied consent ... are both species of actual consent’ (see the *Joe Slovo* case at para 83).

## Free will and decision making

Broadly seen, consent emanates from the conscious or subconscious mind of a person, where it may be deemed or presumed, or from where it may be articulated by means of an ‘intelligent act’ (see J Burchell *Principles of Criminal Law* 5ed (Cape Town: Juta 2016) at p 226, and the authorities cited in footnote 120) and expressed orally or in writing. The concrete manifestation of a spiritual state of mind, originating from the realm of free will, and then expressed or articulated in language, is often fraught with difficulties, namely –

- has consent been granted or withdrawn;
- even if it appears to have been granted or withdrawn, was it expressed by a person who has the requisite (legal) capacity and/or authority;
- does it amount to more than mere submission; and
- was it obtained without coercion and/or with full prior knowledge of the relevant background facts and rights and/or in the full knowledge of the legal consequences?

## What constitutes real, actual or proper consent?

The advances of medical science will no doubt one day shed more light on the decision-making processes in the brain. The Biomedical Engineering Research Group (BERG) at Stellenbosch University recently purchased state-of-the-art brain imaging equipment to determine, among others, brain activity associated with both arbitrary and deliberate decisions (Dr D van den Heever and L Koch ‘Do you have a free will, or not?’ [www.sun.ac.za](http://www.sun.ac.za), accessed 13-5-2019).

In the meanwhile, challenges and claims relying on the granting or withdrawal of consent abound, and different legal tests and mechanisms have been developed to establish consent and to give it legal effect and purpose. Consent does not bear the same meaning in every field of law. The requirements, test and onus of proof for consent is different in criminal law, the law of contract, the law of delict, consumer law or medical malpractice.

## Informed consent in the realm of personal freedom

The only reference to ‘consent’ in the Constitution occurs in s 12(2)(c), which refers to ‘informed consent’ in the context of freedom and security of the person. In *Christian Lawyers’ Association v National Minister of Health and Others* 2004 (10) BCLR 1086 (T), the court found that the ‘cornerstone of the regulation of the termination of pregnancy of a girl and indeed of any woman under the Act is the requirement of her “informed consent”’. The court then proceeded to consider the judicial meaning of informed consent and found that it rests on three independent legs namely, knowledge, appreciation and consent (at p 1093).

Failure to obtain ‘informed consent’ in the realm of personal freedom is largely accepted as constituting assault. (See the important *caveat* in the discussion of Liezl Zwart ‘*Sibisi NO v Maitiri*: A dual burden of proof?’ 2015 (June) *DR* 33.)

## Informed consent in the realm of property law

Consent is a big player when it comes to property law, particularly in the context of socio-economic rights, but has received scant, if any, attention from academic writers to date.

The requirement of informed consent in the context of socio-economic rights was recently developed by the court in the Xolobeni Mine matter, see *Baleni and Others v Minister of Mineral Resources and Others* [2019] 1 All SA 358 (GP) (see law reports p 21). In this judgment the court refers to *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) at para 80 and proceeds to declare that the full and informed consent of the community is required prior to the granting of mining rights. In reaching that decision, the court considered the relevant constitutional values, and also international law instruments such as the International Covenant on Economic, Social and Cultural Rights.

## Lawful occupiers

If land is occupied without the initial consent of the owner or person in charge, then such occupiers are generally speaking unlawful occupiers, governed by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). PIE, however, also applies to some occupiers who had initial consent, but whose consent was subsequently terminated.

The termination of consent of persons residing on rural land with initial consent is governed by the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the legal requirements were summarised by the Constitutional Court in *Snyders and Others v De Jager and Others* 2017 (3) SA

545 (CC) as follows: There must be a lawful ground; the termination must be just and equitable at a substantive level and at a procedural level.

The position for ESTA occupiers is clear. But what about other lawful occupiers, that is occupiers whose occupation is lawful at the outset, but who are not covered by the provisions of ESTA? These are typically occupiers that reside in an urban environment, or rural occupiers who earn more than the threshold amount prescribed by ESTA. PIE is applicable to such occupiers.

Different Acts apply to different types of occupiers, but does that affect the nature of the consent granted? Is the nature of the consent granted by a landowner to a person to reside on land dependent on the character of the land? There appears to be no reason why the termination of consent for those PIE occupiers who had initial consent should be different from the termination of consent for the purposes of ESTA. In both instances the removal of consent has the same consequences and triggers the significant transition from a status of lawfulness to a status of unlawfulness, with far-reaching consequences. There also appears to be no reason why such a transition should be achieved more easily for some who had consent, but be more difficult for others who had no consent.

## Contractual relationship

A large group is easily taken out of the equation, namely occupiers, where a contractual relationship governs the relation between the parties. In that event, the method and requirements to terminate consent are determined by the terms of the contract as governed by the law of contract, because ‘*pacta servanda sunt*’ – the parties are bound by the terms of the contract, they are servants of the pact that was made.

So, for instance the question whether consent to occupy was properly terminated in the situation where a property is sold with a valid lease, will be determined with reference to the terms of the lease. In *Van Coller and Another v Machele and Others* (GP) (unreported case no 96124/2016, 18-5-2017) (Mia AJ) the court held at para 18: ‘The principle “*huur gaat voor koop*” is recognised and there was no termination of his occupancy. Even if the view is held that the Macheles lost their right to occupancy when the property was sold this did not impact on the right of Peter Hudson who had a valid lease in place’. A further example appears from the conclusion: ‘The agreement of lease had expired by effluxion of time on 31 May 2018, and there was a valid termination of Mr Chetty’s right to possess the premises’ opening the portal of an eviction order in *Violetshelf Investments (Pty) Ltd v Chetty*

(GJ) (unreported case no 24858/18, 28-1-2019) (Meyer AJ) at para 10.

Where no contractual relationship between the parties exists, and the state or a public body is involved, their relationship falls within the ambit of public administrative law. In *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA), the constitutional impact of procedural fairness in the realm of administrative decision making was distinguished from the realm of the law of contract, and to make this distinction the court relied on the constitutional authority in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), where the Constitutional Court quotes C Hoexter *Administrative law in South Africa* (Cape Town: Juta) as follows: 'Procedural fairness ... is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but also likely to improve the quality and rationality of administrative decision making and to enhance its legitimacy' (see para 99).

## Conclusion

In respect of lawful occupiers where no contractual agreements are in place, I submit that, whereas:

- The nature of consent to occupy is the same irrespective of the legal construction thereof.
- The termination of consent is a legal act since it triggers a fundamental change in legal status from lawfulness to unlawfulness.
- The termination of consent has the same, significant, consequences for all occupiers (and for local authorities who must provide emergency housing).
- The principles of public administrative law apply when a public body is involved (thereby emphasising the underlying public interest element).
- PIE is silent on the method and requirements to terminate consent.
- The termination of consent of all occupiers should be objectively evaluated, measured and tested.

It follows that the act of terminating consent (the expressing or exercising of the termination) must meet formal legal requirements. In the absence of formal legal requirements it may easily be rendered subjective, silent, hidden and quite possibly an irrational endeavour. If it meets formal legal requirements, it would also facilitate the correct calculation of the relevant notice period, and it would ensure that the act of termination is rational, fair and reasonable.

If the act of termination were allowed to be a silent, hidden or a subjective affair without formal legal requirements,

it would lead to the untenable situation that it is possible to find the consent was revoked and was not revoked. Findings bordering on absurdity have already occurred: 'Yacoob J holds that they did not have consent at all, while Moseneke DCJ, Ngcobo J, O'Regan J and Sachs J conclude that they did but that the consent was conditional and subsequently revoked' (*Joe Slovo* at para 4).

Such finding is reminiscent of the realm of quantum physics, where it is possible that the cat is dead and alive at the same time. But we are not physicists, and as lawyers our project is concerned with advancing a rational constitutional jurisprudence.

Therefore, I submit that the same legal requirements should apply to the termination of consent of all lawful occupiers whose occupation is not governed by an agreement, namely there must be a lawful ground, and the termination must be just and equitable at a substantive level and at a procedural level.

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# Parental rights in known sperm donor agreements



By  
Herbert  
James  
David  
Robertson

**T**he South African family law fraternity is familiar with surrogacy agreements. The surrogacy agreement has been incorporated into South African family law with the introduction of s 40 of the Children's Act 38 of 2005 (the Children's Act) on 1 July 2007. However, the so-called 'known sperm donor agreement' seems to be a novel issue to our corner of the world, with the legality and effect thereof still to be determined.

During 2018 I consulted with a client regarding the legal recognition of the so-called known sperm donor agreement. The facts in the matter were as follows: The client had fallen pregnant, but her ex-boyfriend presented her with a known sperm donor agreement, which portrayed him as a mere 'donor', without any rights, and more importantly, without any responsibilities towards

the child. A dispute ensued, which was settled when the parties entered into a parenting plan. It goes without saying that the parenting plan provided for the father to have both rights and responsibilities towards his child.

A known sperm donor agreement, in essence, provides for a sperm donor – usually through natural insemination – neither to hold parental rights nor responsibilities towards a child born from the intercourse between the parties. The agreement is called a known sperm donor agreement as the identity of the 'donor' is known to the mother, in contrast to a sperm donor agreement where the identity of the donor is unknown to the receiver of such sperm. The known sperm donor agreement's legality and effects are still to be determined in our law, which is the focus of this article.

The decision of *BR v LS* 2018 (5) SA 308

(KZD) was handed down on 15 June 2018 in the Local Division of the High Court in Durban. The facts of the *BR* matter were similar to the events described in the consultation above.

The applicant (the father) met the respondent (the mother) in 2007 and they became romantically involved in January 2011. The relationship was terminated at the end of June 2012. Two years after terminating the relationship the respondent approached the applicant and requested him to impregnate her. The applicant duly complied with the request. When the court inquired as to why the respondent did not make use of a sperm bank, the respondent contended that she preferred natural insemination to using an anonymous donor, as this would prevent any psychological difficulty for the child by not knowing the identity of their biological father.

It was allegedly agreed – between the parties – that the applicant would not have any rights nor responsibilities towards the child. The applicant said that it was agreed that he could be involved in the child's life to the extent that he wished. The respondent then downloaded a known sperm donor agreement from the Internet, edited it and, thereafter, sent it to the applicant for signing. The applicant pondered thereon, but never signed the agreement.

During the pregnancy the applicant attended various medical appointments with the respondent and contributed financially to the medical expenses associated therewith. Further, the applicant attended antenatal classes with the respondent when requested to by the respondent. The applicant contended that he paid an approximate amount of R 40 000 in laying expenses to the respondent. The respondent only acknowledged having received R 24 000, which was not for laying expenses but rather an amount of R 4 000 for each month that she was on maternity leave. The applicant also paid maintenance, in respect of the child, but these payments were returned by the respondent.

When the child was born the applicant was registered as the father on the child's birth certificate. The respondent allowed the applicant around two hours of contact with the minor, per week. The respondent was not content with only having contact with his child when the respondent allowed the same and, therefore, applied to the court to have it declared that, despite permanent residency of the child remaining with the respondent, he should be afforded parental rights and obligations in relation to contact and care of the minor.

The court had two questions to consider. The first being, whether the parties concluded a known sperm donor agreement and what the consequences of such an agreement would be and if the court could award the applicant parental rights and responsibilities in terms of s 23 of the Children's Act, if it was found that the applicant had not met the requirements of s 21 of the Children's Act.

## Does South African law recognise a known sperm donor agreement?

The counsel for the applicant submitted that such an agreement is not recognised and, therefore, is without legal effect as the Children's Act does not provide for it.

The respondent, acting in person, argued that consequences of the respondent being recognised as the father with the rights associated therewith, including the right to have contact with the child, cannot be lawfully enforced, as the

applicant and respondent had concluded a known sperm donor agreement.

The respondent asserted that the result of the known sperm donor agreement, being that these legal consequences cannot apply to the child, as the applicant was only a 'sperm donor' without any rights or responsibilities in relation to the child. The applicant only had contact with the child due to her gracious concessions, and not because he had any right thereto.

The respondent, conceded that the known sperm donor agreement was not recognised in South African law, but submitted that such agreements are becoming more prevalent, not only in South Africa (SA), but also abroad. Finally, the respondent argued, that should the known sperm donor agreement not be recognised it would be inconsistent with her constitutional right to dignity and sexual preference and to choose single motherhood as a family structure. The applicant's final remark was that should the known sperm donor agreement be recognised as valid and enforceable it would free her from having to consult with the applicant in relation to matters specified in the Children's Act. She, therefore, requested the court to develop the law accordingly.

The court was neither persuaded by the applicant nor the respondent's arguments and found that it was a novel issue to the South African legal regime. The court elected to decide the matter without making a ruling on the validity or recognition of the known sperm donor agreement in South African law, yet the court remarked this type of agreement may be *contra bonos mores*.

In this particular case the court looked at the period from when the respondent asked the applicant to impregnate her and the amount of time that had lapsed between the proposed agreement being handed to the applicant and him pondering thereon. From the facts the respondent asked the applicant to impregnate her on 25 May 2014, but only requested the applicant to sign the known sperm donor agreement on 15 September 2015, approximately six months after the child's birth. From the evidence, it seemed that the applicant reflected on whether to sign the agreement or not for some two weeks, before electing not to do so.

The court awarded the applicant parental rights and responsibilities in finding that, through the applicant's actions prior to, during and after the child's birth the requirements of s 21 were met and the applicant was thus afforded contact rights with the child, which would be phased in, on every Wednesday from 12 pm (or after school) to 8 am on Thursday morning, every alternate weekend from Friday at 12 pm to Sunday at 4 pm, as

well as holidays, birthdays and father's day.

Thus, the question on whether a known sperm donor agreement is recognised and whether it is valid in South African law remains to be decided.

## Canadian law and known sperm donor agreement

The Canadian province of Alberta and British Columbia have, as SA has, codified in their law that a 'sperm donor' is not recognised as a legal parent. Yet, there has been no pronouncement of the validity of a known sperm donor agreement.

This issue becomes even more complicated when one has regard to Ontario's heteronormative presumptions (ie, a woman who delivers a child is the mother of that child, and if that mother has a male partner, he is presumed to be the father). Should a woman, however, have a female partner, there is no presumption of parentage.

## Sperm donors and parental rights and responsibilities

Despite the court not ruling on this question, a few entities have already started selling known sperm donor agreements in SA. Online stores are selling copies of the known sperm donor agreement for R 675. Further still, a known sperm donor agreement can be downloaded free of charge on the Internet.

The question, is not if an anonymous donor can be called to become the holder of parental rights and responsibilities, but rather whether after natural insemination a mother may raise the defence of a known sperm donor agreement when the father applies for parental rights and responsibilities.

The process of artificial insemination specifically provides for the identity of the donor and the person who receives the donation to remain unknown to the other party. The intention of the parties, respectively, being to donate and obtain sperm, without ever hoping for the donor to have a relationship with the child or to contribute to the child's upbringing.

Should the child, however, have been conceived through natural insemination the father's chances of being awarded parental rights and responsibilities vastly improve, despite having a known sperm donor agreement in place. In the same breath, the chances of a mother being successful in defending such an application by means of the known sperm donor agreement also seems unlikely, depending on the circumstances of the case.

I submit that the reason for this is, that in most cases it would be in the child's

best interest to have contact with their father, if both parents have agreed to it. Furthermore, it may be *contra bonos mores* for a child to be deprived of the right to be maintained by both parents, just because their mother elected to enter into a known sperm donor agreement.

Should the intention of the parties have been for the father to only be a sperm donor and neither party has a change of heart, such a father would, in all probability, never apply for parental rights and responsibilities. The mother would, therefore, be the sole holder of such rights and responsibilities. This arrangement would have a similar effect to that of an anonymous sperm donor.

Should the father, after the birth of the child, want to be part of the child's life the applicant would in all probability be

successful with his application, but for facts being presented to the court resulting in the court finding that such relief would not be in the best interest of the child in question.

### Conclusion

The position and validity of a known sperm donor agreement in SA remains uncertain. Yet, when having regard to the best interests of the child and the possibility of such an agreement being *contra bonos mores*, as stated in the *obiter dictum* of the *BR* case, it would be advisable to recommend to clients not to enter into known sperm donor agreements. The risks of a known sperm donor agreement can be effectively remedied with legislative intervention, as was done with the surrogacy agreement in 2007.

### For further reading, see also:

- 'Appropriate contact and maintenance guidelines for sperm donors' 2017 (Sep) *DR* 51;
- Dr Donrich Thaldar 'Response to appropriate contact and maintenance guidelines for sperm donors' 2018 (April) *DR* 4; and
- law reports 'Family law' 2018 (Nov) *DR* 34 for the *BR v LS* 2018 (5) SA 308 (KZD) judgment.

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THE SA ATTORNEYS' JOURNAL

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# Indigenous communities and land claims – *a discussion*

By  
George  
Barrie

In the article 'Revisiting the term "community" in the South African context' 2018 (Dec) *DR* 18, Udo Richard Averweg and Professor Marcus Leaning once again brought to light the importance of defining the term 'community' referred to in s 2(1)(d) of the Restitution of Land Rights Act 22 of 1994 (the Act). This section refers to a claim of a 'community' that was dispossessed of rights in land in South Africa (SA). This section must be read in conjunction with s 25(6) and s 25(7) of the Constitution. Section 25(7) states, *inter alia*, that a community whose tenure of land is legally insecure due to past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, to tenure which is legally secure or to comparable redress. Section 25(7) states the same if the community was dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.

It appears that communal land claims are playing a major role in land restitution claims especially after the highly successful and much published Richtersveld community land restitution claim in the Constitutional Court (CC) in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC). The CC held that the Richtersveld community was entitled to restitution of the ownership of land and to the exclusive beneficial use and occupation of the claimed land. This case was initiated in the Land Claims Court (LCC) and reached the CC after an appeal to the Supreme Court of Appeal (SCA) (see GN Barrie 'Land claims by indigenous peoples – litigation versus settlement? Observations on the Richtersveld litigation route followed in South Africa versus the Noongar settlement route followed in Western Australia' (2018) 2 *TSAR* 344). The CC in the *Richtersveld* decision received international attention, not only because of the tenacity of the small Khoi community in taking on the state and its state-owned enterprise, but also for the ramifications of the order made by the CC in favour of the community.

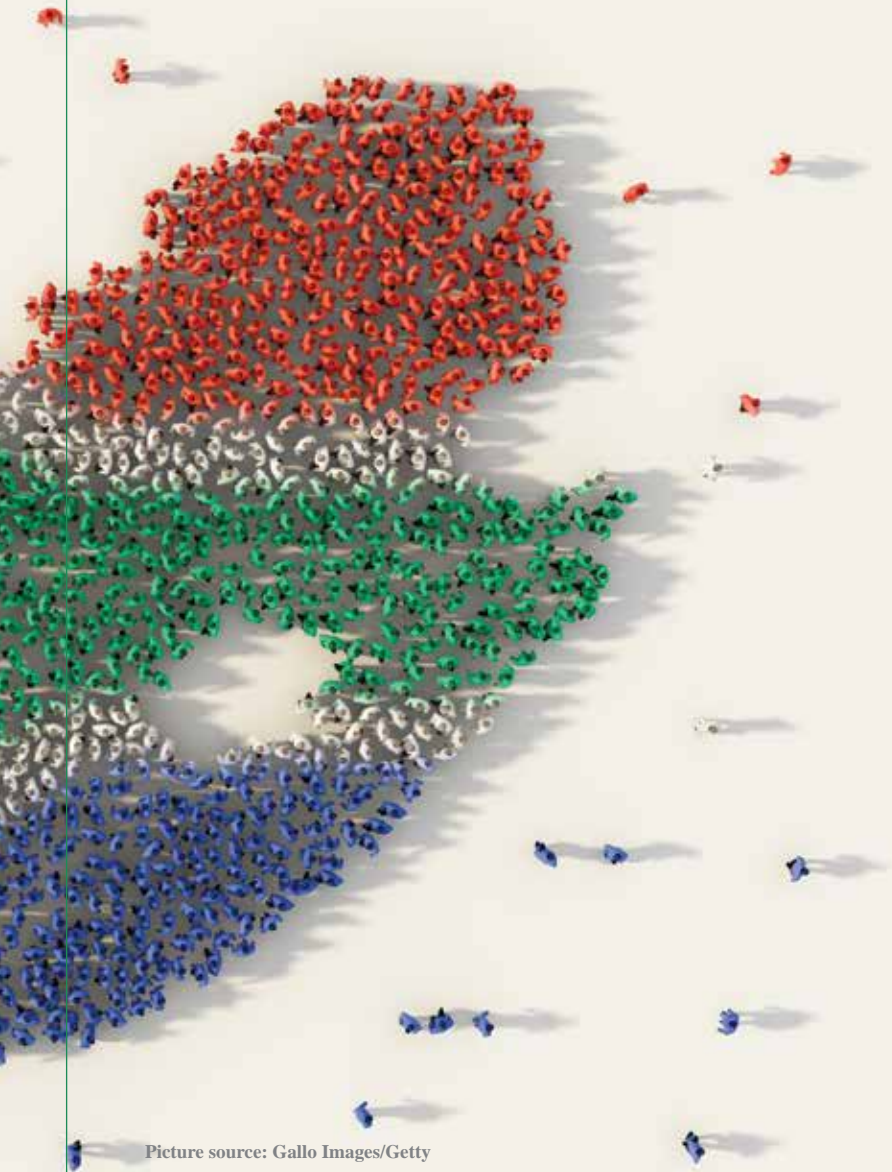
## What is a 'community'?

There have been various attempts by South African courts to define the term 'community' but a consensus remains

elusive. In *Department of Land Affairs and Others v Goeddelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC) Moseneke DCJ held that there was no reason to limit the meaning of the word 'community' in s 2(1)(d) of the Act by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy. That bonds of custom, culture and hierarchical loyalty may be helpful to establish a group's shared rules relating to access and use of land. But far more essential, the court held, was whether the community retained much of their identity and cohesion of an erstwhile clan. Moseneke DCJ adopted a generous interpretation of the Act and held that for a 'community' to qualify as a claimant under s 2(1)(d)

of the Act it must prove that there had remained something substantial and cohesive from the original community, and that they had derived their possession of land from shared rules (see W Du Plessis, J Pienaar and N Olivier 'Land matters' (2007) 22 *SAPR/PL* 548 at 581). In *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* (LC) (unreported case no LCC156/2009,19-4-2012) (Gildenhuys J) the LCC stated that ancestral lands are joined to their descendent communities as closely as the umbilical cord joins mother and child. In this case the community was dispossessed just short of a hundred years ago and concerned the restoration of land comprising the Mala-Mala game reserve.





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Many community restitutions of land claims are settled out of court as was done with the Makuleke community in 1996, the Makhoba community in 2002, the Riemvasmaak in 1994 and the Makgoba community in 2009. The latter's land restitution included the tea plantations previously leased to the Sapekoe group by the state.

The Communal Land Rights Act 11 of 2004, which attempted to define what constitutes a 'community' was declared unconstitutional by the CC in *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) because the wrong procedure had been followed in promulgating the specific Act.

The term 'community' in s 2(1)(d) of

the Act, however, continues to call for an acceptable definition on which there is a semblance of a consensus. As stated by Averweg and Leaning (*op cit*) at present, conceptions of community are varied and a better understanding of the actual meaning of the term is needed.

In embarking on such an endeavour much can be gained from reflecting on how two other countries who have a similar history to SA when it comes to land issues pertaining to indigenous communities – Australia and Canada – have approached the issue. These two countries both have a history of dispossessing their indigenous communities and placing such communities in so-called 'reserves' or 'customary lands'. It is not within the ambit of this article to go into

any detail underlying indigenous communities land claims in these two countries and a brief overview will thus be given.

For purposes of what follows 'indigenous communities' in Canada will be referred to as 'Indigenous Nations' and in Australia as 'Aboriginal Nations'. These designations are capitalised because they are used as proper nouns to signify the status of the communities as they see themselves.

## Canada

In Canada indigenous community land claims are based on the premise that the claim is founded on so-called 'aboriginal title'. In *Delgamuukw v British Columbia* [1997] 3 SCR 1010 it was held that aboriginal title is held communally and is a collective right held by all members of an Indigenous Nation (there are numerous such nations in Canada, which in many instances consist of various 'bands' or communities). It was further held that to prove aboriginal title a community must prove that the land was occupied by the ancestors of the community; that at the time of the colonisation of Canada the communities occupied the specific land exclusively and that there must be continuity between the existing and pre-colonisation occupation by the community. This case supported the previous decision of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 3 CNLR 17.

Section 35(2) of the Canadian Constitution states that "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada'. Approximately 400 000 people identify as being Métis. The Métis are a distinct people that grew out of the symbiotic relationship between the original Indigenous Nations and the early European immigrants to Canada. Given the vastness of Canada, different Métis communities exist with their distinctive traits and traditions. In *R v Powley* 2003 SCC 43 the Supreme Court was seized with a Métis community land claim. To identify the community as a 'community' the court held that the relevant Métis community must have their –

- own customs;
- way of life;
- recognisable group identity;
- self-identification as a community; and
- evidence of an ancestral connection to a historic Métis community.

Regarding land claims of the Inuit Indigenous Nation's community, the Nunavut Land Claims Agreement was signed in 1993 between the government and 26 Inuit communities comprising 30 000 people of whom 85% were Inuit. This agreement gave the Inuit as a community recognised constitutional rights over 351 000 km<sup>2</sup> of land.

## Australia

The Aboriginal Nation of Australia consists of two main groupings. The one group is known as the Torres Strait Islanders and the other group consists of Aboriginal communities on mainland Australia and Tasmania. This latter group comprises of various distinct communities such as the Pitjantjatjara, the Tiwi and the Wiradjuri.

In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 the Australian High Court was confronted with a claim by the Meriam community from the Torres Strait Islanders for the possession, occupation and use of the Murray Islands (part of the Torres Strait Islands). The court held that the Meriam community held so-called 'native title' to the Murray Islands. Such 'native title' was held to be held communally by the Meriam community and the community was entitled to use the land under their laws and customs. The court held that memberships of the community, was based on –

- a biological descent;
- a mutual recognition of a person's belonging to a community;
- a traditional connection with the land claimed;
- an identifiable community with laws and customs regulating access and control of the land; and
- a substantial maintenance of a connection with the specific land.

This was elaborated on in *Western Australia v Ward* (2002) 213 CLR 1 and

*Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

The *Mabo (No2)* case was followed by the Native Title Act 1993, which was designed to recognise and protect Aboriginal Nation community rights in the future.

## Conclusion

It is striking, but not surprising, how similar problems relating to land claims issues by indigenous communities are found in SA, Canada and Australia. The similarity results from the fact that in all three countries the property and constitutional law regimes are based on initial British colonisation, settlement and its aftermath.

The similarities are rife despite the fact that the three countries find themselves in the northern and southern hemispheres. In all three countries the transfer of political and property rights was initially accomplished without the consent of the indigenous communities. The colonisers assumed that by virtue of the international law doctrine of discovery that they gained exclusive property rights. In SA the process of racial segregation of land control had already begun under the colonial authorities and gained momentum with the Black Land Act 27 of 1913, the Development Trust and Land Act 18 of 1936 and the Group Areas Act 41 of 1950. To this must be added the introduction of four independent national states and six self-

governing territories. To achieve land control based on race, quite extensive use was also made of forced removals and evictions. A complex statutory network of primary and subordinate legislation was also necessary to sustain the complex web of rights and obligations, which inevitably encroached on common law rights on the one hand and communal property rights on the other. The profusion of legislative measures which emerged were to the disadvantage of the original indigenous communities.

This situation is very similar to the development of indigenous community land issues in Australia and Canada as set out above. These similarities make it imperative that SA takes cognisance of how indigenous communities have been defined in these two countries and how their community and land claims have been approached by their legislatures and courts. Such a study could only be of benefit in determining how to approach land restitution of communities in SA under the Act.

**George Barrie BA LLB (UP) LLD (Unisa)** is Professor Emeritus of the Law Faculty of the University of Johannesburg (UJ). He is formerly Dean of the UJ Law faculty and senior law adviser to the Department of Foreign Affairs.



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David Matlala *BProc (University of the North) LLB (Wits) LLM (UCT) LLM (Harvard) LLD (Fort Hare)* *HDip Tax Law (Wits)* is an adjunct professor of law at the University of Fort Hare.

# THE LAW REPORTS

April 2019 (2) *South African Law Reports* (pp 329 – 658);  
February [2019] 1 *All South African Law Reports* (pp 291 – 584);  
March [2019] 1 *All South African Law Reports* (pp 585 – 867);  
April [2019] 2 *All South African Law Reports* (pp 1 – 305);  
2019 (3) *Butterworths Constitutional Law Reports* – January (pp 1 – 163)

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

## Abbreviations

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

## Advocates

**Requirements for admission and enrolment as an advocate:** In terms of the Admission of Advocates Act 74 of 1964 (the Act) to be admitted and enrolled as an advocate a person had to be 'duly qualified', which phrase meant satisfying all the requirements for the LLB degree after completing a period of study of not less than four years or otherwise satisfied

other requirements set out in s 3(2) of the Act. The Act was repealed on 1 November 2018 when the Legal Practice Act 28 of 2014 (the LPA) came into operation. The latter prescribes the requirements for admission and enrolment as an advocate as being the LLB degree completed after pursuing a course of study of not less than four years. However, the LPA has three additional requirements, which the Act did not have, namely voca-

tional training, competency assessment or examination and community service. However, vocational training and an examination are required only for admission as a member of any of the societies of advocates (member of a Bar council).

Significant for present purposes is s 115 of the LPA, which provides that any person who, immediately before the date referred to in s 120(4) (1 November 2018),

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was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of the LPA.

The issue in *Ex parte Bakkes and Similar Cases* 2019 (2) SA 486 (ECG) was whether a person who immediately prior to 1 November 2018 was entitled to be admitted and enrolled as an advocate, also had to satisfy the requirements of the LPA given that the Act had been repealed and the application was made in terms of the LPA. The court held that the dual admission and enrolment system applied. This meant that persons who, immediately prior to 1 November 2018 were duly qualified, would be admitted and enrolled as advocates without the need to comply with the requirements of the LPA. However, for persons who duly qualified on or after 1 November 2018 the requirements of the LPA would have to be complied with.

Contrary to the view of Modiba J in *Ex Parte: Goosen and Similar Matters* (GJ) (unreported case no 2018/2137, 25-3-20019) (Modiba, Sutherland JJ and Millar AJ) Roberson J held that there was no ambiguity in s 115 of the LPA. It was clear from the section that persons who qualified for admission and enrolment 'in terms of this Act' meant nothing more than that the LPA would be used as a vehicle for the admission of such persons, given that the Act had been repealed. To require such a person to satisfy the requirements of the Act

and the LPA in order to be admitted would unfairly require such person to be dually qualified and would negate the provision in s 115 to the effect that such a person was entitled to be admitted and enrolled if they were entitled prior to 1 November 2018. Section 115 clearly recognised different requirements for admission and enrolment prior to and from 1 November 2018 onwards. Such a system would in any event eventually disappear as more applicants would have obtained their LLB degrees from 1 November 2018 onwards and the number of applicants who obtained their LLB degrees prior to 1 November 2018 would diminish.

## Citizenship

**Acquisition of citizenship by naturalisation:** Section 4(3) of the Citizenship Amendment Act 17 of 2010 (the Act), which came into effect on 1 January 2013, provides that a child born in South Africa (SA) whose parents are not South African citizens or who have not been admitted into the country for permanent residence, qualifies for South African citizenship on becoming a major if –

- they have lived in the country from the date of their birth to the date of becoming a major; and
- their birth has been registered in accordance with the provisions of the Births and Deaths Registration Act 51 of 1992.

In *Minister of Home Affairs and Another v Ali and Others* 2019 (2) SA 396 (SCA) the five respondents, Ali and others,

satisfied the requirements of the section and accordingly qualified for citizenship by naturalisation. They were all born and lived in SA and had never been to any country or were the citizens of another country. However, their parents were not South African citizens nor had they permanent residence status. When the respondents applied for citizenship they were turned away as the appellant Minister of Home Affairs took the view that the section did not have retrospective application, meaning that it applied only to those children who were born after the commencement of the section on 1 January 2013. Furthermore, the minister had not promulgated the necessary regulations and application forms. The WCC, per Wille AJ, held that in the absence of the regulations and application forms, and pending their making, applications for citizenship by naturalisation had to be made on affidavit. The court further held that the section applied to all persons irrespective of whether they were born before or after 1 January 2013. The minister was ordered to promote the necessary forms to be made available within one year of the court order.

The SCA, after making slight amendment of the High Court order by changing the 'necessary forms' to 'regulations', dismissed an appeal against the order with costs. Mathopo JA (Lewis, Seriti, Wallis and Molemela JJA concurring) held that it was an affront to deny the respondents the right to apply for citizen-

ship in a country where they were born, had lived and which was the only country they had ever known. Preventing children born prior to 1 January 2013, even though they had lived in the country since birth and had attained majority thereafter, was unfairly discriminatory.

## Costs

**Recovery of legal costs paid by the state for government official litigating in his personal capacity:** The facts in *Democratic Alliance v President of the Republic of South Africa and Others and a Related Matter* [2019] 1 All SA 681 (GP) were that in June 2005, December 2007, as well as March 2018 the former president of South Africa, Jacob Zuma, was charged with offences relating to racketeering, corruption, money laundering and fraud. During that period Zuma had just one aim, namely, to resist prosecution. To that end he employed private attorneys and teams of counsel, to make applications, counterapplications and interlocutory applications, which process the court described as litigating in a most luxurious scale. The total amount expended by the state in funding Zuma's criminal prosecution and related civil proceedings ranged from R 16 million to R 32 million. The funding was authorised by the Director-General in the Presidency (the Presidency) and/or the State Attorney. In a few instances funding was provided without authorisation by either of the two.

The Democratic Alliance,

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an official opposition party in Parliament, instituted proceedings for a review and setting aside of the decision of the Presidency and the State Attorney to provide such funding, relying on the Promotion of Administrative Justice Act 3 of 2000 (PAJA), as well as the principle of legality. The Economic Freedom Fighters, another political party, based its review application on the principle of legality only.

The GP granted the order with costs to be paid by Zuma. The court declared invalid, and accordingly reviewed and set aside the decision of the Presidency and the State Attorney to cover legal costs, which Zuma incurred in his personal capacity. To ensure that recovery of such costs would take place the court directed the State Attorney to compile a full and complete accounting of all the legal costs incurred by Zuma in his personal capacity in litigation concerned and, thereafter, to take all necessary steps, including the institution of

legal proceedings, to recover such amounts. The State Attorney was directed, within three months of the order, to file a report, made under oath, detailing the steps that had been taken and that would be taken to recover the amounts paid by the state for Zuma's legal costs.

Meyer J (Ledwaba DJP and Kubushi J concurring) held that the provisions of s 3 of the State Attorney Act 56 of 1957 and reg 12.2.1 of the Treasury Regulations made in terms of the Public Finance Management Act 1 of 1991 did not authorise the impugned decisions by the Presidency and the State Attorney to pay for Zuma's private legal costs in defending corruption and other related charges against him and in ancillary or related civil legal proceedings. The impugned decisions were not authorised by the statutory provisions invoked by the Presidency and the State Attorney and consequently amounted to a breach of the principle of legality. They were unconstitutional and fell

to be set aside. They also fell to be reviewed and set aside in terms of PAJA. They were not authorised, were *ultra vires* and were influenced by an error of law.

## Delict

**Strict liability under actio de pauperie:** In Roman law '*pauperies*' was damage done without any legal wrong on the part of the doer since an animal (being devoid of reasoning) was incapable of committing a legal wrong. In such a situation the owner was held liable for damage caused by their animal merely because they were the owner. However, they could avoid pauperian liability by handing the animal over to the victim in surrender if they chose not to offer pecuniary damages. In *Cloete v Van Meyeren* 2019 (2) SA 490 (ECP); [2019] All SA 662 (ECP) dogs belonging to the defendant Van Meyeren attacked and seriously injured the plaintiff Cloete, a passer-by, in the street. The dogs escaped from the prem-

ises after an intruder had broken the locked gates and left them open. The defendant raised the plea that his liability was excluded by the conduct of the third party, the intruder, who had broken the locked gates and left them open, and consequently there was no fault on the defendant's part.

After separating the issue of liability from the quantum, it was held that the defendant was liable for such loss as would be proved or agreed at a later stage. The defendant was ordered to pay the costs. Lowe J held that there were no facts present in the matter, pleaded or proven, bringing into operation the concept of culpable conduct of a third party (the intruder) causing a domesticated animal to act *contra naturam* and thus exonerating the owner from pauperian liability. Similarly, it was clear that the third-party intruder relied on was not in charge or in control of the dogs and thereafter failed by negligent conduct to prevent them injuring the victim.

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## Education

### Invalidity of exclusion policy under which learner is excluded from examinations and seated apart from fellow learners:

In *NM v John Wesley School and Another* 2019 (2) SA 557 (KZD) the first respondent was an independent private school, namely, John Wesley School (the school), had a policy in terms of which a learner would be excluded from participation in the activities of the school if payment of school fees was not paid up to date. In the instant case the minor, being the applicant's child, was excluded from writing examinations because of the non-payment of school fees and put in a separate room, isolated from other learners, when the examinations were underway. The school refused payment of arrear by instalments, with the result that the minor was so treated until full payment was made. Contesting the validity and constitutionality of the exclusion policy the applicant approached the High Court for an order declaring

that the policy was unlawful and inconsistent with the Constitution. It was so ordered.

Masipa J held that while the school was entitled to invoke its authority to exclude learners, a fair procedure had to be followed. The exclusion had to be for a fair reason, taking into account what was in the best interests of the child. In that regard it did not matter whether the institution was an independent school or a public one. That was the case regardless of whether the exclusion related to the child's conduct or any breaches by its parents. In the present case the fact that the learner was allowed to write his examinations once the arrears were paid did not make the school's conduct less reprehensible. The school's conduct in isolating the learner and placing him in a separate room while other learners wrote examinations was degrading, humiliating and inhumane. It penalised the learner, a minor, for his parents' conduct for which he was not responsible. In imple-

menting such a penalty the school failed to take into account the learner's best interests and conducted itself contrary to international treaties, the South African Schools Act 84 of 1996 and the Constitution. Doing so was not in the best interests of the learner.

## Electricity

### Human catastrophe justifies prohibition of reduction or termination of electricity supply:

In *Resilient Properties (Pty) Ltd v Eskom Holdings Soc Ltd and Others* 2019 (2) SA 577 (GJ); [2019] 2 All SA 185 (GJ), the second respondent, Gamagara Local Authority (the municipality), a small municipality based in Kathu village in the north-eastern sector of the Northern Cape Province, fell into arrears with payment for electricity supplied by the first respondent Eskom. The two parties reached an agreement in terms of which the municipality undertook to pay instalments as they fell due. When the municipality failed to honour the agreement Eskom gave a 'termination notice'

dated 14 March 2018 in which it indicated that it was initially going to reduce and eventually terminate its electricity supply to the municipality. To prevent the threatened reduction or termination, pending final review and setting aside of that decision, the applicant Resilient Properties, the owner and operator of a shopping mall within the area of jurisdiction of the municipality, approached the High Court for interdictory relief. Resilient, whose electricity bill with the municipality was up to date, alleged that the threatened termination of electricity supply would have catastrophic effect on the mall and residents of the municipality by among others destroying water-reticulation and waste-water treatment systems, as well as lead to the shutdown of schools and compromise the operation of old-age homes, security companies and health-care providers. Eskom did not deny the allegations.

The court granted an interdict restraining Eskom from implementing the termina-



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tion notice. The court further directed the municipality to pay Eskom all amounts falling due in terms of the instalments provided for in the acknowledgement of debt existing between the parties. Costs were to be costs in the cause of the pending main application. The court emphasised the fact that what Eskom was being restrained from doing, was the intended interruption of electricity supply as per the 'termination notice' or any substantially similar notice and not every conceivable interruption or reduction decision, as Eskom could well conceive – after appropriate notice and consultation – of a form of reduction of supply of electricity that would not result in human catastrophe as indicated above.

Van der Linde J held that in principle Eskom had the power under s 21(5) of the Electricity Regulation Act 4 of 2006 to terminate or interrupt the supply of electricity to the municipality, given the latter's contractual default. Due to the nature and source of Eskom's power, the exercise thereof was administrative action for the purposes of s 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 and was constrained, if not by the requirement of reasonableness then at least by the baseline standard of rationality. Ordinarily the power to interrupt or terminate the supply of electricity would have been intended to prevent Eskom from having to supply electricity when it would not be paid for. However, it could not be accepted that the power would have been intended to be exercised in such a manner that it would in a given circumstance result in widespread human catastrophe.

## Minerals and petroleum

**Prior informed consent of holders of informal land rights required before granting mining rights:** In *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP); [2019] 1 All SA 358 (GP) the appli-

cants, Baleni and others, were members of the Umgungundlovu community (the community) living on ancestral land in the Xolobeni area, Eastern Cape. The fifth respondent, Transworld Energy and Mineral Resources (the company) wanted to carry out mining activities in the area. The majority of the applicants lived within or in close proximity of the proposed mining area and opposed the intended mining activities of the company taking place without their free prior informed consent as provided for in s 2(1) of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), which states that no person may be deprived of any informal right to land without their consent. The applicants' right to the land in question was informal as it was communal and without title deeds, the land having been occupied in terms of customary law and tradition. On the other hand the first respondent (the minister) relied on the provisions of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA) contending that 'consultation' with the community, instead of their 'consent' was sufficient to enable mining activities to be carried out.

In the application, the applicants sought a declaratory order to the effect that in terms of IPILRA the minister was obliged to obtain their full and informed consent prior to granting any mining rights to the company. The order was granted with costs.

Basson J held that the granting of mining right over the property amounted to deprivation of rights over land for the purposes of IPILRA and s 25 of the Constitution as it would result in the diminution of the use, occupation and access to the land. Due to such deprivation, the consent requirement provided for in s 2(1) of IPILRA was triggered, as the land was not expropriated in terms of the Expropriation Act 63 of 1975 or any other Act. 'Consent' could not be equated with 'consultation'. The former contemplated an agreement while the latter envisaged a process of consensus-seeking

that might not necessarily result in an agreement. Communities such as the applicants were afforded broader protection in terms of IPILRA when mining rights were considered by the Minister.

## Mortgage bonds

**Money order and order to specially execute against primary residential immovable property to be granted or postponed simultaneously:** The facts in *Standard Bank of South Africa Ltd v Hendricks and Another and Related Cases* 2019 (2) SA 620 (WCC), [2019] 1 All SA 839 (WCC) were that on 13 September 2018 a total of seven foreclosure matters served in the WCC, before Savage J where Standard Bank and Absa Bank sought an order of execution against immovable property, which was the primary residence of the judgment debtor. In view of the judgment of the full court of the GJ, in the case of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) Savage J invoked the provisions of s 14(1)(b) of the Superior Courts Act 10 of 2013 and postponed the matters. Thereafter the Judge President referred the matters for hearing before a Full Court, inviting the legal practitioners for the parties, together with *amici curiae*, to address the court on a number of issues, which essentially amounted to whether

an application for a judgment order sounding in money and an order of special executability relating to the same matter could be heard separately or should be held simultaneously. A related question was whether a judgment order sounding in money could be granted while the order of special executability was postponed. There was also the question whether the court had a discretion to postpone such a judgment, as well as a special executability order hearing. The parties were also directed to address the court on the issue of the reserve price if the property were to be declared executable. The individual defendants did not participate in the proceedings.

All the applications were postponed *sine die*, nothing being said about costs which the applicants did not seek. The Full Court per Erasmus, Dolamo and Savage JJ held that r 46A of the Uniform Rules of Court, which required personal service on the debtor of the notice of a motion for a judgment sounding in money and an order of executability, required that more should be said on the attempt to achieve personal service than simply a reference by the Sheriff to the fact that the debtor was not present or could not be found at the premises. Such personal service could include service

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at the debtor's workplace or at their home over the weekend. If personal service was not possible, the court had to be approached to authorise service in some other manner.

A combined application for the judgment sounding in money and the order of executability against a primary residence, in terms of r 46A, required personal service on the debtor. Both an order sounding in money and a special executability order had to be sought simultaneously by the creditor and not separately. It was not appropriate to order postponement of the implementation of the order of special executability only. Having regard to s 26 (right of access to adequate housing) of the Constitution, the court had a discretion to postpone the judgment sounding in money hearing, together with the order for special execution where a court, on a proper consideration of the facts before it, considered doing so to be in the interests of justice.

On the issue of a reserve price it was held that in most instances the benefits of setting a reserve price outweighed any prejudice, which would arise in doing so. A reserve price would halt the sale of homes at nominal value to the direct prejudice of the judgment debtor. It was, therefore, only in exceptional circumstances that the court would exercise its discretion not to set a reserve price.

**Note:** The court attached two annexures to the judgment, one being a Practice Directive dealing with the

requirements for an order sounding in money and an order of special executability while the other annexure dealt with the contents of the affidavit supporting the application, which the attorney or financial institution seeking the order had to prepare.

## Refugees

**Delay in applying for asylum status is not fatal to the application:** The facts in *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC), were that the appellant Ruta, a national of Rwanda, entered the country other than at a port of entry and without a visa, this making him an illegal foreigner. Some 15 months later he was arrested for traffic offences at which stage his status as an illegal foreigner was established. While in prison for the traffic offences the Department of Home Affairs (the Department) sought to deport him to his country. It was at that stage that he applied for asylum status. The attitude of the Department was that it was too late for him to apply and would accordingly be deported.

The GP granted an interdict restraining his deportation and ordered his release from prison. On appeal to the SCA the decision of the High Court was reversed. The CC granted leave to appeal and upheld the appeal with costs even though by that time the issue between the parties had become moot as the appellant had been released from prison and his applica-

tion for asylum status was in process. It was nevertheless in the public interest to deal with the appeal as it raised an arguable point of law while there were many people in the appellant's position before his release.

Reading a unanimous decision of the court Cameron J held that once an intention to apply for asylum was evinced, the protective measures of the Refugees Act 130 of 1998 (the Refugees Act) and the regulations came into play. As a result, the asylum seeker was entitled as of right to be set free subject to the provisions of the Refugees Act. Failure to apply for asylum at the first available opportunity was no disqualification since delay did not function as an absolute disqualification from initiating the asylum application process. All asylum seekers were protected by the principle of *non-refoulement* (which prohibited sending asylum seekers back to a jurisdiction they were fleeing from), which protection applied as long as the claim for refugee status had not been finally rejected after a proper procedure. Until the right to seek asylum was afforded and a proper determination procedure was engaged and completed, the Constitution required that the principle of *non-refoulement* as articulated in s 2 of the Refugees Act should prevail. The overriding principle of the section was that apart from those officially recognised as refugees and afforded refugee status, no applicant for asylum should be expelled,

extradited or returned to any other country or be subjected to any similar measures.

- See law reports 'Immigrants' 2018 (June) DR 30 for the SCA judgment.

## Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Business rescue, cancellation of procurement contracts on the basis of prior fraud, confirmation of a surrogate motherhood agreement, cost price of trading stock as the benchmark against which diminution in value should be measured, costs on attorney and client scale due to vexatious and abusive conduct in litigation, deemed accrual of proceeds of sale of property on date of agreement, emoluments attachment order, fishing quotas, foreclosure of residential property, hate speech, mental competence of the complainant in a rape trial, removal of a trustee by Master not invalidating decisions taken by such trustee, repudiation of contract, review and setting aside of unfair disciplinary proceedings, review of decision of both first instance and appeal, as well as trial for murder, defeating or obstructing administration of justice.



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# LLB graduates from private institutions are qualified to enter professional legal practice

*Independent Institute of Education (Pty) Ltd v The KwaZulu-Natal Law Society and Others (KZNLS) (unreported case no 9090/18, 22-2-2019) (Sibiya AJ)*

In this significant judgment, the applicant was the Independent Institute of Education (IIE), which is registered in terms of s 54(1) (c) of the Higher Education Act 101 of 1997, as amended, as a private higher education institute since 2007. This entitled the IIE to offer tertiary qualifications, such as diplomas, certificates and degrees at graduate and postgraduate level, in accordance with its accreditation. In May 2017 the Council on Higher Education, the body responsible for accrediting programmes of higher education in the country, accredited the IIE to provide the LLB degree at its campuses. In doing so, the Accreditation Committee of the Higher Education Quality Committee of the Council on Higher Education found the IIE to be on par with the course it offered in every respect with the LLB degrees offered by public universities.

In October 2017 the IIE was registered to offer the LLB degree at the National Qualifications Framework level 8, by the South African Qualifications Authority, the statutory body responsible for qualification standards set by the Minister of Higher Education. One of the stated purposes of the qualification is to prepare students for a career in professional legal practice, including practice as an advocate, attorney or prosecutor.

The IIE duly offered the LLB degree at six of its campuses that are designated as Varsity Colleges in various provinces and at different locations, and in the 2018 academic year, the IIE registered an approximate 200 first-year students.

On 19 January 2018, the first respondent, the KwaZulu-Natal Law Society (KZNLS) in response to a query from one of the student's parents, indicated that the LLB degree offered by the IIE did not meet the requirements for admission as an attorney in terms of s 2(1) of the Attorneys Act 53 of 1979 (the 1979 Act). In this regard, it should be noted that the 1979 Act has subsequently been repealed in its entirety by the Legal Prac-

tice Act 28 of 2014 (LPA), which came into effect on 1 November 2018 and s 2(1) of the 1979 Act has been replaced by s 26(1) of the LPA.

The KZNLS' legal stance was premised on two arguments. First, the 1979 Act provides that an LLB obtained from a 'university' qualifies one for articles of clerkship, a prerequisite for admission as an attorney, and neither the applicant nor its Varsity College brand is a university. Secondly, the KZNLS advanced the reason that as of November 2017 the Council on Higher Education had listed all the institutions with an accredited LLB programme and the IIE was not listed as such an institution. The latter argument was subsequently withdrawn by KZNLS and was no longer an issue.

When the matter came before Sibiya AJ on the opposed motion roll on 11 December 2018, the KwaZulu-Natal Division of the High Court in Pietermaritzburg had to determine whether s 26(1) (a) of the LPA infringed the applicant's constitutional rights to –

- equality before the law in terms of s 9(1) of the Constitution;
- freedom of trade, profession and occupation in terms of s 22 of the Constitution;
- right to establish private education institutions in terms of s 29(3) of the Constitution; and
- importantly, if this was indeed so, whether such infringements were reasonable and justifiable in terms of s 36 of the Constitution, namely the limitation clause.

Prior to this hearing, the matter was first enrolled on the motion roll on 25 September 2018 before Koen J in the form of an application brought on an urgent basis to review the decision of the KZNLS to refuse to recognise the IIE's LLB degree as being sufficient for entry into the legal profession. In addition, the applicant sought a declaratory order that its LLB degree was duly registered and was the equivalent to the LLB degree offered by accredited public universities.

On that occasion, Koen J adjourned the application *sine die* and granted the IIE leave to amend the relief it claimed and to supplement its papers.

The IIE did so, and that resulted in the revised content of the papers and relief sought before Sibiya AJ, who in her judgment addressed the issues, which are succinctly summarised below.

The court firstly addressed the meaning of the term 'university' and it referred to the Higher Education Amendment Act 9 of 2016 (the Act) that made the distinction between a university established under the Act and any other higher education institution. The court found that, with reference to the Act, the term 'university' could not be read to include the applicant and the applicant was, therefore, excluded. Although this sustained the argument advanced by the KZNLS, it did not, by any means, end the inquiry.

The court then dealt with the matter of greater legal and indeed constitutional significance, namely, whether s 26(1) of the LPA infringed or limited the IIE's applicants' rights under ss 9, 22 and 29(3) of the Constitution.

In doing so, the court dealt with the content of s 29(3) and found that the IIE, having shown that it met the criteria set out in s 29(3) and also those in ch 7 of the Higher Education Act, therefore, enjoyed the same rights to offer the accredited four-year LLB as public universities have and its exclusion from s 26(1)(a) of the LPA unlawfully and unconstitutionally limited this right.

In addressing the cardinal importance of the right to equality before the law under s 9(1), the court ruled that the KZNLS had unfairly discriminated against the IIE and that the IIE and its students have the right to equal protection and benefit of the law. The court's reasoning was that the minimum standards set for admission as an attorney was an LLB degree from a university. It held further that there is only one LLB degree that is accredited by the South African

Qualifications Authority and it is the same for public universities, as well as for the IIE, a private tertiary institution. The court considered the confirmation of the Council on Higher Education that the applicant's four-year LLB degree is in every respect on par with those from public universities. Furthermore, the court found there was no rational link between the impugned provision and the legislative purpose as reflected in all the relevant statutes. This meant that the differentiation that constituted the KZNLS' argument for non-recognition, limited the IIE's rights under s 9(1) of the Constitution, without valid justification.

In addressing the ambit of s 22 of the Constitution, the High Court referred to correspondence between the Minister of Higher Education and the Minister of Justice where the former stated at para 41 that: 'The problem that section 26(1)(a) [of the LPA] creates is that LLB graduates who have obtained their qualifica-

tion from registered private higher education institutions may not be given an opportunity to practice.'

The court's statement at para 46 relating to the effect of s 26(1)(a) of the LPA is of singular importance, that is, 'of limiting the entry into the profession to the LLB degree obtained from a university, when there is no material distinction between what is offered by a university and that offered by the applicant, cannot be said to be anything but arbitrary.' The court concluded that s 26(1)(a) of the LPA limited the rights of the applicant and its LLB students.

The further inquiry examined whether the limitation of the rights under ss 9, 22 and 29(3) of the Constitution were justifiable under s 36, as the court had found that the distinction created by s 26(1)(a) of the LPA between LLB degrees in public universities and those from the IIE created an unnecessary and unjustifiable limitation to entry into the profession

and consequently found the provisions of s 26(1)(a) to be unconstitutional and invalid.

The court order further stipulated that students who graduate with an LLB degree offered by the IIE after 1 January 2018, are as qualified to enter the practice of the legal profession as the graduates from public universities in South Africa.

As Sibiya AJ's judgment involved the invalidation of a provision in parliamentary legislation it is required that the Constitutional Court must in terms of s 167(5) ratify or confirm the invalidation.

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By  
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## Legality of occupation of property by homeless persons

*Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* (SCA) (unreported case no 734/2017, 3-4-2019) (Maya P) (Dambuza, Van der Merwe, Schippers JJA and Nicholls AJA concurring)

'Homelessness is a problem experienced worldwide, regardless of a country's economic status. In South Africa, an estimated 100 000 to 200 000 people are living on the streets. With harsh weather conditions, no access to ablution facilities and no income, people living this way are arguably the most destitute in the country' – Kerry-Lee Black ('Exploring the lived experiences of homelessness in a Cape Town suburb' (Dissertation, University of Cape Town, 2017) at 1).

As a result, on being homeless and not being able to afford rent for accommodation, people usually occupy vacant land or perhaps any place where they can make a home for themselves – by building structures with material they have collected. On 3 April, the Supreme Court of Appeal (SCA) delivered judgment in the case of *Ngomane*, where it was approached to provide relief for applicants, a group of destitute and home-

less people who had made a home for themselves on a traffic island under the R31 highway bridge over End Street, between Durban and Meikle Streets, in the business district of the City of Johannesburg Metropolitan Municipality (the City). As such, this case note, and commentary will focus on the facts and background of the case, and the court's decision in the matter.

### Legal background

The applicants approached the SCA for leave to appeal against the decision of the Gauteng Local Division of the High Court in Johannesburg. The applicants had sought an order directing the respondents to return their personal belongings and material; alternatively, that they be provided with similar material and possession thereof. The applicants' property was confiscated and destroyed by the Johannesburg Metropolitan Police Department (JMPD). The basis of their

application was that the traffic island constituted a place of residence and home within the meaning of s 26(3) of the Constitution, thus rendering the conduct of the JMPD an unlawful eviction.

### The court's decision

The court firstly determined whether the applicants' property constituted a building or structure in terms of s 1 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). The court held that the pile of loose wooden pallets, cardboard boxes and plastic sheets belonging to the applicants could not be interpreted as buildings or structures within the meaning of s 1 of PIE. Therefore, the conduct of the JMPD did not amount to eviction.

Nonetheless, the applicants' property was unlawfully destroyed. The court went on to establish whether the applicants had any remedy and if so, this enabled the court to determine the harm

suffered by the applicants. It agreed with the court *a quo*, that the applicants could not invoke the *mandament van spolie* (spoliation order), on the basis that such order is applicable and granted where the property in question is in existence and may be returned to the rightful/lawful owner. As such, the spoliation order cannot be granted if the property in question has been destroyed. The SCA reiterated what was said in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at paras 24 to 26:

‘While the *mandament* clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property – not its reconstructed equivalent. To insist that the *mandament* be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function). ... I do not think that formulating an appropriate constitutional remedy in this case requires us to seize upon a common-law analogy and force it to perform a constitutional function.’

In rejecting the spoliation order relief,

the court held at para 21 that: ‘What is clear, however, is that the confiscation and destruction of the applicants’ property was a patent, arbitrary deprivation thereof [as provided in s 25(1) of the Constitution] and a breach of their right to privacy enshrined in s 14(c) of the Constitution, “which includes the right not to have ... their possessions seized”’. The respondents’ conduct was further characterised as ‘disrespectful and demeaning’. The court held that this, in effect, resulted in distress and violated the applicants’ right to dignity.

Therefore, the respondents’ conduct was unconstitutional and unlawful, thus entitling the applicants to obtain the appropriate relief as envisaged in s 38 of the Constitution. As to what constitutes appropriate relief, the court relied on *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paras 18 and 19.

The court then upheld the application for leave to appeal and condonation for late filing, with costs, and ordered that –

- the destruction of the applicants’ property was unconstitutional and unlawful;
- the first respondent had to pay each applicant a sum of R 1 500 as compensation for the destruction of their property; and
- the respondents had to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

## Conclusion

The court dismissed the applicants’ reliance on s 26(3) of the Constitution and PIE, and held that the property of the applicants did not constitute a building or structure within the meaning of s 1 of PIE. It, however, ensured that the applicants obtained alternative relief, namely, a payment of R 1 500 each. This was a fair decision. However, I am of the view that the court could have suggested to the respondents – that, in future, when they embark on the ‘clean-up’ operation, a (written) notice should be given to the people who stay in the area, which has to be cleaned. People who stay in places such as those in which the applicants lived, are also members of society and they should be treated with dignity and they should enjoy the same human rights as everyone else. Despite living in a place not falling within the meaning of s 1 of PIE, a written notice before clearing the place should have preceded any action. Furthermore, the clean-up by the officials should be carried in a manner that respects and protects the inherent dignity of those affected.

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By  
Jared  
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# Professional indemnity insurance

*Centriq Insurance Limited v Oosthuizen and Another* (SCA)  
(unreported case no 237/2018, 14-3-2019) (Cachalia JA)  
(Mbha, Mathopo JJA and Dlodlo and Rogers AJJA concurring)

**T**he Supreme Court of Appeal’s (SCA) recent dismissal of an appeal in the case of *Centriq Insurance Limited*, highlighted the need for professional indemnity (PI) insurance providers to ensure certainty when it comes to their exclusion clauses. If too ambiguous, these clauses could hold insurance providers liable for actions of an insured person whom the insurer never intended to cover. The judgment also highlights the importance of financial advisers fully understanding the investment vehicles

they recommend to clients, as their fiduciary duties are taken seriously by the court.

## The facts

The facts of the matter, in brief, are as follows: Mrs Oosthuizen was left widowed after her husband’s death due to a shooting incident. Mr Oosthuizen’s life policy subsequently paid out an amount of R 3,4 million. As a school teacher, Mrs Oosthuizen sought to provide a financially stable future for herself and her child by investing a portion of this pay

out. Two million rand was invested in Sharemax Investments (Pty) Ltd after she was advised to do so by Mr Castro. Mrs Oosthuizen was informed by Mr Castro that the investment would relate to a shopping complex and that dividends would be earned from the moment of full subscription of the shares. The apparent dividends would pay out 10% after tax. Mr Castro convinced Mrs Oosthuizen of his confidence in the investment, even though numerous newspaper articles criticised the investment as being a ponzi scheme (at para 14).



Mrs Oosthuizen then made her investment in the scheme but apart from receiving a payment of R 1 400, received no returns before the development ultimately failed. The failure was due to a Reserve Bank investigation, which found that Sharemax had been taking deposits illegally (at para 3).

To recoup her initial investment plus interest, Mrs Oosthuizen instituted proceedings against Mr Castro who in turn sought indemnification from Centriq Insurance Limited. Centriq, however, denied such indemnification on the grounds that an exclusion clause in the policy existed in their favour. The exclusion released them from indemnifying an insured member in respect of any claims against such member arising from depreciation in the value of any investment or claims as a result of the performance of an investment. Based on these two arguments Centriq approached the SCA to dismiss the order granted in Mrs Oosthuizen's favour and additionally to hold Centriq liable for Mr Castro's actions (at para 6).

The court, in dismissing the appeal, and with reference to Professor J Bird (*MacGillivray on Insurance Law* 14ed (Sweet & Maxwell 2018) at para 11-007-1-008) stated that: 'The consequence of adopting a business-like or commercially sensible construction of an insur-

ance policy is that the literal meaning of words read in their context may have to yield to a fair and sensible application where they are likely to "produce an unrealistic and generally unanticipated result", which is at odds with the purpose of the policy.' The court further held that courts are not entitled to lean to a construction more favourable to an insured person than the language of the contract permits in cases where the policy seems 'to drive a hard bargain.' The insured person would only be entitled to that, for which they are insured. In cases of real ambiguity, the courts would use the doctrine of *contra proferentem*, interpreting the plain language of the policy as against the insurer who inserted the exclusion as per *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) (at para 18).

Addressing both exclusions, Cachalia JA observed that the investment resulted in a complete loss of capital, therefore, not triggering the first exception relating to depreciation. Regarding the second exclusion, Mr Castro was aware from the onset that Mrs Oosthuizen's intention was focused on the security of the investment and not its guaranteed performance, thereby negating its use (at para 30). Mrs Oosthuizen had no previous background or experience in investing and trusted Mr Castro as he was previously her late husband's advis-

er. Furthermore, Mr Castro misled Mrs Oosthuizen as to the investments fundamental character (at para 30). For these reasons the court negated the use of the exclusionary clause.

## Conclusion

This judgment will have interesting consequences on the future of exclusion clauses and their drafting in relation to PI insurance. It further creates the precedent of ensuring that exclusion clauses be more effective, and that insurers are to specify the content of such exclusions in as much detail as possible. If this is done as part of the policy, then its use will be relied on in whatever manner it is so laid out, as that would constitute what the parties contracted for. Only in cases of ambiguity, would alternate interpretations be considered and even then, it would be to whatever ends the court finds it to be commercially acceptable. Such a route would leave the door open to an outcome neither party expected when entering into the contract in the first instance.

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## Commencement of Acts

**Financial Intelligence Centre Amendment Act 1 of 2017, ss 2(a) and (c), 3(c), 17, 20, 21(b), 24, 39 and 42. Commencement:** 1 April 2019. GN519 GG42360/29-3-2019 (also available in Afrikaans).

**Public Administration Management Act 11 of 2014, ss 5, 6, 7, 9, 11, 12 and 19. Commencement:** 1 April 2019. Proc15 GG42337/29-3-2019.

## Selected list of delegated legislation

**Agricultural Product Standards Act 119 of 1990**

Imposition of levies on perishable products. GenN205 GG42380/5-4-2019.

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

Codes of good practice on Broad-Based Black Economic Empowerment: Defence sector code. GN567 GG42391/12-4-2019.

**Civil Aviation Act 13 of 2009**

Twentieth amendment of the Civil Aviation Regulations, 2019. GN R520 GG42362/29-3-2019.

**Compensation for Occupational Injuries and Diseases Act 130 of 1993**

Annual increase in medical tariffs for medical services providers. GenN188, GenN189, GenN190, GenN191, GenN192 and GenN193 GG42354/29-3-2019.

Amendment of rules, forms and particulars: Return of earnings. GN514 GG42351/29-3-2019.

Standard rates. GN532 GG42372/2-4-2019.

**Constitution of the Republic of South Africa, 1996**

Rules for the election of the president, speaker and deputy speaker of the National Assembly, chairperson and deputy chairperson of the National Council of Provinces, premiers of provinces and the speaker and deputy speaker of provincial legislatures. GenN207 GG42386/5-4-2019.

**Criminal Procedure Act 51 of 1977**

Declaration of Peace Officers in terms of s 334 of the Act: Immigration Officers appointed in terms of s 33(2)(b) of the Immigration Act 13 of 2002. GN R499 GG42338/29-3-2019.

**Dental Technicians Act 19 of 1979**

Amendment of the regulations relating to the registration of dental laboratories and related matters. GN R524 GG42367/1-4-2019.

Annual fees payable. GN R523 GG42367/1-4-2019.

# New legislation

Legislation published from  
29 March – 30 April 2019

**Electricity Act 41 of 1987**

License fees payable by licensed generators of electricity. GN602 GG42417/26-4-2019.

**Electronic Communications Act 36 of 2005**

Ordering System Specification for geographic, non-geographic and number portability in terms of reg 7 of the Number Portability Regulations. GN518 GG42358/29-3-2019.

Increase of administrative fees in relation to service licenses. GenN201 GG42370/1-4-2019.

Increase of the radio frequency spectrum license fees in terms of the Radio Frequency License Fee Amendment Regulations, 2015. GenN200 GG42370/1-4-2019.

Increase of administrative fees in relation to the type of approval. GenN202 GG42377/3-4-2019.

**Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947**

Amendment of regulations relating to the tariffs for registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest control operators, appeals and imports. GN471 GG42337/29-3-2019.

Films and Publications Act 65 of 1996 Classification guidelines for classification of films, interactive computer games and certain publications. GN539 GG42380/5-4-2019.

**Financial Intelligence Centre Act 38 of 2001**

Directive: Usage of an automated transaction monitoring system for the detection and submission of regulatory reports to the Financial Intelligence Centre in terms of s 29. GN517 GG42357/29-3-2019.

Adoption of resolutions by the security council of the United Nations. GN528 GG42369/1-4-2019.

**Financial Sector Regulation Act 9 of 2017**

Amendment of the Financial Sector Regulations. GenN196 GG42359/29-3-2019 (also available in Sesotho).

**Independent Communications Authority of South Africa Act 13 of 2000**

Amendment of the national and provincial party elections broadcasts and political advertisements regulations, 2014. GN534 GG42374/2-4-2019.

**International Trade Administration Act 71 of 2002**

Guidelines and conditions to a bilateral safeguard application in terms of art 34 of the Economic Partnership Agreement between European Union and Southern African Development Community states. GenN177 GG42337/29-3-2019.

**Land Survey Act 8 of 1997**

Fees to be charged by the offices of the Chief Surveyor-General and the Surveyor-General for products and services provided. GN610 GG42417/26-4-2019.

**Legal Aid South Africa Act 39 of 2014**

Amendment of regulations. GN R498 GG42338/29-3-2019 (also available in Sesotho).

Amendments to the Legal Aid Manual. GN R522 GG42366/1-4-2019.

**National Credit Act 34 of 2005**

Amendment of the regulations for matters relating to the functions of the National Consumer Tribunal and rules for conduct of matters before the Tribunal. GN496 GG42337/29-3-2019.

**National Education Policy Act 27 of 1996**

Amendments to the national policy pertaining to the conduct, administration and management of the National Senior Certificate examination. GN633 and GN634 GG42430/30-4-2019.

**National Environmental Management Act 107 of 1998**

Regulations laying down the procedure to be followed for the adoption of spatial tools or environmental management instruments contemplated in s 24(2)(c) and (e). GN542 GG42380/5-4-2019.

**National Heritage Resources Act 25 of 1999**

Identified types of objects that are protected and may not be exported without a permit. GN587 GG42407/18-4-2019.

**National Prosecuting Authority Act 32 of 1998**

Establishment of an investigating directorate in the office of National Director of Public Prosecutions. Proc 20 GG42383/4-4-2019 (also available in Afrikaans).

**Natural Scientific Professions Act 27 of 2003**

South African Council for Natural Scientific Professions: Code of Conduct. BN212 GG42391/12-4-2019.

**Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993**

Declaration of certain nuclear-related dual-use equipment, materials, software and related technology as controlled goods, and control measures applicable to such goods. GN493 GG42337/29-3-2019 (also available in Setswana).

Declaration of certain chemical goods as controlled goods, and control measures applicable to such goods. GN495 GG42337/29-3-2019 (also available in Sesotho).

Declaration of certain missile technology and related items as controlled goods, and control measures applicable to such goods. GN491 GG42337/29-3-2019 (also available in Afrikaans).

**Nursing Act 33 of 2005**

National policy on nursing education and training. GN544 GG42380/5-4-2019. Regulations relating to the approval of minimum requirements for the education and training of a learner or student leading to registration in the category midwife. GN R558 GG42381/5-4-2019.

**Pharmacy Act 53 of 1974**

Rule relating to services for which pharmacists may levy a fee and guidelines for levying such a fee. BN35 GG42337/29-3-2019.

Fees payable to the Council. BN41 GG42391/12-4-2019.

**Private Security Industry Regulation Act 56 of 2001 and Security Officers Act 92 of 1987**

Amendment of regulations made under the Security Officers Act. GenN186 GG42350/29-3-2019.

Annual fee increase. GenN216 GG42391/12-4-2019.

**Public Audit Act 25 of 2004**

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By J Saner SC  
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R1 242,14

Regulations on audits by auditors in private practice. GN527 GG42368/1-4-2019 (also available in Afrikaans).

Investigations and Special Audits Regulations. GN525 GG42368/1-4-2019 (also available in Afrikaans).

Material Irregularity Regulations. GN526 GG42368/1-4-2019 (also available in Afrikaans).

#### Road Accident Fund Act 56 of 1996

Adjustment of statutory limit for claims for loss of income and loss of support to R 281 271 with effect from 30 April 2019. BN71 GG42417/26-4-2019 (also available in Afrikaans).

#### Subdivision of Agricultural Land Act 70 of 1970

Revised tariffs for services rendered. GN470 GG42337/29-3-2019.

#### Superior Courts Act 10 of 2013

Determination of areas under jurisdiction of Mpumalanga division of

High Court of South Africa. GN615 GG42420/26-4-2019.

### Draft Bills

Draft Tourism Amendment Bill. GenN235 GG42404/15-4-2019.

Draft Central Application Service Bill, 2019. GN595 GG42410/18-4-2019.

### Draft delegated legislation

Exposure Draft of the proposed Directive on the Application of Standards of Generally Recognised Accounting Practice by Public Entities that Apply International Financial Reporting Standards for comment. BN37 GG42391/12-4-2019.

Draft national norms and standards for funding of community education and training colleges. GN582 GG42396/12-4-2019.

Draft Consumer Advisory Amendment

Regulations, 2019 in terms of the Electronic Communications Act 36 of 2005. GN604 GG42417/26-4-2019.

Draft chartered accountancy (CA) sector code in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 for comment. GenN244 GG42417/26-4-2019.

Proposed amendments to the Animal Diseases Regulations in terms of the Animal Diseases Act 35 of 1984 with regard to African horse sickness for comment. GN600 GG42417/26-4-2019.

Proposed amendment of regulations relating to assistance of victims in respect of basic education in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. GenN247 GG42424/29-4-2019.



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### Political party instigating workers to strike

In *Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers Union of South Africa and Others* [2019] 4 BLLR 393 (LC), representatives of a political party paid a surprise visit to the premises of Calgan Lounge (the employer) and held an impromptu meeting with several of its employees. This meeting resulted in the political party informing the employer that it had been 'mandated' to intervene on behalf of the employees and that a 'barrage' of demands and grievances would follow in due course. The employer sought to address the issue directly with its employees and requested that they follow the procedures as prescribed in the Labour Relations Act 66 of 1995 (the LRA).

The following day, the political party arrived at the employer's premises and presented a memorandum to the Chief Executive Officer of the employer on the political party's letterhead. In general terms, the memorandum stated that the political party would 'unashamedly' take

up the plight of the employees who were allegedly suffering an injustice at the employer's workplace. The political party accused the National Union of Furniture and Allied Workers Union of South Africa, who is the recognised and majority trade union at the employer (the Union), of collaborating with the employer to advance the employer's interests to the detriment of the employees it was required to protect.

The memorandum set out a number of demands to which the employer was required to adhere to within seven days, failing which further 'mass protest action' would take place. The demands included, among other things –

- the resolution of grievances relating to alleged victimisation, discrimination and sexual harassment of employees;
- the refund of alleged unlawful deductions;
- the reinstatement of dismissed employees;
- the removal of a manager;
- the termination of the relationship with the Union; and
- a failure by the employer to comply with occupational health and safety obligations and subjecting the employees to poor working conditions.

The employer undertook to investigate the serious allegations contained in the memorandum but drew the political

party's attention to the fact that it was not a registered trade union and accordingly lacked the necessary legal status to engage with the employer on work related issues. Thereafter, the employees commenced a 'go-slow' and defied numerous instructions, claiming that the political party would protect them. In an attempt to restore some semblance of normality, the employer arranged for a Union official to intervene. The official was, however, shouted down and the employees embarked on a full-blown strike during which the employer's property was damaged. The employer brought an urgent application to the Labour Court to interdict the strike.

Although the political party had not filed any opposing papers nor had they made an attempt to ensure compliance with the LRA, they informed the presiding judge that no matter what the court may order, the strike would continue until the employer had acceded to all its demands. An interim interdict was granted, and the striking employees were subsequently dismissed. On the return date, the political party members attended court, again having failed to file any papers, and demanded that not only should the court refuse the final interdict sought by the employer, but it should also immediately reinstate the dismissed employees and compel the

# Employment law update





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One of the world's biggest Baobabs, a giant *Adansonia digitata*, lives on Sunland Farm near Modjadjikloof, Limpopo. Boasting a stem of around 47 metres in circumference, the *Big Baobab* is famous for being the widest of its species and carbon dated to be well over 1 700 years old. The *Big Baobab* has been designated 'Champion Trees of South Africa' status by the Department of Agriculture, Forestry and Fisheries and declared as protected under Section 12 of the National Forests Act, 1998.





employer to negotiate with the political party about its demands.

The court confirmed that the employees had engaged in an unprotected strike in support of demands, many of which were political in nature and were not the kind that could legitimately form the subject matter of protected strike action. Moreover, a number of the demands were simply unlawful. For example, it is trite that a demand for the removal of a member of management without proper cause and fair process is an unlawful demand, and to demand from an employer to simply expel a majority trade union 'flies in the face of the right of freedom of association'. In the circumstances, the court had no doubt that the order in relation to the unprotected strike had to be confirmed.

The court then turned to the issue of the unlawful conduct by the employees and the political party. It was clear from the evidence that the political party was directly involved in, if not the instigators of, all the events that gave rise to the strike action. The court held that a political party had no business getting involved in workplace issues.

In this regard, the court held that the

deliberate design of the LRA is to designate the task of dealing with workplace disputes to employers' organisations, trade unions and workplace forums. There is no place in this structure for the involvement of political parties. In fact, it was in the court's view that the practising of any form of politics, be it under the guise of protecting employees' rights or otherwise in the workplace, was an untenable proposition. The memorandum of grievances submitted by the political party read more like a political manifesto than a genuine grievance designed to resolve workplace disputes. It even took issue with the legitimacy of the LRA as a regulatory measure.

The approach adopted by the political party was that the Constitution entitled it to conduct itself as it did in this case. The political party was mistaken in this respect. The court held that it is trite law that direct reliance on the Constitution is not permissible where there is a specific statute regulating the constitutional right. In this case, the constitutional right sought to be exercised was regulated by the LRA. There is good reason as to why trade unions are required to register under the LRA, it ensures that such insti-

tutions fulfil the duties as mandated by the LRA. By seeking to assume this role, which is reserved for registered trade unions, the political party in effect sought to bypass all the regulatory provisions that trade unions must comply with. Accordingly, the court found that the political party had undermined collective bargaining, the result of which was that the employees had lost their jobs.

In the circumstances, the court held that the employer had made out a proper case for final relief. The employer was entitled to require its employees to comply with the LRA, insofar as they may have disputes or grievances against the employer. The employer was equally entitled to expect the political party not to become involved in matters that did not concern it. The interdict was accordingly confirmed in its entirety and the political party was ordered to pay the costs of the matter.

In summary, a political party is not entitled to organise employees in the workplace in matters concerning the employment relationship. If it seeks to do so, it will be required to register as a trade union and comply with the requirements as prescribed under the LRA.



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).

## Interdicting a strike in terms of s 19 of the Labour Relations Amendment Act

*Mahle Behr SA (Pty) Ltd v NUMSA and Others; Foskor (Pty) Ltd v NUMSA and Others* (LC) (unreported case no D448/19, D439/19, 20-3-2019) (Gush J).

The transitional provisions as per s 19 of the Labour Relations Amendment Act 8 of 2018, which came into effect on 1 January 2019 states:

'(1) The registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions –

(a) consult with the national office bearers of those unions or employers' organisations on the most appropriate means to amend the constitution to comply with section 95; and

(b) issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.

(2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)(b) and the requirements of section 95(5)(p) and (q) of the Act, the trade union or employer organisation, before engaging in a strike or lockout, must conduct a secret ballot of members'.

Section 95(5)(p) of the Labour Relations Act 66 of 1995 (the LRA) requires a registered trade union to include in its constitution a provision 'that the trade union ... before calling a strike ... must conduct a ballot of those of its members in respect of whom it intends to call the strike.'

The applicants in both matters approached the Labour Court for an order interdicting National Union of Metalworkers of South Africa (NUMSA) from calling out its members on a protected strike.

It was common cause that NUMSA's constitution did not make provision for a secret ballot by its members before engaging in strike action nor did NUMSA

conduct a secret ballot among its members employed by the applicants prior to its decision to embark on strike action.

The issue before the court was whether s 19(2) applied to NUMSA wherein it was obliged to conduct a secret ballot before its members engaged in a strike.

NUMSA representative raised two arguments why s 19(2) did not find application on the merits –

- firstly, that s 19(2) unduly limits the right to strike; and
- secondly, that the transitional provision only applies for the period between the registrar issuing a directive as contemplated in 19(1)(b) and before the union complies with the said directive.

From a reading and understanding of the second argument it appears as though the registrar had not yet issued a directive contemplated in s 19(1)(b) before this matter was argued at court.

In respect of the first argument raised the court held:

'As far as the first issue is concerned it appears clear from the transitional provisions that the right to strike is not limited. All that is required should a union not wish to be subject to the transitional provisions is for that union's constitution to essentially comply with the requirements of section 95(5)(p). This provision has been a requirement since the inception of the Labour Relations Act 66 of 1995. It is inconceivable that a trade union would have been registered if its

constitution at the time did not comply with the requirements of section 95(5). The section specifically provides that “the constitution of any trade union that intends to register must” comply, *inter alia*, with subsection 5.’

On the second argument, the court noted that the issue raised turned on an interpretation of s 19. In addressing this argument, the court held:

‘The purpose of the legislation is clear in that its purpose, *inter alia*, is to provide that before a union may engage in a strike it should conduct a secret ballot of its members. In addition to this provision and to regulate the interim position the transitional provisions require the holding of a secret ballot by a union (and

employers organisation in respect of a lock out) prior to engaging in a strike. The requirement is peremptory and applies only to registered trade unions that do not include in their constitution the requirement of a ballot.

To interpret the section as not applying to the respondents negates any suggestion that the transitional provisions will apply in the interim pending compliance.’

In addition, the court was alive to s 67(7) of the LRA, which states that a failure of a trade union to follow its constitution in respect of conducting a ballot does not give rise to or constitute a ground for any litigation which seeks to affect the legality of the strike. The

court, however, found that s 67(7) only applied to unions whose constitution already made provision for a ballot. In this case NUMSA’s constitution had not.

The court was thus satisfied that the transitional requirements applied to all trade unions, which did not make provision for a secret ballot in its constitution and until such time as the union complied with s 95(5)(p), it would be obliged to conduct a secret ballot before engaging in a strike.

In the absence of conducting a secret ballot, NUMSA and its members were interdicted from perusing any strike action.



By  
Meryl  
Federl

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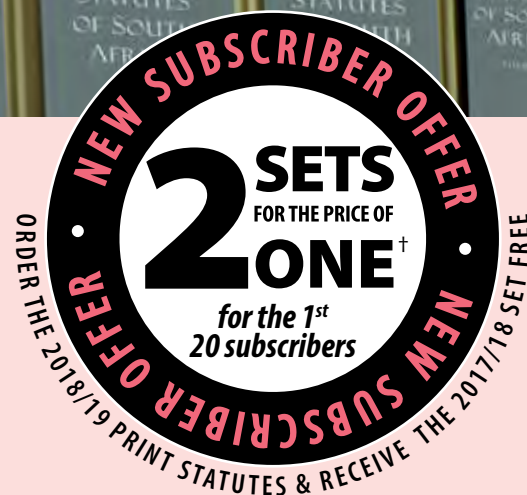
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